
IN THE SUPREME COURT OF THE UNITED STATES

Petitioner, Khai Quang Bui

v.

Respondent, Hernan Ruiz Cabaellero

ON PETITION FOR WRIT OF CERITORARI

TO THE SUPREME COURT OF VIRGINIA

APPENDIX

PETITION FOR WRIT OF CERTIORARI

Khai Bui

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TABLE OF CONTENTS

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 15th day of March, 2021.

Khai Bui,

Appellant,

against Record No. 201256

Circuit Court No. CL-2018-15376

Hernan Ruiz Cabaellero,

Appellee,

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: s/ _____

Deputy Clerk

U.S. Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U. S. Constitution Amendment XIV

Section 1.
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.
Section 2.
Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for
President and Vice President of the United
States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.
Section 3.
No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to

the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Constitution Amendment XIV Section 1

PROCEDURAL DUE PROCESS CIVIL

Generally

Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power.737 Exactly what procedures are needed to satisfy due process, however, will vary depending on the circumstances and subject matter involved.738 A basic threshold issue respecting whether due process is satisfied is whether the government conduct being examined is a part of a criminal or civil proceeding.739 The appropriate framework for assessing procedural rules in the field of criminal law is determining whether the procedure is offensive to the concept of fundamental fairness.740 In civil contexts, however, a balancing test is used that evaluates the government's chosen procedure with respect to the private interest affected, the risk of erroneous deprivation of that interest under the chosen procedure, and the government interest at stake.741

Relevance of Historical Use.

The requirements of due process are determined in part by an examination of the settled usages and modes of proceedings of the common and statutory law of England during pre-colonial times and in the early years of this country.742 In other words, the antiquity of a legal procedure is a factor weighing in its favor. However, it does

not follow that a procedure settled in English law and adopted in this country is, or remains, an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be "fastened upon American jurisprudence like a strait jacket, only to be unloosed by constitutional amendment."743 Fortunately, the states are not tied down by any provision of the Constitution to the practice and procedure that existed at the common law, but may avail themselves of the wisdom gathered by the experience of the country to make changes deemed to be necessary.744

Non-Judicial Proceedings.

A court proceeding is not a requisite of due process.745 Administrative and executive proceedings are not judicial, yet they may satisfy the Due Process Clause.746 Moreover, the Due Process Clause does not require de novo judicial review of the factual conclusions of state regulatory agencies,747 and may not require judicial review at all.748 Nor does the Fourteenth Amendment prohibit a state from conferring judicial functions upon non-judicial bodies, or from delegating powers to a court that are legislative in nature.749 Further, it is up to a state to determine to what extent its legislative, executive, and judicial powers should be kept distinct and separate.750

The Requirements of Due Process.

Although due process tolerates variances in procedure "appropriate to the nature of the case,"751 it is nonetheless possible to identify its core goals and requirements. First, "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."752 Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests.753 The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an opportunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel.

(1) Notice. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise

interested parties of the pendency of the action and afford them an opportunity to present their objections."754 This may include an obligation, upon learning that an attempt at notice has failed, to take "reasonable followup measures" that may be available.755 In addition, notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest.756 Ordinarily, service of the notice must be reasonably structured to assure that the person to whom it is directed receives it.757 Such notice, however, need not describe the legal procedures necessary to protect one's interest if such procedures are otherwise set out in published, generally available public sources.758

(2) Hearing. "[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest."759 This right is a "basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment . . . ."760 Thus, the notice of hearing and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."761

(3) Impartial Tribunal. Just as in criminal and quasi-criminal cases,762 an impartial decisionmaker is an essential right in civil proceedings as well.763 "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."764 Thus, a showing of bias or of strong implications of bias was deemed made where a state optometry board, made up of only private practitioners, was proceeding against other licensed optometrists for unprofessional conduct because they were employed by corporations. Since success in the board's effort would redound to the personal benefit of private practitioners, the Court thought the interest of the board members to be sufficient to disqualify them.765 There is, however, a "presumption of honesty and integrity in those serving as adjudicators,"766 so that the burden is on the objecting

party to show a conflict of interest or some other specific reason for disqualification of a specific officer or for disapproval of the system. Thus, combining functions within an agency, such as by allowing members of a State Medical Examining Board to both investigate and adjudicate a physician's suspension, may raise substantial concerns, but does not by itself establish a violation of due process.767 The Court has also held that the official or personal stake that school board members had in a decision to fire teachers who had engaged in a strike against the school system in violation of state law was not such so as to disqualify them.768 Sometimes, to ensure an impartial tribunal, the Due Process Clause requires a judge to recuse himself from a case. In Caperton v. A. T. Massey Coal Co., Inc., the Court noted that "most matters relating to judicial disqualification [do] not rise to a constitutional level," and that "matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion."769 The Court added, however, that "[t]he early and leading case on the subject" had "concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case."770 In addition, although "[p]ersonal bias or prejudice 'alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause,' " there "are circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' "771 These circumstances include "where a judge had a financial interest in the outcome of a case" or "a conflict arising from his participation in an earlier proceeding."772 In such cases, "[t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.' "773 In Caperton, a company appealed a jury verdict of $50 million, and its chairman spent $3 million to elect a justice to the Supreme Court of Appeals of West Virginia at a time when "[i]t was reasonably foreseeable . . . that the pending case would be before the newly elected justice."774 This $3 million was more than the total amount spent by all other supporters of the justice and three times the amount spent by the justice's own committee. The justice was elected, declined to recuse himself, and joined a 3-to-2 decision

overturning the jury verdict. The Supreme Court, in a 5-to-4 opinion written by Justice Kennedy, "conclude[d] that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."775

Subsequently, in Williams v. Pennsylvania, the Court found that the right of due process was violated when a judge on the Pennsylvania Supreme Court—who participated in case denying post-conviction relief to a prisoner convicted of first-degree murder and sentenced to death—had, in his former role as a district attorney, given approval to seek the death penalty in the prisoner's case.776 Relying on Caperton, which the Court viewed as having set forth an "objective standard" that requires recusal when the likelihood of bias on the part of the judge is "too high to be constitutionally tolerable,"777 the Williams Court specifically held that there is an impermissible risk of actual bias when a judge had previously had a "significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."778 The Court based its holding, in part, on earlier cases which had found impermissible bias occurs when the same person serves as both "accuser" and "adjudicator" in a case, which the Court viewed as having happened in Williams.779 It also reasoned that authorizing another person to seek the death penalty represents "significant personal involvement" in a case,780 and took the view that the involvement of multiple actors in a case over many years "only heightens"—rather than mitigates—the "need for objective rules preventing the operation of bias that otherwise might be obscured."781 As a remedy, the case was remanded for reevaluation by the reconstituted Pennsylvania Supreme Court, notwithstanding the fact that the judge in question did not cast the deciding vote, as the Williams Court viewed the judge's participation in the multi-member panel's deliberations as sufficient to taint the public legitimacy of the underlying proceedings and constitute reversible error.782

(4) Confrontation and Cross-Examination.

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."783 Where the "evidence consists of the

testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously," the individual's right to show that it is untrue depends on the rights of confrontation and cross-examination. "This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."784

(5) Discovery. The Court has never directly confronted this issue, but in one case it did observe in dictum that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."785 Some federal agencies have adopted discovery rules modeled on the Federal Rules of Civil Procedure, and the Administrative Conference has recommended that all do so.786 There appear to be no cases, however, holding they must, and there is some authority that they cannot absent congressional authorization.787

(6) Decision on the Record. Although this issue arises principally in the administrative law area,788 it applies generally. "[T]he decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law."789

(7) Counsel. In Goldberg v. Kelly, the Court held that a government agency must permit a welfare recipient who has been denied benefits to be represented by and assisted by counsel.790 In the years since, the Court has struggled with whether civil litigants in court and persons before agencies who could not afford retained counsel should have counsel appointed and paid for, and the matter seems far from settled. The Court has established a presumption that an indigent does not have the right to appointed counsel unless his "physical liberty" is threatened.791 Moreover, that an indigent may have a right to appointed counsel in some civil proceedings where incarceration is threatened does not mean that counsel must be made available in all such cases. Rather, the Court focuses on the circumstances in individual cases, and may hold that provision of

counsel is not required if the state provides appropriate alternative safeguards.792

Though the calculus may vary, cases not involving detention also are determined on a case-by-case basis using a balancing standard.793 For instance, in a case involving a state proceeding to terminate the parental rights of an indigent without providing her counsel, the Court recognized the parent's interest as "an extremely important one." The Court, however, also noted the state's strong interest in protecting the welfare of children. Thus, as the interest in correct fact-finding was strong on both sides, the proceeding was relatively simple, no features were present raising a risk of criminal liability, no expert witnesses were present, and no "specially troublesome" substantive or procedural issues had been raised, the litigant did not have a right to appointed counsel.794 In other due process cases involving parental rights, the Court has held that due process requires special state attention to parental rights.795 Thus, it would appear likely that in other parental right cases, a right to appointed counsel could be established.

The Procedure That Is Due Process

The Interests Protected: "Life, Liberty and Property".

The language of the Fourteenth Amendment requires the provision of due process when an interest in one's "life, liberty or property" is threatened.796 Traditionally, the Court made this determination by reference to the common understanding of these terms, as embodied in the development of the common law.797 In the 1960s, however, the Court began a rapid expansion of the "liberty" and "property" aspects of the clause to include such non-traditional concepts as conditional property rights and statutory entitlements.

Since then, the Court has followed an inconsistent path of expanding and contracting the breadth of these protected interests. The "life" interest, on the other hand, although often important in criminal cases, has found little application in the civil context.

The Property Interest.

The expansion of the concept of "property rights" beyond its common law roots reflected a recognition by the Court that certain interests that fall short of traditional property rights are nonetheless important parts of people's economic well-being. For instance, where household goods were sold under an installment contract and title was retained by the seller, the possessory interest of the buyer was deemed sufficiently important to require procedural due process

before repossession could occur.798 In addition, the loss of the use of garnished wages between the time of garnishment and final resolution of the underlying suit was deemed a sufficient property interest to require some form of determination that the garnisher was likely to prevail.799 Furthermore, the continued possession of a driver's license, which may be essential to one's livelihood, is protected; thus, a license should not be suspended after an accident for failure to post a security for the amount of damages claimed by an injured party without affording the driver an opportunity to raise the issue of liability.800

A more fundamental shift in the concept of property occurred with recognition of society's growing economic reliance on government benefits, employment, and contracts,801 and with the decline of the "right-privilege" principle. This principle, discussed previously in the First Amendment context,802 was pithily summarized by Justice Holmes in dismissing a suit by a policeman protesting being fired from his job: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."803 Under this theory, a finding that a litigant had no "vested property interest" in government employment,804 or that some form of public assistance was "only" a privilege,805 meant that no procedural due process was required before depriving a person of that interest.806 The reasoning was that, if a government was under no obligation to provide something, it could choose to provide it subject to whatever conditions or procedures it found appropriate.

The conceptual underpinnings of this position, however, were always in conflict with a line of cases holding that the government could not require the diminution of constitutional rights as a condition for receiving benefits. This line of thought, referred to as the "unconstitutional conditions" doctrine, held that, "even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, it may not do so on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."807 Nonetheless, the two doctrines coexisted in an unstable relationship until the 1960s, when the right-privilege distinction started to be largely disregarded.808

Concurrently with the virtual demise of the "right-privilege" distinction, there arose the "entitlement" doctrine, under which the Court erected a barrier of procedural—but not substantive—

protections 809 against erroneous governmental deprivation of something it had within its discretion bestowed. Previously, the Court had limited due process protections to constitutional rights, traditional rights, common law rights and "natural rights." Now, under a new "positivist" approach, a protected property or liberty interest might be found based on any positive governmental statute or governmental practice that gave rise to a legitimate expectation. Indeed, for a time it appeared that this positivist conception of protected rights was going to displace the traditional sources.

As noted previously, the advent of this new doctrine can be seen in Goldberg v. Kelly,810 in which the Court held that, because termination of welfare assistance may deprive an eligible recipient of the means of livelihood, the government must provide a pre-termination evidentiary hearing at which an initial determination of the validity of the dispensing agency's grounds for termination may be made. In order to reach this conclusion, the Court found that such benefits "are a matter of statutory entitlement for persons qualified to receive them."811 Thus, where the loss or reduction of a benefit or privilege was conditioned upon specified grounds, it was found that the recipient had a property interest entitling him to proper procedure before termination or revocation.

At first, the Court's emphasis on the importance of the statutory rights to the claimant led some lower courts to apply the Due Process Clause by assessing the weights of the interests involved and the harm done to one who lost what he was claiming. This approach, the Court held, was inappropriate. "[W]e must look not to the 'weight' but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property."812 To have a property interest in the constitutional sense, the Court held, it was not enough that one has an abstract need or desire for a benefit or a unilateral expectation. He must rather "have a legitimate claim of entitlement" to the benefit. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."813

Consequently, in Board of Regents v. Roth, the Court held that the refusal to renew a teacher's contract upon expiration of his one-year

term implicated no due process values because there was nothing in the public university's contract, regulations, or policies that "created any legitimate claim" to reemployment.814 By contrast, in Perry v. Sindermann,815 a professor employed for several years at a public college was found to have a protected interest, even though his employment contract had no tenure provision and there was no statutory assurance of it.816 The "existing rules or understandings" were deemed to have the characteristics of tenure, and thus provided a legitimate expectation independent of any contract provision.817

The Court has also found "legitimate entitlements" in a variety of other situations besides employment. In Goss v. Lopez,818 an Ohio statute provided for both free education to all residents between five and 21 years of age and compulsory school attendance; thus, the state was deemed to have obligated itself to accord students some due process hearing rights prior to suspending them, even for such a short period as ten days. "Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."819 The Court is highly deferential, however, to school dismissal decisions based on academic grounds.820

The further one gets from traditional precepts of property, the more difficult it is to establish a due process claim based on entitlements. In Town of Castle Rock v. Gonzales,821 the Court considered whether police officers violated a constitutionally protected property interest by failing to enforce a restraining order obtained by an estranged wife against her husband, despite having probable cause to believe the order had been violated. While noting statutory language that required that officers either use "every reasonable means to enforce [the] restraining order" or "seek a warrant for the arrest of the restrained person," the Court resisted equating this language with the creation of an enforceable right, noting a long-standing tradition of police discretion coexisting with apparently mandatory arrest statutes.822 Finally, the Court even questioned whether finding that the statute contained mandatory language would have created a property right, as the wife, with no criminal enforcement authority herself, was merely an indirect recipient of the benefits of the governmental enforcement scheme.823

In Arnett v. Kennedy,824 an incipient counter-revolution to the expansion of due process was rebuffed, at least with respect to entitlements. Three Justices sought to qualifythe principle laid down in the entitlement cases and to restore in effect much of the right-privilege distinction, albeit in a new formulation. The case involved a federal law that provided that employees could not be discharged except for cause, and the Justices acknowledged that due process rights could be created through statutory grants of entitlements. The Justices, however, observed that the same law specifically withheld the procedural protections now being sought by the employees. Because "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest,"825 the employee would have to "take the bitter with the sweet."826 Thus, Congress (and by analogy state legislatures) could qualify the conferral of an interest by limiting the process that might otherwise be required.

But the other six Justices, although disagreeing among themselves in other respects, rejected this attempt to formulate the issue. "This view misconceives the origin of the right to procedural due process," Justice Powell wrote. "That right is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."827 Yet, in Bishop v. Wood,828 the Court accepted a district court's finding that a policeman held his position "at will" despite language setting forth conditions for discharge. Although the majority opinion was couched in terms of statutory construction, the majority appeared to come close to adopting the three-Justice Arnett position, so much so that the dissenters accused the majority of having repudiated the majority position of the six Justices in Arnett. And, in Goss v. Lopez,829 Justice Powell, writing in dissent but using language quite similar to that of Justice Rehnquist in Arnett, seemed to indicate that the right to public education could be qualified by a statute authorizing a school principal to impose a ten-day suspension.830

Subsequently, however, the Court held squarely that, because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the

preconditions to adverse action." Indeed, any other conclusion would allow the state to destroy virtually any state-created property interest at will.831 A striking application of this analysis is found in Logan v. Zimmerman Brush Co.,832 in which a state anti-discrimination law required the enforcing agency to convene a fact-finding conference within 120 days of the filing of the complaint. Inadvertently, the Commission scheduled the hearing after the expiration of the 120 days and the state courts held the requirement to be jurisdictional, necessitating dismissal of the complaint. The Court noted that various older cases had clearly established that causes of action were property, and, in any event, Logan's claim was an entitlement grounded in state law and thus could only be removed "for cause." This property interest existed independently of the 120-day time period and could not simply be taken away by agency action or inaction.833

The Liberty Interest.

With respect to liberty interests, the Court has followed a similarly meandering path. Although the traditional concept of liberty was freedom from physical restraint, the Court has expanded the concept to include various other protected interests, some statutorily created and some not.834 Thus, in Ingraham v. Wright,835 the Court unanimously agreed that school children had a liberty interest in freedom from wrongfully or excessively administered corporal punishment, whether or not such interest was protected by statute. "The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' . . . Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."836

The Court also appeared to have expanded the notion of "liberty" to include the right to be free of official stigmatization, and found that such threatened stigmatization could in and of itself require due process.837 Thus, in Wisconsin v. Constantineau,838 the Court invalidated a statutory scheme in which persons could be labeled "excessive drinkers," without any opportunity for a hearing and rebuttal, and could then be barred from places where alcohol was served. The Court, without discussing the source of the entitlement, noted that the governmental action impugned the individual's reputation, honor, and integrity.839

But, in Paul v. Davis,840 the Court appeared to retreat from recognizing damage to reputation alone, holding instead that the liberty interest extended only to those situations where loss of one's reputation also resulted in loss of a statutory entitlement. In Davis, the police had included plaintiff's photograph and name on a list of "active shoplifters" circulated to merchants without an opportunity for notice or hearing. But the Court held that "Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather, his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interest by means of damage actions."841 Thus, unless the government's official defamation has a specific negative effect on an entitlement, such as the denial to "excessive drinkers" of the right to obtain alcohol that occurred in Constantineau, there is no protected liberty interest that would require due process.

A number of liberty interest cases that involve statutorily created entitlements involve prisoner rights, and are dealt with more extensively in the section on criminal due process. However, they are worth noting here. In Meachum v. Fano,842 the Court held that a state prisoner was not entitled to a fact-finding hearing when he was transferred to a different prison in which the conditions were substantially less favorable to him, because (1) the Due Process Clause liberty interest by itself was satisfied by the initial valid conviction, which had deprived him of liberty, and (2) no state law guaranteed him the right to remain in the prison to which he was initially assigned, subject to transfer for cause of some sort. As a prisoner could be transferred for any reason or for no reason under state law, the decision of prison officials was not dependent upon any state of facts, and no hearing was required.

In Vitek v. Jones,843 by contrast, a state statute permitted transfer of a prisoner to a state mental hospital for treatment, but the transfer could be effectuated only upon a finding, by a designated physician or psychologist, that the prisoner "suffers from a mental disease or defect" and "cannot be given treatment in that facility." Because the transfer was conditioned upon a "cause," the establishment of the facts necessary to show the cause had to be done through fair procedures. Interestingly, however, the Vitek Court also held that the prisoner had a "residuum of liberty" in being

free from the different confinement and from the stigma of involuntary commitment for mental disease that the Due Process Clause protected. Thus, the Court has recognized, in this case and in the cases involving revocation of parole or probation,844 a liberty interest that is separate from a statutory entitlement and that can be taken away only through proper procedures.

But, with respect to the possibility of parole or commutation or otherwise more rapid release, no matter how much the expectancy matters to a prisoner, in the absence of some form of positive entitlement, the prisoner may be turned down without observance of procedures.845 Summarizing its prior holdings, the Court recently concluded that two requirements must be present before a liberty interest is created in the prison context: the statute or regulation must contain "substantive predicates" limiting the exercise of discretion, and there must be explicit "mandatory language" requiring a particular outcome if substantive predicates are found.846 In an even more recent case, the Court limited the application of this test to those circumstances where the restraint on freedom imposed by the state creates an "atypical and significant hardship."847

Proceedings in Which Procedural Due Process Need Not Be Observed.

Although due notice and a reasonable opportunity to be heard are two fundamental protections found in almost all systems of law established by civilized countries,848 there are certain proceedings in which the enjoyment of these two conditions has not been deemed to be constitutionally necessary. For instance, persons adversely affected by a law cannot challenge its validity on the ground that the legislative body that enacted it gave no notice of proposed legislation, held no hearings at which the person could have presented his arguments, and gave no consideration to particular points of view. "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. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. 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."849

Similarly, when an administrative agency engages in a legislative function, as, for example, when it drafts regulations of general application affecting an unknown number of persons, it need not afford a hearing prior to promulgation.850 On the other hand, if a regulation, sometimes denominated an "order," is of limited application, that is, it affects an identifiable class of persons, the question whether notice and hearing is required and, if so, whether it must precede such action, becomes a matter of greater urgency and must be determined by evaluating the various factors discussed below.851

One such factor is whether agency action is subject to later judicial scrutiny.852 In one of the initial decisions construing the Due Process Clause of the Fifth Amendment, the Court upheld the authority of the Secretary of the Treasury, acting pursuant to statute, to obtain money from a collector of customs alleged to be in arrears. The Treasury simply issued a distress warrant and seized the collector's property, affording him no opportunity for a hearing, and requiring him to sue for recovery of his property. While acknowledging that history and settled practice required proceedings in which pleas, answers, and trials were requisite before property could be taken, the Court observed that the distress collection of debts due the crown had been the exception to the rule in England and was of long usage in the United States, and was thus sustainable.853

In more modern times, the Court upheld a procedure under which a state banking superintendent, after having taken over a closed bank and issuing notices to stockholders of their assessment, could issue execution for the amounts due, subject to the right of each stockholder to contest his liability for such an assessment by an affidavit of illegality. The fact that the execution was issued in the first instance by a governmental officer and not from a court, followed by personal notice and a right to take the case into court, was seen as unobjectionable.854

It is a violation of due process for a state to enforce a judgment against a party to a proceeding without having given him an opportunity to be heard sometime before final judgment is entered.855 With regard to the presentation of every available defense, however, the requirements of due process do not necessarily entail affording an opportunity to do so before entry of judgment. The person may be remitted to other actions initiated by him 856 or

an appeal may suffice. Accordingly, a surety company, objecting to the entry of a judgment against it on a supersedeas bond, without notice and an opportunity to be heard on the issue of liability, was not denied due process where the state practice provided the opportunity for such a hearing by an appeal from the judgment so entered. Nor could the company found its claim of denial of due process upon the fact that it lost this opportunity for a hearing by inadvertently pursuing the wrong procedure in the state courts.857 On the other hand, where a state appellate court reversed a trial court and entered a final judgment for the defendant, a plaintiff who had never had an opportunity to introduce evidence in rebuttal to certain testimony which the trial court deemed immaterial but which the appellate court considered material was held to have been deprived of his rights without due process of law.858

What Process Is Due.

The requirements of due process, as has been noted, depend upon the nature of the interest at stake, while the form of due process required is determined by the weight of that interest balanced against the opposing interests.859 The currently prevailing standard is that formulated in Mathews v. Eldridge,860 which concerned termination of Social Security benefits. "Identification 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 termination of welfare benefits in Goldberg v. Kelly,861 which could have resulted in a "devastating" loss of food and shelter, had required a pre-deprivation hearing. The termination of Social Security benefits at issue in Mathews would require less protection, however, because those benefits are not based on financial need and a terminated recipient would be able to apply for welfare if need be. Moreover, the determination of ineligibility for Social Security benefits more often turns upon routine and uncomplicated evaluations of data, reducing the likelihood of error, a likelihood found significant in Goldberg. Finally, the administrative burden and other societal costs involved in giving Social Security recipients

a pre-termination hearing would be high. Therefore, a post-termination hearing, with full retroactive restoration of benefits, if the claimant prevails, was found satisfactory.862

Application of the Mathews standard and other considerations brought some noteworthy changes to the process accorded debtors and installment buyers. Earlier cases, which had focused upon the interests of the holders of the property in not being unjustly deprived of the goods and funds in their possession, leaned toward requiring pre-deprivation hearings. Newer cases, however, look to the interests of creditors as well. "The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well."863

Thus, Sniadach v. Family Finance Corp.,864 which mandated pre-deprivation hearings before wages may be garnished, has apparently been limited to instances when wages, and perhaps certain other basic necessities, are in issue and the consequences of deprivation would be severe.865 Fuentes v. Shevin,866 which struck down a replevin statute that authorized the seizure of property (here household goods purchased on an installment contract) simply upon the filing of an ex parte application and the posting of bond, has been limited,867 so that an appropriately structured ex parte judicial determination before seizure is sufficient to satisfy due process.868 Thus, laws authorizing sequestration, garnishment, or other seizure of property of an alleged defaulting debtor need only require that (1) the creditor furnish adequate security to protect the debtor's interest, (2) the creditor make a specific factual showing before a neutral officer or magistrate, not a clerk or other such functionary, of probable cause to believe that he is entitled to the relief requested, and (3) an opportunity be assured for an adversary hearing promptly after seizure to determine the merits of the controversy, with the burden of proof on the creditor.869

Similarly, applying the Mathews v. Eldridge standard in the context of government employment, the Court has held, albeit by a combination of divergent opinions, that the interest of the employee in retaining his job, the governmental interest in the expeditious removal of unsatisfactory employees, the avoidance of administrative burdens, and the risk of an erroneous termination

combine to require the provision of some minimum pre-termination notice and opportunity to respond, followed by a full post-termination hearing, complete with all the procedures normally accorded and back pay if the employee is successful.870 Where the adverse action is less than termination of employment, the governmental interest is significant, and where reasonable grounds for such action have been established separately, then a prompt hearing held after the adverse action may be sufficient.871 In other cases, hearings with even minimum procedures may be dispensed with when what is to be established is so pro forma or routine that the likelihood of error is very small.872 In a case dealing with negligent state failure to observe a procedural deadline, the Court held that the claimant was entitled to a hearing with the agency to pass upon the merits of his claim prior to dismissal of his action.873 In Brock v. Roadway Express, Inc.,874 a Court plurality applied a similar analysis to governmental regulation of private employment, determining that an employer may be ordered by an agency to reinstate a "whistle-blower" employee without an opportunity for a full evidentiary hearing, but that the employer is entitled to be informed of the substance of the employee's charges, and to have an opportunity for informal rebuttal. The principal difference with the Mathews v. Eldridge test was that here the Court acknowledged two conflicting private interests to weigh in the equation: that of the employer "in controlling the makeup of its workforce" and that of the employee in not being discharged for whistleblowing. Whether the case signals a shift away from evidentiary hearing requirements in the context of regulatory adjudication will depend on future developments.875

A delay in retrieving money paid to the government is unlikely to rise to the level of a violation of due process. In City of Los Angeles v. David,876 a citizen paid a $134.50 impoundment fee to retrieve an automobile that had been towed by the city. When he subsequently sought to challenge the imposition of this impoundment fee, he was unable to obtain a hearing until 27 days after his car had been towed. The Court held that the delay was reasonable, as the private interest affected—the temporary loss of the use of the money—could be compensated by the addition of an interest payment to any refund of the fee. Further factors considered were that a 30-day delay was unlikely to create a risk of significant

factual errors, and that shortening the delay significantly would be administratively burdensome for the city.

In another context, the Supreme Court applied the Mathews test to strike down a provision in Colorado's Exoneration Act.877 That statute required individuals whose criminal convictions had been invalidated to prove their innocence by clear and convincing evidence in order to recoup any fines, penalties, court costs, or restitution paid to the state as a result of the conviction.878 The Court, noting that "[a]bsent conviction of crime, one is presumed innocent,"879 concluded that all three considerations under Mathews "weigh[ed] decisively against Colorado's scheme."880 Specifically, the Court reasoned that (1) those affected by the Colorado statute have an "obvious interest" in regaining their funds;881 (2) the burden of proving one's innocence by "clear and convincing" evidence unacceptably risked erroneous deprivation of those funds;882 and (3) the state had "no countervailing interests" in withholding money to which it had "zero claim of right."883 As a result, the Court held that the state could not impose "anything more than minimal procedures" for the return of funds that occurred as a result of a conviction that was subsequently invalidated.884

In another respect, the balancing standard of Mathews has resulted in states' having wider flexibility in determining what process is required. For instance, in an alteration of previously existing law, no hearing is required if a state affords the claimant an adequate alternative remedy, such as a judicial action for damages or breach of contract.885 Thus, the Court, in passing on the infliction of corporal punishment in the public schools, held that the existence of common-law tort remedies for wrongful or excessive administration of punishment, plus the context in which the punishment was administered (i.e., the ability of the teacher to observe directly the infraction in question, the openness of the school environment, the visibility of the confrontation to other students and faculty, and the likelihood of parental reaction to unreasonableness in punishment), made reasonably assured the probability that a child would not be punished without cause or excessively.886

The Court did not, however, inquire about the availability of judicial remedies for such violations in the state in which the case arose.887

The Court has required greater protection from property deprivations resulting from operation of established state procedures than from those resulting from random and

unauthorized acts of state employees,888 and presumably this distinction still holds. Thus, the Court has held that post-deprivation procedures would not satisfy due process if it is "the state system itself that destroys a complainant's property interest."889 Although the Court briefly entertained the theory that a negligent (i.e., non-willful) action by a state official was sufficient to invoke due process, and that a post-deprivation hearing regarding such loss was required,890 the Court subsequently overruled this holding, stating that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property."891

In "rare and extraordinary situations," where summary action is necessary to prevent imminent harm to the public, and the private interest infringed is reasonably deemed to be of less importance, government can take action with no notice and no opportunity to defend, subject to a later full hearing.892 Examples are seizure of contaminated foods or drugs or other such commodities to protect the consumer,893 collection of governmental revenues,894 and the seizure of enemy property in wartime.895 Thus, citing national security interests, the Court upheld an order, issued without notice and an opportunity to be heard, excluding a short-order cook employed by a concessionaire from a Naval Gun Factory, but the basis of the five-to-four decision is unclear.896 On the one hand, the Court was ambivalent about a right-privilege distinction;897 on the other hand, it contrasted the limited interest of the cook—barred from the base, she was still free to work at a number of the concessionaire's other premises—with the government's interest in conducting a high-security program.898

Jurisdiction

Generally.

Jurisdiction may be defined as the power of a government to create legal interests, and the Court has long held that the Due Process Clause limits the abilities of states to exercise this power.899 In the famous case of Pennoyer v. Neff,900 the Court enunciated two principles of jurisdiction respecting the states in a federal system 901 : first, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and second, "no State can exercise direct jurisdiction and authority over persons or property without its territory."902 Over a long period of time, however, the mobility of American society

and the increasing complexity of commerce led to attenuation of the second principle of Pennoyer, and consequently the Court established the modern standard of obtaining jurisdiction based upon the nature and the quality of contacts that individuals and corporations have with a state.903 This "minimum contacts" test, consequently, permits state courts to obtain power over out-of-state defendants.

In Personam Proceedings Against Individuals.

How juris-diction is determined depends on the nature of the suit being brought. If a dispute is directed against a person, not property, the proceedings are considered in personam, and jurisdiction must be established over the defendant's person in order to render an effective decree.904 Generally, presence within the state is sufficient to create personal jurisdiction over an individual, if process is served.905 In the case of a resident who is absent from the state, domicile alone is deemed to be sufficient to keep him within reach of the state courts for purposes of a personal judgment, and process can be obtained by means of appropriate, substituted service or by actual personal service on the resident outside the state.906 However, if the defendant, although technically domiciled there, has left the state with no intention to return, service by publication, as compared to a summons left at his last and usual place of abode where his family continued to reside, is inadequate, because it is not reasonably calculated to give actual notice of the proceedings and opportunity to be heard.907

With respect to a nonresident, it is clearly established that no person can be deprived of property rights by a decree in a case in which he neither appeared nor was served or effectively made a party.908 The early cases held that the process of a court of one state could not run into another and summon a resident of that state to respond to proceedings against him, when neither his person nor his property was within the jurisdiction of the court rendering the judgment.909 This rule, however, has been attenuated in a series of steps.

Consent has always been sufficient to create jurisdiction, even in the absence of any other connection between the litigation and the forum. For example, the appearance of the defendant for any purpose other than to challenge the jurisdiction of the court was deemed a voluntary submission to the court's power,910 and even a special appearance to deny jurisdiction might be treated as consensual submission to the court.911 The concept of "constructive

consent" was then seized upon as a basis for obtaining jurisdiction. For instance, with the advent of the automobile, States were permitted to engage in the fiction that the use of their highways was conditioned upon the consent of drivers to be sued in state courts for accidents or other transactions arising out of such use. Thus, a state could designate a state official as a proper person to receive service of process in such litigation, and establishing jurisdiction required only that the official receiving notice communicate it to the person sued.912

Although the Court approved of the legal fiction that such jurisdiction arose out of consent, the basis for jurisdiction was really the state's power to regulate acts done in the state that were dangerous to life or property.913 Because the state did not really have the ability to prevent nonresidents from doing business in their state,914 this extension was necessary in order to permit states to assume jurisdiction over individuals "doing business" within the state. Thus, the Court soon recognized that "doing business" within a state was itself a sufficient basis for jurisdiction over a nonresident individual, at least where the business done was exceptional enough to create a strong state interest in regulation, and service could be effectuated within the state on an agent appointed to carry out the business.915

The culmination of this trend, established in International Shoe Co. v. Washington,916 was the requirement that there be "minimum contacts" with the state in question in order to establish jurisdiction. The outer limit of this test is illustrated by Kulko v. Superior Court,917 in which the Court held that California could not obtain personal jurisdiction over a New York resident whose sole relevant contact with the state was to send his daughter to live with her mother in California.918 The argument was made that the father had "caused an effect" in the state by availing himself of the benefits and protections of California's laws and by deriving an economic benefit in the lessened expense of maintaining the daughter in New York. The Court explained that, "[l]ike any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test . . . is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."919

Although the Court noted that the "effects" test had been accepted as a test of contacts when wrongful activity outside a state causes

injury within the state or when commercial activity affects state residents, the Court found that these factors were not present in this case, and any economic benefit to Kulko was derived in New York and not in California.920 As with many such cases, the decision was narrowly limited to its facts and does little to clarify the standards applicable to state jurisdiction over nonresidents.

Walden v. Fiore further articulated what "minimum contacts" are necessary to create jurisdiction as a result of the relationship between the defendant, the forum, and the litigation.921 In Walden, the plaintiffs, who were residents of Nevada, sued a law enforcement officer in federal court in Nevada as a result of an incident that occurred in an airport in Atlanta as the plaintiffs were attempting to board a connecting flight from Puerto Rico to Las Vegas. The Court held that the court in Nevada lacked jurisdiction because of insufficient contacts between the officer and the state relative to the alleged harm, as no part of the officer's conduct occurred in Nevada. In so holding, the Court emphasized that the minimum contacts inquiry should not focus on the resulting injury to the plaintiffs; instead, the proper question is whether the defendant's conduct connects him to the forum in a meaningful way.922

Suing Out-of-State (Foreign) Corporations.

"A curious aspect of American law is that a corporation has no legal existence outside the boundaries of the state chartering it.923 Thus, the basis for state court jurisdiction over an out-of-state ("foreign") corporation has been even more uncertain than that with respect to individuals. Before International Shoe Co. v. Washington,924 it was asserted that, because a corporation could not carry on business in a state without the state's permission, the state could condition its permission upon the corporation's consent to submit to the jurisdiction of the state's courts, either by appointment of someone to receive process or in the absence of such designation, by accepting service upon corporate agents authorized to operate within the state.925 Further, by doing business in a state, the corporation was deemed to be present there and thus subject to service of process and suit.926 This theoretical corporate presence conflicted with the idea of corporations having no existence outside their state of incorporation, but it was nonetheless accepted that a corporation "doing business" in a state to a sufficient degree was "present" for service of process upon its agents in the state who carried out that business.927

Presence alone, however, does not expose a corporation to all manner of suits through the exercise of general jurisdiction. Only corporations, whose "continuous and systematic" affiliations with a forum make them "essentially at home" there, are broadly amenable to suit.928 While the paradigmatic examples of where a corporate defendant is "at home" are the corporation's place of incorporation and principal place of business,929 the Court has recognized that in "exceptional cases" general jurisdiction can be exercised by a court located where the corporate defendant's operations are "so substantial" as to "render the corporation at home in that state."930 Nonetheless, insubstantial in-state business, in and of itself, does not suffice to permit an assertion of jurisdiction over claims that are unrelated to any activity occurring in a state.931 Without the protection of such a rule, foreign corporations would be exposed to the manifest hardship and inconvenience of defending, in any state in which they happened to be carrying on business, suits for torts wherever committed and claims on contracts wherever made.932 And if the corporation stopped doing business in the forum state before suit against it was commenced, it might well escape jurisdiction altogether.933 In early cases, the issue of the degree of activity and, in particular, the degree of solicitation that was necessary to constitute doing business by a foreign corporation, was much disputed and led to very particularistic holdings.934 In the absence of enough activity to constitute doing business, the mere presence of an agent, officer, or stockholder, who could be served, within a state's territorial limits was not sufficient to enable the state to exercise jurisdiction over the foreign corporation.935

The touchstone in jurisdiction cases was recast by International Shoe Co. v. Washington and its "minimum contacts" analysis.936 International Shoe, an out-of-state corporation, had not been issued a license to do business in the State of Washington, but it systematically and continuously employed a sales force of Washington residents to solicit therein and thus was held amenable to suit in Washington for unpaid unemployment compensation contributions for such salesmen. The Court deemed a notice of assessment served personally upon one of the local sales solicitors, and a copy of the assessment sent by registered mail to the corporation's principal office in Missouri, sufficient to apprise the corporation of the proceeding.

To reach this conclusion, the Court not only overturned prior holdings that mere solicitation of business does not constitute a sufficient contact to subject a foreign corporation to a state's jurisdiction,937 but also rejected the "presence" test as begging the question to be decided. "The terms 'present' or 'presence,' " according to Chief Justice Stone, "are used merely to symbolize those activities of the corporation's agent within the State which courts will deem to be sufficient to satisfy the demands of due process. . . . Those demands may be met by such contacts of the corporation with the State of the forum as make it reasonable, in the context of our federal system . . . , to require the corporation to defend the particular suit which is brought there; [and] . . . that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. . . . An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."938 As to the scope of application to be accorded this "fair play and substantial justice" doctrine, the Court concluded that "so far as . . . [corporate] obligations arise out of or are connected with activities within the State, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."939

Extending this logic, a majority of the Court ruled that an out-of-state association selling mail order insurance had developed sufficient contacts and ties with Virginia residents so that the state could institute enforcement proceedings under its Blue Sky Law by forwarding notice to the company by registered mail, notwithstanding that the Association solicited business in Virginia solely through recommendations of existing members and was represented therein by no agents whatsoever.940 The Due Process Clause was declared not to "forbid a State to protect its citizens from such injustice" of having to file suits on their claims at a far distant home office of such company, especially in view of the fact that such suits could be more conveniently tried in Virginia where claims of loss could be investigated.941

Likewise, the Court reviewed a California statute which subjected foreign mail order insurance companies engaged in contracts with California residents to suit in California courts, and which had authorized the petitioner to serve a Texas insurer by registered mail only.942 The contract between the company and the insured

specified that Austin, Texas, was the place of "making" and the place where liability should be deemed to arise. The company mailed premium notices to the insured in California, and he mailed his premium payments to the company in Texas. Acknowledging that the connection of the company with California was tenuous—it had no office or agents in the state and no evidence had been presented that it had solicited anyone other than the insured for business—the Court sustained jurisdiction on the basis that the suit was on a contract which had a substantial connection with California. "The contract was delivered in California, the premiums were mailed there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."943

In making this decision, the Court noted that "[l]ooking back over the long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."944 However, in Hanson v. Denckla, decided during the same Term, the Court found in personam jurisdiction lacking for the first time since International Shoe Co. v. Washington, pronouncing firm due process limitations. In Hanson,945 the issue was whether a Florida court considering a contested will obtained jurisdiction over corporate trustees of disputed property through use of ordinary mail and publication. The will had been entered into and probated in Florida, the claimants were resident in Florida and had been personally served, but the trustees, who were indispensable parties, were resident in Delaware. Noting the trend in enlarging the ability of the states to obtain in personam jurisdiction over absent defendants, the Court denied the exercise of nationwide in personam jurisdiction by states, saying that "it would be a mistake to assume that th[e] trend [to expand the reach of state courts] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."946

The Court recognized in Hanson that Florida law was the most appropriate law to be applied in determining the validity of the will and that the corporate defendants might be little inconvenienced by having to appear in Florida courts, but it denied that either circumstance satisfied the Due Process Clause. The Court noted that due process restrictions do more than guarantee immunity from

inconvenient or distant litigation, in that "[these restrictions] are consequences of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the 'minimum contacts' with that State that are a prerequisite to its exercise of power over him." The only contacts the corporate defendants had in Florida consisted of a relationship with the individual defendants. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. . . . The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case."947

The Court continued to apply International Shoe principles in diverse situations. Thus, circulation of a magazine in a state was an adequate basis for that state to exercise jurisdiction over an out-of-state corporate magazine publisher in a libel action. The fact that the plaintiff did not have "minimum contacts" with the forum state was not dispositive since the relevant inquiry is the relations among the defendant, the forum, and the litigation.948 Or, damage done to the plaintiff's reputation in his home state caused by circulation of a defamatory magazine article there may justify assertion of jurisdiction over the out-of-state authors of such article, despite the lack of minimum contact between the authors (as opposed to the publishers) and the state.949 Further, though there is no per se rule that a contract with an out-of-state party automatically establishes jurisdiction to enforce the contract in the other party's forum, a franchisee who has entered into a franchise contract with an out-of-state corporation may be subject to suit in the corporation's home state where the overall circumstances (contract terms themselves, course of dealings) demonstrate a deliberate reaching out to establish contacts with the franchisor in the franchisor's home state.950

The Court has continued to wrestle over when a state may adjudicate a products liability claim for an injury occurring within it, at times finding the defendant's contacts with the place of injury

to be too attenuated to support its having to mount a defense there. In World-Wide Volkswagen Corp. v. Woodson,951 the Court applied its "minimum contacts" test to preclude the assertion of jurisdiction over two foreign corporations that did no business in the forum state. Plaintiffs had sustained personal injuries in Oklahoma in an accident involving an alleged defect in their automobile. The car had been purchased the previous year in New York, the plaintiffs were New York residents at time of purchase, and the accident had occurred while they were driving through Oklahoma on their way to a new residence in Arizona. Defendants were the automobile retailer and its wholesaler, both New York corporations that did no business in Oklahoma. The Court found no circumstances justifying assertion by Oklahoma courts of jurisdiction over defendants. The Court found that the defendants (1) carried on no activity in Oklahoma, (2) closed no sales and performed no services there, (3) availed themselves of none of the benefits of the state's laws, (4) solicited no business there either through salespersons or through advertising reasonably calculated to reach the state, and (5) sold no cars to Oklahoma residents or indirectly served or sought to serve the Oklahoma market. Although it might have been foreseeable that the automobile would travel to Oklahoma, foreseeability was held to be relevant only insofar as "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."952 The Court in World-Wide Volkswagen Corp. contrasted the facts of the case with the instance of a corporation "deliver[ing] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."953

In Asahi Metal Industry Co. v. Superior Court,954 the Court addressed more closely how jurisdiction flows with products downstream. The Court identified two standards for limiting jurisdiction even as products proceed to foreseeable destinations. The more general standard harked back to the fair play and substantial justice doctrine of International Shoe and requires balancing the respective interests of the parties, the prospective forum state, and alternative fora. All the Justices agreed with the legitimacy of this test in assessing due process limits on jurisdiction.955 However, four Justices would also apply a more exacting test: A defendant who placed a product in the stream of commerce knowing that the product might eventually be sold in a

state will be subject to jurisdiction there only if the defendant also had purposefully acted to avail itself of the state's market. According to Justice O'Connor, who wrote the opinion espousing this test, a defendant subjected itself to jurisdiction by targeting or serving customers in a state through, for example, direct advertising, marketing through a local sales agent, or establishing channels for providing regular advice to local customers. Action, not expectation, is key.956 In Asahi, the state was found to lack jurisdiction under both tests cited.

Doctrinal differences on the due process touchstones in stream-of-commerce cases became more critical to the outcome in J. McIntyre Machinery, Ltd. v. Nicastro.957 Justice Kennedy, writing for a four-Justice plurality, asserted that it is a defendant's purposeful availment of the forum state that makes jurisdiction consistent with traditional notions of fair play and substantial justice. The question is not so much the fairness of a state reaching out to bring a foreign defendant before its courts as it is a matter of a foreign defendant having acted within a state so as to bring itself within the state's limited authority. Thus, a British machinery manufacturer who targeted the U.S. market generally through engaging a nationwide distributor and attending trade shows, among other means, could not be sued in New Jersey for an industrial accident that occurred in the state. Even though at least one of its machines (and perhaps as many as four) were sold to New Jersey concerns, the defendant had not purposefully targeted the New Jersey market through, for example, establishing an office, advertising, or sending employees.958 Concurring with the plurality, Justice Breyer emphasized the outcome lay in stream-of-commerce precedents that held isolated or infrequent sales could not support jurisdiction. At the same time, Justice Breyer cautioned against adoption of the plurality's strict active availment of the forum rule, especially because the Court had yet to consider due process requirements in the context of evolving business models, modern e-commerce in particular.959

Nonetheless, in order for a state court to exercise specific jurisdiction, the suit must arise out of or relate to the defendant's contacts with the forum,960 and when there is "no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."961 As a result, the Court, in Bristol-Myers Squibb Co. v. Superior Court, concluded that

the California Supreme Court erred in employing a "relaxed" approach to personal jurisdiction by holding that a state court could exercise specific jurisdiction over a corporate defendant who was being sued by non-state residents for out-of-state activities solely because the defendant had "extensive forum contacts" unrelated to the claims in question.962 Concluding that California's approach was a "loose and spurious form of general jurisdiction,"963 the Court held that without a "connection between the forum and the specific claims at issue," California courts lacked jurisdiction over the corporate defendant.964

Actions In Rem: Proceeding Against Property.

In an in rem action, which is an action brought directly against a property interest, a state can validly proceed to settle controversies with regard to rights or claims against tangible or intangible property within its borders, notwithstanding that jurisdiction over the defendant was never established.965 Unlike jurisdiction in personam, a judgment entered by a court with in rem jurisdiction does not bind the defendant personally but determines the title to or status of the only property in question.966 Proceedings brought to register title to land,967 to condemn 968 or confiscate 969 real or personal property, or to administer a decedent's estate 970 are typical in rem actions. Due process is satisfied by seizure of the property (the "res") and notice to all who have or may have interests therein.971 Under prior case law, a court could acquire in rem jurisdiction over nonresidents by mere constructive service of process,972 under the theory that property was always in possession of its owners and that seizure would afford them notice, because they would keep themselves apprized of the state of their property. It was held, however, that this fiction did not satisfy the requirements of due process, and, whatever the nature of the proceeding, that notice must be given in a manner that actually notifies the person being sought or that has a reasonable certainty of resulting in such notice.973

Although the Court has now held "that all assertions of state-court jurisdiction must be evaluated according to the ['minimum contacts'] standards set forth in International Shoe Co. v. Washington,"974 it does not appear that this will appreciably change the result for in rem jurisdiction over property. "[T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For

example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State."975 Thus, for "true" in rem actions, the old results are likely to still prevail.

Quasi in Rem: Attachment Proceedings.

If a defendant is neither domiciled nor present in a state, he cannot be served personally, and any judgment in money obtained against him would be unenforceable. This does not, however, prevent attachment of a defendant's property within the state. The practice of allowing a state to attach a non-resident's real and personal property situated within its borders to satisfy a debt or other claim by one of its citizens goes back to colonial times. Attachment is considered a form of in rem proceeding sometimes called "quasi in rem," and under Pennoyer v. Neff 976 an attachment could be implemented by obtaining a writ against the local property of the defendant and giving notice by publication.977 The judgement was then satisfied from the property attached, and if the attached property was insufficient to satisfy the claim, the plaintiff could go no further.978

This form of proceeding raised many questions. Of course, there were always instances in which it was fair to subject a person to suit on his property located in the forum state, such as where the property was related to the matter sued over.979 In others, the question was more disputed, as in the famous New York Court of Appeals case of Seider v. Roth,980 in which the property subject to attachment was the contractual obligation of the defendant's insurance company to defend and pay the judgment. But, in Harris v. Balk,981 the facts of the case and the establishment of jurisdiction through quasi in rem proceedings raised the issue of fairness and territoriality. The claimant was a Maryland resident who was owed a debt by Balk, a North Carolina resident. The Marylander ascertained, apparently adventitiously, that Harris, a North

Carolina resident who owed Balk an amount of money, was passing through Maryland, and the Marylander attached this debt. Balk had no notice of the action and a default judgment was entered, after which Harris paid over the judgment to the Marylander. When Balk later sued Harris in North Carolina to recover on his debt, Harris argued that he had been relieved of any further obligation by satisfying the judgment in Maryland, and the Supreme Court sustained his defense, ruling that jurisdiction had been properly obtained and the Maryland judgment was thus valid.982

Subsequently, Harris v. Balk was overruled by Shaffer v. Heitner,983 in which the Court rejected the Delaware state court's jurisdiction, holding that the "minimum contacts" test of International Shoe applied to all in rem and quasi in rem actions. The case involved a Delaware sequestration statute under which plaintiffs were authorized to bring actions against nonresident defendants by attaching their "property" within Delaware, the property here consisting of shares of corporate stock and options to stock in the defendant corporation. The stock was considered to be in Delaware because that was the state of incorporation, but none of the certificates representing the seized stocks were physically present in Delaware. The reason for applying the same test as is applied in in personam cases, the Court said, "is simple and straightforward. It is premised on recognition that '[t]he phrase 'judicial jurisdiction' over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing."984 Thus, "[t]he recognition leads to the conclusion that in order to justify an exercise of jurisdiction in rem, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.' "985

A further tightening of jurisdictional standards occurred in Rush v. Savchuk.986 The plaintiff was injured in a one-car accident in Indiana while a passenger in a car driven by defendant. Plaintiff later moved to Minnesota and sued defendant, still resident in Indiana, in state court in Minnesota. There were no contacts between the defendant and Minnesota, but defendant's insurance company did business there and plaintiff garnished the insurance contract, signed in Indiana, under which the company was obligated to defend defendant in litigation and indemnify him to the extent of the policy limits. The Court refused to permit jurisdiction to be grounded on the contract; the contacts justifying jurisdiction must

be those of the defendant engaging in purposeful activity related to the forum.987 Rush thus resulted in the demise of the controversial Seider v. Roth doctrine, which lower courts had struggled to save after Shaffer v. Heitner.988

Actions in Rem: Estates, Trusts, Corporations.

Generally, probate will occur where the decedent was domiciled, and, as a probate judgment is considered in rem, a determination as to assets in that state will be determinative as to all interested persons.989 Insofar as the probate affects real or personal property beyond the state's boundaries, however, the judgment is in personam and can bind only parties thereto or their privies.990 Thus, the Full Faith and Credit Clause would not prevent an out-of-state court in the state where the property is located from reconsidering the first court's finding of domicile, which could affect the ultimate disposition of the property.991

The difficulty of characterizing the existence of the res in a particular jurisdiction is illustrated by the in rem aspects of Hanson v. Denckla.992 As discussed earlier,993 the decedent created a trust with a Delaware corporation as trustee,994 and the Florida courts had attempted to assert both in personam and in rem jurisdiction over the Delaware corporation. Asserting the old theory that a court's in rem jurisdiction "is limited by the extent of its power and by the coordinate authority of sister States,"995 i.e., whether the court has jurisdiction over the thing, the Court thought it clear that the trust assets that were the subject of the suit were located in Delaware and thus the Florida courts had no in rem jurisdiction. The Court did not expressly consider whether the International Shoe test should apply to such in rem jurisdiction, as it has now held it generally must, but it did briefly consider whether Florida's interests arising from its authority to probate and construe the domiciliary's will, under which the foreign assets might pass, were a sufficient basis of in rem jurisdiction and decided they were not.996 The effect of International Shoe in this area is still to be discerned.

The reasoning of the Pennoyer 997 rule, that seizure of property and publication was sufficient to give notice to nonresidents or absent defendants, has also been applied in proceedings for the forfeiture of abandoned property. If all known claimants were personally served and all claimants who were unknown or nonresident were given constructive notice by publication, judgments in these proceedings

were held binding on all.998 But, in Mullane v. Central Hanover Bank & Trust Co.,999 the Court, while declining to characterize the proceeding as in rem or in personam, held that a bank managing a common trust fund in favor of nonresident as well as resident beneficiaries could not obtain a judicial settlement of accounts if the only notice was publication in a local paper. Although such notice by publication was sufficient as to beneficiaries whose interests or addresses were unknown to the bank, the Court held that it was feasible to make serious efforts to notify residents and nonresidents whose whereabouts were known, such as by mailing notice to the addresses on record with the bank.1000

Notice: Service of Process.

Before a state may legitimately exercise control over persons and property, the state's jurisdiction must be perfected by an appropriate service of process that is effective to notify all parties of proceedings that may affect their rights.1001 Personal service guarantees actual notice of the pendency of a legal action, and has traditionally been deemed necessary in actions styled in personam.1002 But "certain less rigorous notice procedures have enjoyed substantial acceptance throughout our legal history; in light of this history and the practical obstacles to providing personal service in every instance," the Court in some situations has allowed the use of procedures that "do not carry with them the same certainty of actual notice that inheres in personal service."1003 But, whether the action be in rem or in personam, there is a constitutional minimum; due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."1004

The use of mail to convey notice, for instance, has become quite established,1005 especially for assertion of in personam jurisdiction extraterritorially upon individuals and corporations having "minimum contacts" with a forum state, where various "long-arm" statutes authorize notice by mail.1006 Or, in a class action, due process is satisfied by mail notification of out-of-state class members, giving such members the opportunity to "opt out" but with no requirement that inclusion in the class be contingent upon affirmative response.1007 Other service devices and substitutions have been pursued and show some promise of further loosening of

the concept of territoriality even while complying with minimum due process standards of notice.1008

Power of the States to Regulate Procedure

Generally.

As long as a party has been given sufficient notice and an opportunity to defend his interest, the Due Process Clause of the Fourteenth Amendment does not generally mandate the particular forms of procedure to be used in state courts.1009 The states may regulate the manner in which rights may be enforced and wrongs remedied,1010 and may create courts and endow them with such jurisdiction as, in the judgment of their legislatures, seems appropriate.1011 Whether legislative action in such matters is deemed to be wise or proves efficient, whether it works a particular hardship on a particular litigant, or perpetuates or supplants ancient forms of procedure, are issues that ordinarily do not implicate the Fourteenth Amendment. The function of the Fourteenth Amendment is negative rather than affirmative 1012 and in no way obligates the states to adopt specific measures of reform.1013

Commencement of Actions.

A state may impose certain conditions on the right to institute litigation. Access to the courts has been denied to persons instituting stockholders' derivative actions unless reasonable security for the costs and fees incurred by the corporation is first tendered.1014 But, foreclosure of all access to the courts, through financial barriers and perhaps through other means as well, is subject to federal constitutional scrutiny and must be justified by reference to a state interest of suitable importance. Thus, where a state has monopolized the avenues of settlement of disputes between persons by prescribing judicial resolution, and where the dispute involves a fundamental interest, such as marriage and its dissolution, the state may not deny access to those persons unable to pay its fees.1015

Older cases, which have not been questioned by more recent ones, held that a state, as the price of opening its tribunals to a nonresident plaintiff, may exact the condition that the nonresident stand ready to answer all cross actions filed and accept any in personam judgments obtained by a resident defendant through service of process or appropriate pleading upon the plaintiff 's attorney of record.1016 For similar reasons, a requirement of the performance of a chemical analysis as a condition precedent to a suit

to recover for damages resulting to crops from allegedly deficient fertilizers, while allowing other evidence, was not deemed arbitrary or unreasonable.1017

Amendment of pleadings is largely within the discretion of the trial court, and unless a gross abuse of discretion is shown, there is no ground for reversal. Accordingly, where the defense sought to be interposed is without merit, a claim that due process would be denied by rendition of a foreclosure decree without leave to file a supplementary answer is utterly without foundation.1018

Defenses.

Just as a state may condition the right to institute litigation, so may it establish terms for the interposition of certain defenses. It may validly provide that one sued in a possessory action cannot bring an action to try title until after judgment is rendered and after he has paid that judgment.1019 A state may limit the defense in an action to evict tenants for nonpayment of rent to the issue of payment and leave the tenants to other remedial actions at law on a claim that the landlord had failed to maintain the premises.1020 A state may also provide that the doctrines of contributory negligence, assumption of risk, and fellow servant do not bar recovery in certain employment-related accidents. No person has a vested right in such defenses.1021 Similarly, a nonresident defendant in a suit begun by foreign attachment, even though he has no resources or credit other than the property attached, cannot challenge the validity of a statute which requires him to give bail or security for the discharge of the seized property before permitting him an opportunity to appear and defend.1022

Costs, Damages, and Penalties.

What costs are allowed by law is for the court to determine; an erroneous judgment of what the law allows does not deprive a party of his property without due process of law.1023 Nor does a statute providing for the recovery of reasonable attorney's fees in actions on small claims subject unsuccessful defendants to any unconstitutional deprivation.1024 Congress may, however, severely restrict attorney's fees in an effort to keep an administrative claims proceeding informal.1025

Equally consistent with the requirements of due process is a statutory procedure whereby a prosecutor of a case is adjudged liable for costs, and committed to jail in default of payment thereof, whenever the court or jury, after according him an opportunity to

present evidence of good faith, finds that he instituted the prosecution without probable cause and from malicious motives.1026 Also, as a reasonable incentive for prompt settlement without suit of just demands of a class receiving special legislative treatment, such as common carriers and insurance companies together with their patrons, a state may permit harassed litigants to recover penalties in the form of attorney's fees or damages.1027 By virtue of its plenary power to prescribe the character of the sentence which shall be awarded against those found guilty of crime, a state may provide that a public officer embezzling public money shall, notwithstanding that he has made restitution, suffer not only imprisonment but also pay a fine equal to double the amount embezzled, which shall operate as a judgment for the use of persons whose money was embezzled. Whatever this fine is called, whether a penalty, or punishment, or civil judgment, it comes to the convict as the result of his crime.1028 On the other hand, when appellant, by its refusal to surrender certain assets, was adjudged in contempt for frustrating enforcement of a judgment obtained against it, dismissal of its appeal from the first judgment was not a penalty imposed for the contempt, but merely a reasonable method for sustaining the effectiveness of the state's judicial process.1029

To deter careless destruction of human life, a state may allow punitive damages to be assessed in actions against employers for deaths caused by the negligence of their employees,1030 and may also allow punitive damages for fraud perpetrated by employees.1031 Also constitutional is the traditional common law approach for measuring punitive damages, granting the jury wide but not unlimited discretion to consider the gravity of the offense and the need to deter similar offenses.1032 The Court has indicated, however, that, although the Excessive Fines Clause of the Eighth Amendment "does not apply to awards of punitive damages in cases between private parties,"1033 a "grossly excessive" award of punitive damages violates substantive due process, as the Due Process Clause limits the amount of punitive damages to what is "reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence."1034 These limits may be discerned by a court by examining the degree of reprehensibility of the act, the ratio between the punitive award and plaintiff's actual or potential harm, and the legislative sanctions provided for comparable

misconduct.1035 In addition, the "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . ."1036

Statutes of Limitation.

A statute of limitations does not deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce the right by suit. By the same token, a state may shorten an existing period of limitation, provided a reasonable time is allowed for bringing an action after the passage of the statute and before the bar takes effect. What is a reasonable period, however, is dependent on the nature of the right and particular circumstances.1037

Thus, where a receiver for property is appointed 13 years after the disappearance of the owner and notice is made by publication, it is not a violation of due process to bar actions relative to that property after an interval of only one year after such appointment.1038 When a state, by law, suddenly prohibits all actions to contest tax deeds which have been of record for two years unless they are brought within six months after its passage, no unconstitutional deprivation is effected.1039 No less valid is a statute which provides that when a person has been in possession of wild lands under a recorded deed continuously for 20 years and had paid taxes thereon during the same, and the former owner in that interval pays nothing, no action to recover such land shall be entertained unless commenced within 20 years, or before the expiration of five years following enactment of said provision.1040 Similarly, an amendment to a workmen's compensation act, limiting to three years the time within which a case may be reopened for readjustment of compensation on account of aggravation of a disability, does not deny due process to one who sustained his injury at a time when the statute contained no limitation. A limitation is deemed to affect the remedy only, and the period of its operation in this instance was viewed as neither arbitrary nor oppressive.1041

Moreover, a state may extend as well as shorten the time in which suits may be brought in its courts and may even entirely remove a statutory bar to the commencement of litigation. Thus, a repeal or extension of a statute of limitations affects no unconstitutional deprivation of property of a debtor-defendant in whose favor such statute had already become a defense. "A right to defeat a just debt by the statute of limitation . . . [is not] a vested right," such as is

protected by the Constitution. Accordingly no offense against the Fourteenth Amendment is committed by revival, through an extension or repeal, of an action on an implied obligation to pay a child for the use of her property,1042 or a suit to recover the purchase price of securities sold in violation of a Blue Sky Law,1043 or a right of an employee to seek, on account of the aggravation of a former injury, an additional award out of a state-administered fund.1044

However, for suits to recover real and personal property, when the right of action has been barred by a statute of limitations and title as well as real ownership have become vested in the defendant, any later act removing or repealing the bar would be void as attempting an arbitrary transfer of title.1045 Also unconstitutional is the application of a statute of limitation to extend a period that parties to a contract have agreed should limit their right to remedies under the contract. "When the parties to a contract have expressly agreed upon a time limit on their obligation, a statute which invalidates . . . [said] agreement and directs enforcement of the contract after . . . [the agreed] time has expired" unconstitutionally imposes a burden in excess of that contracted.1046

Burden of Proof and Presumptions.

It is clearly within the domain of the legislative branch of government to establish presumptions and rules respecting burden of proof in litigation.1047 Nonetheless, the Due Process Clause does prevent the deprivation of liberty or property upon application of a standard of proof too lax to make reasonable assurance of accurate factfinding. Thus, "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' "1048

Applying the formula it has worked out for determining what process is due in a particular situation,1049 the Court has held that a standard at least as stringent as clear and convincing evidence is required in a civil proceeding to commit an individual involuntarily to a state mental hospital for an indefinite period.1050 Similarly, because the interest of parents in retaining custody of their children is fundamental, the state may not terminate parental rights through

reliance on a standard of preponderance of the evidence—the proof necessary to award money damages in an ordinary civil action— but must prove that the parents are unfit by clear and convincing evidence.1051 Further, unfitness of a parent may not simply be presumed because of some purported assumption about general characteristics, but must be established.1052

As long as a presumption is not unreasonable and is not conclusive, it does not violate the Due Process Clause. Legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property, however, and a statute creating a presumption which is entirely arbitrary and which operates to deny a fair opportunity to repel it or to present facts pertinent to one's defense is void.1053 On the other hand, if there is a rational connection between what is proved and what is inferred, legislation declaring that the proof of one fact or group of facts shall constitute prima facie evidence of a main or ultimate fact will be sustained.1054

For a brief period, the Court used what it called the "irrebuttable presumption doctrine" to curb the legislative tendency to confer a benefit or to impose a detriment based on presumed characteristics based on the existence of another characteristic.1055 Thus, in Stanley v. Illinois,1056 the Court found invalid a construction of the state statute that presumed illegitimate fathers to be unfit parents and that prevented them from objecting to state wardship. Mandatory maternity leave rules requiring pregnant teachers to take unpaid maternity leave at a set time prior to the date of the expected births of their babies were voided as creating a conclusive presumption that every pregnant teacher who reaches a particular point of pregnancy becomes physically incapable of teaching.1057

Major controversy developed over the application of "irrebuttable presumption doctrine" in benefits cases. Thus, although a state may require that nonresidents must pay higher tuition charges at state colleges than residents, and while the Court assumed that a durational residency requirement would be permissible as a prerequisite to qualify for the lower tuition, it was held impermissible for the state to presume conclusively that because the legal address of a student was outside the state at the time of application or at some point during the preceding year he was a nonresident as long as he remained a student. The Due Process

Clause required that the student be afforded the opportunity to show that he is or has become a bona fide resident entitled to the lower tuition.1058

Moreover, a food stamp program provision making ineligible any household that contained a member age 18 or over who was claimed as a dependent for federal income tax purposes the prior tax year by a person not himself eligible for stamps was voided on the ground that it created a conclusive presumption that fairly often could be shown to be false if evidence could be presented.1059 The rule which emerged for subjecting persons to detriment or qualifying them for benefits was that the legislature may not presume the existence of the decisive characteristic upon a given set of facts, unless it can be shown that the defined characteristics do in fact encompass all persons and only those persons that it was the purpose of the legislature to reach. The doctrine in effect afforded the Court the opportunity to choose between resort to the Equal Protection Clause or to the Due Process Clause in judging the validity of certain classifications,1060 and it precluded Congress and legislatures from making general classifications that avoided the administrative costs of individualization in many areas.

Use of the doctrine was curbed if not halted, however, in Weinberger v. Salfi,1061 in which the Court upheld the validity of a Social Security provision requiring that the spouse of a covered wage earner must have been married to the wage earner for at least nine months prior to his death in order to receive benefits as a spouse. Purporting to approve but to distinguish the prior cases in the line,1062 the Court imported traditional equal protection analysis into considerations of due process challenges to statutory classifications.1063 Extensions of the prior cases to government entitlement classifications, such as the Social Security Act qualification standard before it, would, said the Court, "turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution."1064 Whether the Court will now limit the doctrine to the detriment area only, exclusive of benefit programs, whether it will limit it to those areas which involve fundamental rights or suspect classifications (in the equal protection sense of those expressions)1065 or whether it will simply permit the doctrine to

pass from the scene remains unsettled, but it is noteworthy that it now rarely appears on the Court's docket.1066

Trials and Appeals.

Trial by jury in civil trials, unlike the case in criminal trials, has not been deemed essential to due process, and the Fourteenth Amendment has not been held to restrain the states in retaining or abolishing civil juries.1067 Thus, abolition of juries in proceedings to enforce liens,1068 mandamus 1069 and quo warranto 1070 actions, and in eminent domain 1071 and equity 1072 proceedings has been approved. states are also free to adopt innovations respecting selection and number of jurors. Verdicts rendered by ten out of twelve jurors may be substituted for the requirement of unanimity,1073 and petit juries containing eight rather than the conventional number of twelve members may be established.1074

If a full and fair trial on the merits is provided, due process does not require a state to provide appellate review.1075 But if an appeal is afforded, the state must not so structure it as to arbitrarily deny to some persons the right or privilege available to others.1076

28 U.S. Code Title 28—JUDICIARY AND JUDICIAL PROCEDURE

28 U.S.C. § 451 Definitions

As used in this title:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

The terms "district court" and "district court of the United States" mean the courts constituted by chapter 5 of this title.

The term "judge of the United States" includes judges of the courts of appeals, district courts, Court of International Trade and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior.

The term "justice of the United States" includes the Chief Justice of the United States and the associate justices of the Supreme Court.

The terms "district" and "judicial district" means the districts enumerated in Chapter 5 of this title.
The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

28 U.S.C. § 452 Courts always open; powers unrestricted by expiration of sessions

All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.
The continued existence or expiration of a session of a court in no way affects the power of the court to do any act or take any proceeding.

28 U.S.C. § 1257 State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C. § 1292 Interlocutory Decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except

for an accounting.

(d)

(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)

(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a

motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)

28 U.S.C. § 1651 Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 1652 State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 2071 Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with

Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)

(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

28 U.S.C. § 2106 Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Constitution of Virginia Article VI Section 5.

Rules of practice and procedure

> The Supreme Court shall have the authority to make rules governing the course of appeals and the practice and procedures to be used in the courts of the Commonwealth, but such rules shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly.

Code of Virginia

Va. Code § 8.01-3. Supreme Court may prescribe rules; effective date and availability; indexed, and annotated; effect of subsequent enactments of General Assembly.

> A. The Supreme Court, subject to §§ 17.1-503 and 16.1-69.32, may, from time to time, prescribe the forms of writs and make general regulations for the practice in all courts of the Commonwealth; and may prepare a system of rules of practice and a system of pleading and the forms of process and may prepare rules of evidence to be used in all such courts. This section shall be liberally construed so as to eliminate unnecessary delays and expenses.
> B. The Supreme Court, subject to § 30-399,
> shall enact rules and procedures as may be necessary for implementing the requirements of Article II, Section 6-A of the Constitution of Virginia, empowering the Supreme Court to establish congressional or state legislative districts as provided for in that section.
> C. New rules and amendments to rules shall not become effective until 60 days from adoption by the Supreme Court, and shall be made available to all courts, members of the bar, and the public.
> D. The Virginia Code Commission shall publish and cause to be properly indexed and annotated the rules adopted by the Supreme Court, and all amendments thereof by the Court, and all changes made therein pursuant to subsection E.
> E. The General Assembly may, from time to time, by the

enactment of a general law, modify or annul any rules adopted or amended pursuant to this section. In the case of any variance between a rule and an enactment of the General Assembly such variance shall be construed so as to give effect to such enactment.
F. Any amendment or addition to the rules of evidence shall be adopted by the Supreme Court on or before November 15 of any year and shall become effective on July 1 of the following year unless the General Assembly modifies or annuls any such amendment or addition by enactment of a general law. Notwithstanding the foregoing, the Supreme Court, at any time, may amend the rules to conform with any enactment of the General Assembly and correct unmistakable printer's errors, misspellings, unmistakable errors to statutory cross-references, and other unmistakable errors in the rules of evidence.
G. When any rule contained in the rules of evidence is derived from one or more sections of the Code of Virginia, the Supreme Court shall include a citation to such section or sections in the title of the rule.

Va. Code § 8.01-42.1. Civil action for racial, religious, or ethnic harassment, violence or vandalism.

A. An action for injunctive relief or civil damages, or both, shall lie for any person who is subjected to acts of (i) intimidation or harassment, (ii) violence directed against his person, or (iii) vandalism directed against his real or personal property, where such acts are motivated by racial, religious, gender, disability, gender identity, sexual orientation, or ethnic animosity.
B. Any aggrieved party who initiates and prevails in an action authorized by this section shall be entitled to damages, including punitive damages, and in the discretion of the court to an award of the cost of the litigation and reasonable attorney fees in an amount to be fixed by the court.
C. The provisions of this section shall not apply to any actions between an employee and his employer, or between or among employees of the same employer, for damages arising out of incidents occurring in the workplace or arising out of the employee-employer relationship.
D. As used in this section:

"Disability" means a physical or mental impairment that substantially limits one or more of a person's major life activities."

Va. Code § 8.01-296 Manner of serving process upon natural persons.

Subject to the provisions of § 8.01-286.1, in any action at law or in equity or any other civil proceeding in any court, process, for which no particular mode of service is prescribed, may be served upon natural persons as follows:
1. By delivering a copy thereof in writing to the party in person; or
2. By substituted service in the following manner:
a. If the party to be served is not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of 16 years or older; or
b. If such service cannot be effected under subdivision 2 a, then by posting a copy of such process at the front door or at such other door as appears to be the main entrance of such place of abode, provided that not less than 10 days before judgment by default may be entered, the party causing service or his attorney or agent mails to the party served a copy of such process and thereafter files in the office of the clerk of the court a certificate of such mailing. In any civil action brought in a general district court, the mailing of the application for a warrant in debt or affidavit for summons in unlawful detainer or other civil pleading or a copy of such pleading, whether yet issued by the court or not, which contains the date, time and place of the return, prior to or after filing such pleading in the general district court, shall satisfy the mailing requirements of this section. In any civil action brought in a circuit court, the mailing of a copy of the pleadings with a notice that the proceedings are pending in the court indicated and that upon the expiration of 10 days after the giving of the notice and the expiration of the statutory period within which to respond, without further notice, the entry of a judgment by default as prayed for in the pleadings may be requested, shall satisfy the mailing requirements of this section and any notice requirement of the Rules of Court. Any judgment by default entered after July 1,

1989, upon posted service in which proceedings a copy of the pleadings was mailed as provided for in this section prior to July 1, 1989, is validated.

c. The person executing such service shall note the manner and the date of such service on the original and the copy of the process so delivered or posted under this subdivision and shall effect the return of process as provided in §§ 8.01-294 and 8.01-325.

3. If service cannot be effected under subdivisions 1 and 2, then by order of publication in appropriate cases under the provisions of §§ 8.01-316 through 8.01-320.

4. The landlord or his duly authorized agent or representative may serve notices required by the rental agreement or by law upon the tenant or occupant under a rental agreement that is within the purview of Chapter 14 (§ 55.1-1400 et seq.) of Title 55.1.

Va. Code § 18.2-57. Assault and battery; penalty.

A. Any person who commits a simple assault or assault and battery is guilty of a Class 1 misdemeanor, and if the person intentionally selects the person against whom a simple assault is committed because of his race, religious conviction, gender, disability, gender identity, sexual orientation, color, or national origin, the penalty upon conviction shall include a term of confinement of at least six months.

B. However, if a person intentionally selects the person against whom an assault and battery resulting in bodily injury is committed because of his race, religious conviction, gender, disability, gender identity, sexual orientation, color, or national origin, the person is guilty of a Class 6 felony, and the penalty upon conviction shall include a term of confinement of at least six months.

C. In addition, if any person commits an assault or an assault and battery against another knowing or having reason to know that such other person is a judge, a magistrate, a law-enforcement officer as defined in subsection F, a correctional officer as defined in § 53.1-1, a person directly involved in the care, treatment, or supervision of inmates in the custody of the Department of Corrections or an employee of a local or regional correctional facility directly involved in the care, treatment, or supervision of inmates in the custody of the facility, a person directly involved in

the care, treatment, or supervision of persons in the custody of or under the supervision of the Department of Juvenile Justice, an employee or other individual who provides control, care, or treatment of sexually violent predators committed to the custody of the Department of Behavioral Health and Developmental Services, a firefighter as defined in § 65.2-102, or a volunteer firefighter or any emergency medical services personnel member who is employed by or is a volunteer of an emergency medical services agency or as a member of a bona fide volunteer fire department or volunteer emergency medical services agency, regardless of whether a resolution has been adopted by the governing body of a political subdivision recognizing such firefighters or emergency medical services personnel as employees, engaged in the performance of his public duties anywhere in the Commonwealth, such person is guilty of a Class 6 felony, and, upon conviction, the sentence of such person shall include a mandatory minimum term of confinement of six months.

Nothing in this subsection shall be construed to affect the right of any person charged with a violation of this section from asserting and presenting evidence in support of any defenses to the charge that may be available under common law.

C. In addition, if any person commits a battery against another knowing or having reason to know that such other person is a full-time or part-time employee of any public or private elementary or secondary school and is engaged in the performance of his duties as such, he is guilty of a Class 1 misdemeanor and the sentence of such person upon conviction shall include a sentence of 15 days in jail, two days of which shall be a mandatory minimum term of confinement. However, if the offense is committed by use of a firearm or other weapon prohibited on school property pursuant to § 18.2-308.1, the person shall serve a mandatory minimum sentence of confinement of six months.

E. In addition, any person who commits a battery against another knowing or having reason to know that such individual is a health care provider as defined in § 8.01-581.1 who is engaged in the performance of his duties in a hospital or in an emergency room on the premises of any clinic or other facility rendering emergency medical care is guilty of a Class 1 misdemeanor. The sentence of such person, upon conviction, shall include a term of confinement

of 15 days in jail, two days of which shall be a mandatory minimum term of confinement.

F. As used in this section:

"Disability" means a physical or mental impairment that substantially limits one or more of a person's major life activities.

"Hospital" means a public or private institution licensed pursuant to Chapter 5 (§ 32.1-123 et seq.) of Title 32.1 or Article 2 (§ 37.2-403 et seq.) of Chapter 4 of Title 37.2.

"Judge" means any justice or judge of a court of record of the Commonwealth including a judge designated under § 17.1-105, a judge under temporary recall under § 17.1-106, or a judge pro tempore under § 17.1-109, any member of the State Corporation Commission, or of the Virginia Workers' Compensation Commission, and any judge of a district court of the Commonwealth or any substitute judge of such district court.

"Law-enforcement officer" means any full-time or part-time employee of a police department or sheriff's office that is part of or administered by the Commonwealth or any political subdivision thereof who is responsible for the prevention or detection of crime and the enforcement of the penal, traffic or highway laws of the Commonwealth, any conservation officer of the Department of Conservation and Recreation commissioned pursuant to § 10.1-115, any special agent of the Virginia Alcoholic Beverage Control Authority, conservation police officers appointed pursuant to § 29.1-200, full-time sworn members of the enforcement division of the Department of Motor Vehicles appointed pursuant to § 46.2-217, and any employee with internal investigations authority designated by the Department of Corrections pursuant to subdivision 11 of § 53.1-10, and such officer also includes jail officers in local and regional correctional facilities, all deputy sheriffs, whether assigned to law-enforcement duties, court services or local jail responsibilities, auxiliary police officers appointed or provided for pursuant to §§ 15.2-1731 and 15.2-1733, auxiliary deputy sheriffs appointed pursuant to § 15.2-1603, police officers of the Metropolitan Washington Airports Authority pursuant to § 5.1-158, and fire marshals appointed pursuant to § 27-30 when such fire marshals have police powers as set out in §§ 27-34.2 and 27-34.2:1.

"School security officer" means the same as that term is defined in § 9.1-101.

G. "Simple assault" or "assault and battery" shall not be construed to include the use of, by any school security officer or full-time or part-time employee of any public or private elementary or secondary school while acting in the course and scope of his official capacity, any of the following: (i) incidental, minor or reasonable physical contact or other actions designed to maintain order and control; (ii) reasonable and necessary force to quell a disturbance or remove a student from the scene of a disturbance that threatens physical injury to persons or damage to property; (iii) reasonable and necessary force to prevent a student from inflicting physical harm on himself; (iv) reasonable and necessary force for self-defense or the defense of others; or (v) reasonable and necessary force to obtain possession of weapons or other dangerous objects or controlled substances or associated paraphernalia that are upon the person of the student or within his control.
In determining whether a person was acting within the exceptions provided in this subsection, due deference shall be given to reasonable judgments that were made by a school security officer or full-time or part-time employee of any public or private elementary or secondary school at the time of the event.

Rules of Supreme Court of Virginia

Rule 1:12 of the Supreme Court of Virginia p.24

Rule 1:13 of the Supreme Court of Virginia p.25

Rule 1:15 (c) of the Supreme Court of Virginia p.27

Rule 1:18B of the Supreme Court of Virginia p.60

Rule 2:103 (a) of the Supreme Court of Virginia p.108

Rule 2:104 (b) of the Supreme Court of Virginia p.109

Rule 2:201 of the Supreme Court of Virginia p.112

Rule 2:302 of the Supreme Court of Virginia p.116

Rule 2:602 of the Supreme Court of Virginia p.141

Rule 2:603 of the Supreme Court of Virginia p.142

Rule 2:608 of the Supreme Court of Virginia p.147

Rule 2:610 of the Supreme Court of Virginia p.149

Rule 2:801 (c) of the Supreme Court of Virginia p.162

Rule 2:803 of the Supreme Court of Virginia p.164

Rule 2:1101 of the Supreme Court of Virginia p.186

Rule 3:4 of the Supreme Court of Virginia p.198

Rule 3:8 (a) of the Supreme Court of Virginia p.203

Rule 5:25 of the Supreme Court of Virginia p.431

KHAI BUI

1124 Duchess dr

Mclean, VA 22102

Telephone: 703-338-5898

Email:akhaibui@yahoo.com

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Khai Bui, :

Plaintiff, :CL 2018-15376

v. :

Ruiz Cabaellero Hernan F, :

Defendant, :

Pre – trial disclosure of evidence 7-21-2019

Comes now, plaintiff pro se has not received any discoveries questions from defendant. Plaintiff think that disclosing these evidences are within the rules of due process for discoveries. These exhibits are evidences of plaintiff's continuing facts and relevant to the case.

- plaintiff evidence through investigation of facts – [exhibit I] picture of similar weapon used by defendant in the morning of
- August 21, 2018, [exhibit M] drawn diagram of house where

primaries allege harassment and assault and batteries occur, [exhibit N] picture of similar closet door on the second floor

- plaintiff evidence through investigation of facts but for some reasons can not update at this time: cell phone text messages to Juan and Marlene
- Work paystub past August 16, 2018
- Federal tax 2018 as an update records to previous tax statement filed
- Email sending log of on company software from 2018-2019

Wherefore, this is evidence proffer on July 21, 2018 while the parties are continuing discoveries.

s/ Khai Bui Date: 7-21-2019

Certificate of Service

I, Khai Bui pro-se, confirm a true copy of pre-trial disclosure of evidence was mailed on July 22, 2019 to:

Hernan Ruiz Caballero

7602 Gaylord dr

Annandale, VA 22003

KHAI BUI

1124 Duchess dr

Mclean, VA 22102

Telephone: 703-338-5898

Email:akhaibui@yahoo.com

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Khai Bui,	:
Plaintiff,	:CL 2018-15376
v.	:
Ruiz Cabaellero Hernan F,	:
Defendant,	:

Plaintiff's second evidence package

To the party as defendant in this case, these exhibits are in possession of plaintiff. Objection to these exhibits may be made in accordance to rules of supreme court. Any exhibits, and filings in the case may be use during trial with notice.

i. Exhibit O – Mr Bui's own domain. It a page of his domain transfer

ii. Exhibit P – Payment receipt of an account on abcombination.com

iii. Exhibit Q – brute force attack on ISP server ip address

iv. Exhibit T – text messages with Marlene. (physical cell phone will be shown as evidence in court)

v. Exhibit U – text messages with Juan. (physical cell phone will be shown as evidence in court)

vi. Witnesses Juan and Marlene are scheduled to be at trial

vii. Exhibit Z – 3 pages of grubhub direct deposit

viii. Exhibit Z-2 – 2 pages of work hours 8-21-2018

ix. Exhibit Z-8 – 5 pages of work hours week 9-30-2018

x. Exhibit K – 20 tax return 2018

xi. Exhibit K – 40 email 2 pages, business server license, sites, emails, proof of receipt

xii. Exhibit R – 70, a knife similar to one used by defendant in the assault and batteries – Exhibit – 70 will be proffer for hearing

xiii. Exhibit K – 45 payment receipt of test account

xiv. Exhibit K – 47 13 business emails to customers of undeliverable emails 12-23-2018

xv. Exhibit K – 28 email sender settings and sender limitation, 200 emails per day. Server limitation 100 emails per message, 2 minutes apart per message, and other limitation per

provider

xvi. Plaintiff second evidence package

KHAI BUI

akhaibui@yahoo.com

1124 Duchess dr

Mclean, VA 22102

Date: 8-17-2019

s/ Khai Bui

Certificate of Service

I, Khai Bui pro-se, confirm a true copy of second evidence package was sent on August 17, 2019 to:

Hernan Ruiz Caballero

7602 Gaylord dr

Annandale, VA 22003

USPS Tracking Number: 9505515637479229780923 mailed 8/17/2019

Filed 8/29/2019

KHAI BUI

1124 Duchess dr

Mclean, VA 22102

Telephone: 703-338-5898

Email:akhaibui@yahoo.com

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Khai Bui, :

Plaintiff, :CL 2018-15376

v. :

Ruiz Cabaellero Hernan F, :

Defendant, :

Motion inlimne

Comes Now, Khai Bui, pro se is requesting that the following evidences and testimonies be excluded in the trial because the evidences are pre-judicial. Under the Rules of evidence in the rule of court 2:602, 2:608, 2:610, and 2:803, witnesses cannot testifies if lack of knowledge, a hearsay statement made cannot be admissible, bias witness may be impeached, and extrinsic proof can be use as impeachment evidence.

I. Objection to answers in discoveries as they are from an untrusted

source. It seems that defendant allege facts about his children while they were in the house and what he felt. Those answers including other answers are irrelevant and untruthful. Defendant also did not response timely in discoveries.

II. Written statement and sign by Angela Lizarazo on January 20, 2019 allege opinions, some facts, character telling, and some names. This document can not be admissible evidence because this person did not allow plaintiff to cross-exam in discoveries. She did not attend deposition and did not response to written deposition. As a result of this, the statement is a hearsay, bias of a witness, impeachable, and lack personal knowledge.

III. Javon Green cannot testifies because he also did not response or attend deposition. Therefore, he is bias and lack of personal knowledge. (subpoena deposition issued and written deposition sent on 7-30-2019)

IV. Angela Lizarazo cannot testifies because she a witness that had did not complies to all rules of evidences in this motion (subpoena of

V. deposition issued and written deposition sent on 7-30-2019)

Wherefore, plaintiff request that these evidences be inadmissible as pre-judicial in a trial.

8-29-2019

s/

Khai Bui

s/

Pansy McCray

Notary Public

Certificate of Service

I, Khai Bui pro-se, confirm a true copy of motion inlimne was mailed on August 29, 2019 to:

Hernan Ruiz Caballero

7602 Gaylord dr

Annandale, VA 22003

USPS Tracking Number: 9505515637459241742253 mailed 8/29/2019

Filed 9/12/2019

KHAI BUI

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IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Khai Bui, :

Plaintiff, :CL 2018-15376

v. :

Ruiz Cabaellero Hernan F, :

Defendant, :

Motion inlimne

Comes Now, Khai Bui, pro se is making objection to exhibit list file by defendant for September 18, 2019 trial.

I. Objection to exhibit list file on September 18, 2019 as discriminatory because copy of exhibit list was not served mail to plaintiff. Furthermore, in civil action a defendant has a duty to plead facts sufficient to informs the other party of the true nature of its defense.

The defense pleading does not state any facts that it can relies on and mostly allege that defendant does not know. With a stricken witness statement from the defense pleading, the pleading is without ground as it does not clearly state a defense.

II. Objection to exhibit list on September 18, 2019 because it affects plaintiff's substantial rights to discover before exhibits are offered. Plaintiff's rights to defend any defense arguments evidences were not extended through the use of discoveries deadline. Defendant is submitting evidences in line with after discoveries deadline. Prior deadline submitted are exhibit number 6A, 4A, 5A, 5B. The rest of the exhibits on the list were not made known before the end of discoveries deadline. Plaintiff is seeking to exclude these as follows:

a. Exhibit 1A – objection, evidence was not proffer during discoveries. Nobodies know when this view was captured and assault and batteries took place at the washing machine.

b. Exhibit 1B – objection, evidence was not proffer during discoveries. Laundry closet door might be a different set of doors than it was August 21, 2018.

c. Exhibit 1C – objection, evidence was not raised in defense

d. pleading and was not offer in discoveries. Plaintiff's position

was not argued in defense pleading.

e. Exhibit 2A – objection, defendant's type of weapon was not responded to in his defense pleading. Key fob was not mentioned in discoveries.

f. Exhibit 3A – objection, evidence of work and work hours were not offered in discoveries even though there were several questions about work address and work hours. Plaintiff was made inaccessible to defendant's work and work schedule because he objected to giving his work address or addresses. Documents of work and work hours can not be confirmed because he did not provide work address.

g. Exhibit 3B – objection, evidence of work and work hours were not offered in discoveries even though there were several questions about work address and work hours. Plaintiff was made inaccessible to defendant's work and work schedule because he objected to giving his work address or addresses.

h. Exhibit 3C – objection, evidence of work and work hours were not offered in discoveries even though there were several questions about work address and work hours. Plaintiff was made inaccessible to defendant's work and work schedule

because he objected to giving his work address or addresses.

i. Exhibit 5A – objection, evidence is not understandable because it is from a third party. It can not be used to prove a conversation from a source because that message could be from any source.

j. Exhibit 6A – objection, witness statement attached to defense pleading was stricken from March 8, 2019 order. Additionally, content of statement is hearsay within hearsay and witness is not available to testifies. The statement is the witness's own perception therefore it does not fit in any hearsay exception. Crawford v. Washington in 2004, the Supreme Court held that some hearsay offered against a criminal defendant is "testimonial" in nature and thus requires an opportunity for cross-examination, even if the hearsay is very reliable and falls within some firmly routed hearsay exception. Because it is a testimonial in nature, it is subject to confrontation clause of sixth amendment, thus require to be cross-examine. Furthermore, this evidence is unfair prejudice because the witness is not in court for cross examination or subject to impeach process. (attached court

order granting motion to strike)

k. Exhibit 6B – objection, witness passport of the same witness who made the stricken statement. It was not offered in discoveries. Objection if it is of a different witness, it was not offered in discoveries.

l. Exhibit 6C – objection, witness is not a tenant on record of background check. It was not offered in discoveries. Objection if it is of a different witness, it was not offered in discoveries.

m. Exhibit 6D – objection, witness plane ticket of the same witness who made the stricken statement. It was not offered in discoveries. Objection if it is of a different witness, it was not offered in discoveries.

n. Exhibit 6E – objection, witness doctor certificate of the same witness who made the stricken statement as proof that she is occupied in another country. It was not offered in discoveries. Objection if it is of a different witness, it was not offered in discoveries.

o. Exhibit 7A – objection, evidence was not made known in discoveries as trial materials.

Wherefore, exhibit list is for evidences that were fairly argued in pleading

or discoveries. Civil cases are based on good faith discoveries and that is where evidences are supposed to be formed. If pleading does not have facts then evidences cannot be offered. The two main objection states reasons that exhibit is prejudice. Exhibit that are identified state its own reason for objection. Defendant had no discoveries and is submitting evidences after discoveries.

Wherefore, plaintiff request that the objection to evidences for trial is granted and evidences that are on this list be exclude prior to trial

s/ Khai Bui

9-10-2019

s/ Mike S. Ramos

Notary Public

Certificate of Service

I, Khai Bui pro-se, confirm a true copy of motion inlimne was mailed on September 10, 2019 to:

Hernan Ruiz Caballero

7602 Gaylord dr

Annandale, VA 22003

s/ Khai Bui

Khai Bui

1124 Duchess dr

Mclean, VA 22102

Phone: 703-338-5898

Email:akhaibui@yahoo.com

USPS Tracking Number: mailed 9/12/2019 9505515637479255797643

delivered 9/13/2019

Khai Bui

1124 Duchess dr

Mclean, VA 22102

akhaibui@yahoo.com

703-338-5898

Supreme Court of Virginia

Notice of filing transcript, testimonies and other incidents

I, Khai Bui, appellant is filing transcript, court objects to the facts submitted by the plaintiff, emails of exhibit list incident that was proffered at trial on September 18, 2019 and testimonies of officer Armstrong about the ruling. Appellant's paid for the transcribed of trial court trial for case CL2018-15376 on September 18, 2019. Appellant is filing two emails that was proffered during the trial. Emails was not print on paper during the trial. Therefore, the trial judge skipped the offered. Statement of facts by the court is the trial court objections to the facts submitted by plaintiff after the trial. Testimonies of officer Armstrong is attached as available with subpoena about the rulings. There was no subpoena issued therefore he could not make a statement.

Transcript of court digital audio recording for the trial on September 18, 2019 is one hundred fifty-two pages. It contains the beginning of trial, witnesses' testimonies, arguments, and orders.

Circuit court and Rudiger, Green and Kerns reporting services confirm that the transcript recording and transcribe of recording are accurate to words. There are instances where the recordings cannot transcribe. Those instances would be transcribe as (--).

s/ 9-15-2020 Khai Bui

s/ OGERTA PAMBUKU
Notary Public

Khai Bui
1124 Duchess dr
Mclean, VA 22102
akhaibui@yahoo.com
703-338-5898

Certificate of Service

I, Khai Bui pro-se, confirm a true copy of the Notice of filing transcript, testimonies and other incidents will be mailed on September 16, 2020 to:

Hernan Fernando Ruiz Caballero

7602 Gaylord dr

Annandale, VA 22003

s/ 9-15-2020 Khai Bui

Khai Bui

s/ OGERTA PAMBUKU

Notary Public

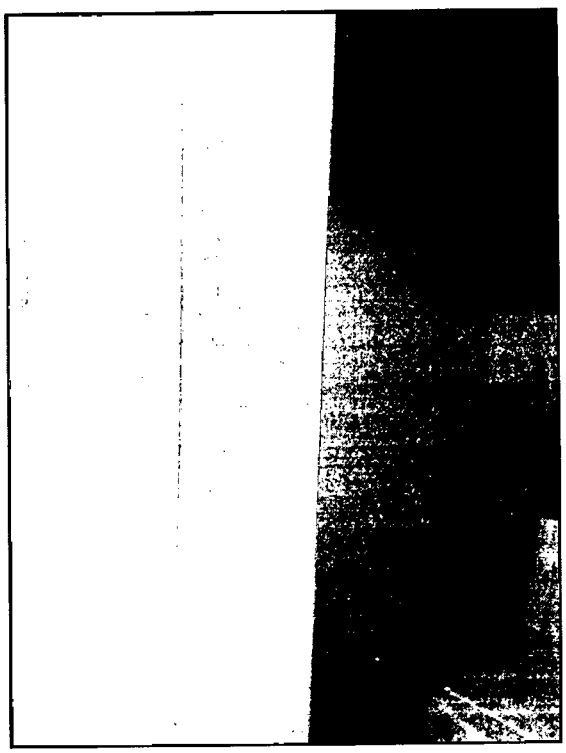
1124 Duchess dr

Mclean, VA 22102

akhaibui@yahoo.com

703-338-5898

Plaintiff Exhibit R-45 case CL2018 -15376



Plaintiff Exhibit R-48 case CL2018 -15376

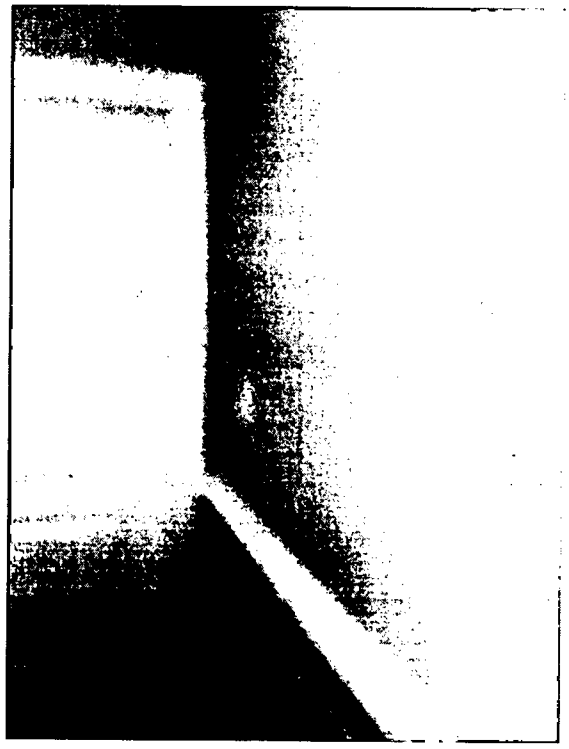
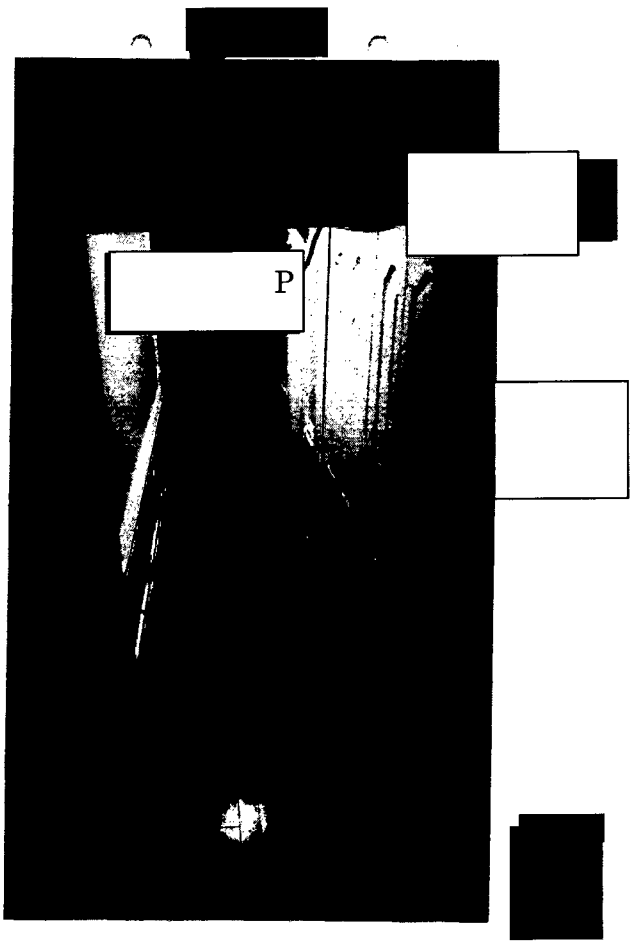
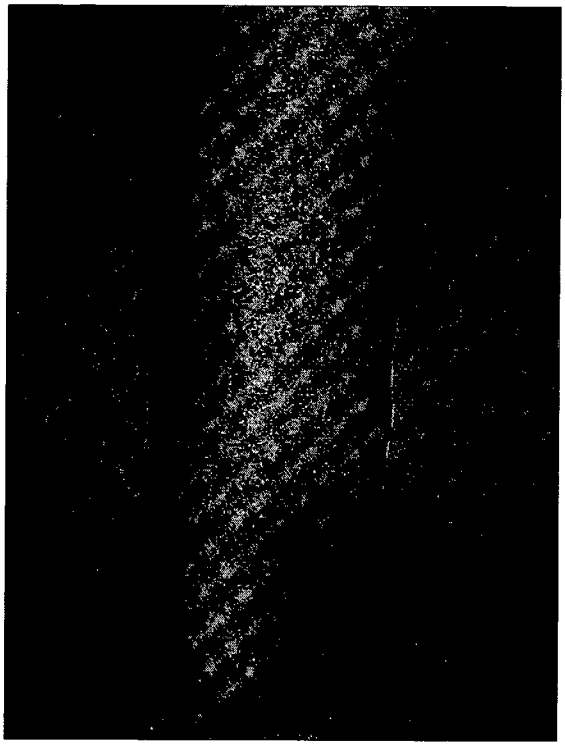


Exhibit 1B View of laundry closet door



Plaintiff Exhibit R-21 case CL2018 -15376



Plaintiff Exhibit R-23 case CL2018 -15376

General Information - Civil Case | Circuit Court (fairfaxcounty.gov)

TRIAL EXHIBIT PROCEDURE

An exhibit is the document or other tangible item a party seeks to have the judge accept at trial as valid evidence in the case. An exhibit does not become evidence in the case until the judge rules that it is accepted as evidence in the case.

Procedure

- **Non-Domestic Civil Cases** - Parties must file with the Clerk of the Court a list of exhibits specifically identifying each exhibit to be introduced at trial on or before the date stated in the Scheduling Order. A **copy** of all exhibits not previously supplied in discovery must be delivered to opposing counsel or party on or before the date stated in the Scheduling Order.
- **Domestic Cases** - Parties must file with the Clerk of the Court and serve the opposing counsel or party a list of exhibits specifically identifying each exhibit to be introduced at trial at least fifteen (15) days prior to the trial date. A **copy** of all exhibits not previously supplied in discovery must be delivered to opposing counsel or party at least fifteen (15) days prior to the
- trial date.

The original, labeled exhibits must be brought to court the day of trial. The Case Status Team does not give out exhibit labels.

Exhibit Format:

- Exhibits should be on standard size paper and inserted into binders. If necessary, pictures should be taken of the large exhibits and inserted into the binders. Counsel/Pro Se parties must bring to trial a sufficient number of binders with pre-marked exhibits so that one binder each can be given to the judge, opposing counsel, and placed on the witness stand.
- The Exhibit List Form should be completed and inserted into the front of the binder. Please do not mark anything in the last two columns.
- Mark each exhibit with appropriate labels. Record both the exhibit and case number on the labels. Please leave sufficient space for the Judge's initials and the date.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

TO: ALL Attorneys of record and Pro-Se Parties

NOTICE OF PROCEDURE FOR TRIAL EXHIBITS

A LIST of exhibits specifically identifying each exhibits to be introduced at trial must be filed with the Clerk of the Court on or before the date stated in the Scheduling Order. (LIST ONLY)

A COPY of all exhibits not previously supplied in discovery must be delivered to opposing counsel or party on or before the date stated in the Scheduling Order.

The original exhibits must be brought to court the DAY of TRIAL

1 Exhibits should be on standard size paper and inserted into binders. If necessary, pictures should be taken of the large exhibits and inserted into the binders. Counsel/Pro Se parties must bring to trial a sufficient number of binders with pre-marked exhibits so that one binder each can be given to the judge, opposing counsel, and place on the witness stand.

2 The Exhibit List Form should be completed and inserted into the front of the binder. Please do not mark anything in the last two columns.

3 Mark each exhibit with appropriate labels. Record both the exhibit and case number on the labels. Please leave sufficient space for the Judge's initials and the date. (The case Tracking Program DOES NOT GIVE out exhibit labels)