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PORTLAND DUE PROCESS



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PORTLAND

PORTLAND HAS BEEN MAKING HEADLINES RECENTLY DUE TO THE ACTIVITY OF FEDERAL LAW ENFORCEMENT. VIDEOS AND STORIES HAVE BEEN CIRCULATING SHOWING FEDERAL AGENTS IN UNMARKED VANS SNATCHING PROTESTORS OFF THE STREETS. IN PARTICULAR, THE STORY OF MARK PETTIBONE HAS BEEN GETTING ATTENTION. PETTIBONE WAS WALKING HOME IN DOWNTOWN PORTLAND FROM A PEACEFUL BLACK LIVES MATTER PROTEST WHEN FEDERAL OFFICERS WEARING MILITARY FATIGUES WITH GENERIC “POLICE” INSIGNIAS FORCED HIM INTO AN UNMARKED VAN. UNABLE TO DETERMINE IF THEY WERE LEGITIMATE POLICE OFFICERS OR FAR-RIGHT EXTREMISTS—WHO PETTIBONE NOTED OFTEN DON MILITARY-LIKE OUTFITS AND HARASS LEFT-LEANING PROTESTERS—PETTIBONE HAD FLED FROM THE PURSUING VANS BEFORE HE WAS EVENTUALLY CAPTURED. HE WAS THEN TAKEN TO THE MARK O. HATFIELD FEDERAL COURTHOUSE WHERE HE WAS READ HIS MIRANDA RIGHTS. POLICE RUMMAGED THROUGH HIS THINGS, AND AFTER ASKING FOR A LAWYER PETTIBONE WAS RELEASED. THERE IS NO KNOWN RECORD OF ARREST NOR ARE ANY FEDERAL LAW ENFORCEMENT AGENCIES TAKING RESPONSIBILITY. HIS ARREST HIGHLIGHTS TWO MAJOR QUESTIONS: WHY WAS HE ARRESTED AND WAS HIS ARREST CONSTITUTIONAL?

In response to a widely circulated video of a different arrest in Portland, Customs and Border Patrol released a statement saying that the agents identified themselves and arrested the person because they had information showing that the person was “suspected of assaults against federal agents or destruction of federal property.” Legally, the most clear-cut justification federal forces have for making arrests is enforcing federal law. This is not to say federal police cannot make arrests for violations of state law. If any law is broken in the presence of a federal officer, it’s not controversial for them to make an arrest. Oregon also has a stipulation allowing federal officers to enforce state law, but that requires a permit from Oregon’s Department of Public Safety Standards and Training signifying that “the federal officer has received proper training to enable federal officers to make arrests.” Given that the Attorney General of Oregon is suing federal forces to leave, it’s highly unlikely they were granted state permits. This means that for federal police to patrol Portland’s streets and track down subjects far away from any federal property where they are stationed, they must be carrying out federal law.

However, no matter whether local or federal law is broken, police need probable cause to make arrests, specifically probable cause under “exigent circumstances” to make arrests without a warrant, and in cases like Pettibone’s, who was simply walking home from a peaceful protest, it is unclear whether there was any. This is reflective of inadequate due process, especially the lack of an arrest record and any government agency taking responsibility for the arrest, making it impossible to find out if there was actually probable cause for arrest. In a lawsuit filed against federal law enforcement agencies in Portland, Oregon Attorney General Ellen Rosenblum alleged “[o]n information and belief, defendants did not afford and will not afford Pettibone and the other citizens who were or will be detained due process of law.” So the question arises: Does the Constitutional right to due process ensure an arrested person is shown why they were arrested?

The answer is: it depends. Under the 1970 precedent set by *Goldberg v. Kelly*, part of the process “due” is the chance to “examine all materials that would be relied upon” for prosecution, which would require an arrested person to have access to the probable cause that justified their arrest in an exigent circumstance. However, a later case, *Mathews v. Eldridge*, overturned that ruling and instead of a specific set of procedures due, created a set of factors that should be considered when deciding which procedures are constitutionally “due”:

“First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the 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 requirement would entail.”

This allowed for a more flexible, case-by-case evaluation of the meaning of due process and called on any party calling for a change to due process requirements to not only show that the current action is insufficient, but to also form a process that is justified in its own right. For protestors being arrested in Portland, there is no direct answer to whether they are being denied their constitutional right to due process as interpreted under the Supreme Court, but the standard for due process does still have some structure, even if unofficial. Judge Henry Friendly, a former federal judge in the appeals court for the Second Circuit, created a list of procedures required by due process in his article “Some Kind of Hearing.” While not actually legally binding, Cornell’s Legal Information Institute maintains it is “highly influential.”

CORNELL LEGAL INFORMATION INSTITUTE AND ANALYSIS

While there is no definitive list of the "required procedures" that due process requires, Judge Henry Friendly generated a list that remains highly influential, as to both content and relative priority

1. An unbiased tribunal
2. Notice of the proposed action and the grounds asserted for it.
3. Opportunity to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to cross-examine adverse witnesses.
7. A decision based exclusively on the evidence presented.
8. The opportunity to be represented by counsel.
9. The requirement that the tribunal prepares a record of the evidence presented.
10. The requirement that the tribunal prepares written findings of fact and reasons for its decision.

This is not a list of procedures which are required to prove due process, but rather a list of the kinds of procedures that might be claimed in a 'due process' argument, roughly in order of their perceived importance.

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Even though Portland's protestors do not have a clearly defined right to be told the probable cause they were arrested under, Oregon's Attorney General has a strong argument that the protestors deserve "the right to know opposing evidence" in a due process argument, and show that the current processes are insufficient to meet the constitutional burden of legality.

As federal forces pull back in Portland, Trump has threatened to send officers to other cities including Chicago, New York, Philadelphia, and Detroit, where local officials may face the same legal questions as Portland.