

LECTURE #1 – INTRODUCTION TO THE AMERICAN LEGAL AND ADMINISTRATIVE LAW SYSTEM

When I think about what nations are proudest of, and boast of, and tell the world they are best at, I must say for America it is our laws, our legal system, and Constitution. For the French we all know the French are the proudest and care the most about their language. Italians, I think, are the proudest of their food. They brag about their food. In America we are the proudest of our laws. The American laws and the legal system starting with the US Constitution which began our country in 1789 and is still the foundation and basis of our legal system is what we say we are the proudest of. (And we probably talk more about it than we follow and observe it.) There are 4 key principles of the American legal system: 1.) Government of law, not people, 2.) Limited Government, 3.) For every wrong a legal remedy, 4.) Due Process.

I. GOVERNMENT OF LAWS NOT MAN - The first key principle is that the USA is a government of laws and not of men. It's not just an American principle, obviously, it's a principle that came from the ancient Greeks, from Athens. The Athenians believed that laws were superior to men as the basis of governments – governments have kings, presidents, czars, chairmen and so forth, but men are corrupted by passion no matter how good they are, how beneficial they are. The theory is that human leaders weaken and are corrupted by their own passions, whereas laws are passionless and therefore are superior to the authority of men. We have a saying in English, "Power corrupts and absolute power corrupts absolutely". The great Russian writer of the 20th century, Alexander Solzhenitsyn said the same thing when he said, "A government that does not have an objective legal system is tyranny." In other words, one that does not vary depending on the people who rule. In the US no man is above the law – not even the President. In the last 40 years one of our Presidents was removed from office, President Richard Nixon, because he broke the law and everybody knew he had broken the law. We put a man on trial who was our president just 10 years ago, President Bill Clinton. He was accused of lying in a court matter and was actually accused of even worse things and was tried by the US Congress to be impeached, to be removed from office, and he just won narrowly to stay in office. We have many congressmen today in jail, there are 10 congressmen in jail, because videotapes were made of them receiving bribes of money. We have many policemen who go to jail because they try to use their power to arrest people or solicit bribes from people without legal authority. That is the basis of the idea that we're a government of law and not of men. No man is above the law, not even the President of the US, not a policeman, not a Senator, not a Congressman. It doesn't always work. Laws are not perfect. Governments are not perfect. But America does a pretty good job of it. When I was a government official (I was a municipal official, a city attorney), a couple of my lawyer friends told me,

something you wouldn't hear many places, in many countries, and under many legal systems: they told me being a city official in the city of Miami Beach can be the kiss of death. Everyone will be watching you and if anyone sees you do anything wrong or drive the wrong car, or make the wrong friend or make money because of your office you can actually be removed from office or prosecuted for a crime, or at the very least embarrassed by the newspaper publicity even if it is untrue.

II. THE LEAST GOVERNMENT IS THE BEST GOVERNMENT - The second basic principle of America and its legal system is a more unique one, probably surprising until you realize or remember that America is only 200 years old, two hundred years ago was 1807 and the Constitution was formed in 1789, just a few years before that, so you've got a two hundred year old country of people who came mainly from Europe, came over from France, England, Sweden, Norway, Spain, a few from Russia, not too many, but mainly English and Germans came to America, and they wanted to be farmers. They were not the wealthy people. You don't come to a new country when you're established in your own country. Many new people came for freedom from their crowded country, their crowded cities and they decided they wanted the open, abundant land and they farmed and built a new society. We had what we called a frontier society. The main concern of all the people was farming. Large tracts of land were available for free just for farming them. If you could build a house and live on it and farm it you had a big farm and were a wealthy farmer and wealthy land owner. The only thing frontier people were concerned about was the native Americans, the Indians. There were battles and wars. So the only need for government really was just the need to have soldiers to defend against the native Americans we called the Indians. And of course there are always people who want to rob and steal and so there was always a need for law and order in the form of police, but not too much. America grew up as a country of people who carried guns and joined with their neighbors to defend against Indians and criminals. Americans believe that that government is best that governs least. Our saying is the least government is the best government. And that was a fixed saying for a good 150 years in America until we hit the 1930's and the depression and WW II. All of a sudden it became necessary to have administrative agencies regulating rates for railroads, administrative agencies regulating how much people could charge for things and even during the war when you have a shortage of housing we needed administrative agencies to hold the rents down so the private owners of apartments and houses could not charge too much for housing. Our Wall Street Stock Market crash in 1929 that led to the Depression and so much poverty in America led the government to establish an administrative agency called the Securities Exchange Commission, so people couldn't sell stocks and bonds and investments without being approved, licensed, and regulated by an administrative agency. And all of a sudden in the late 1900's and today in the 21st century Americans are more receptive of government and administrative agencies. We still have sayings that survive from the days of mistrusting government – there's a saying we have in America that "It's close enough for government work"

meaning it's not very close, someone is not right on target, but they are close enough for government work. In other words, we all know that government employees and officials are not really as competent and careful as private employees so their work is not as accurate as private company work. And that's still a belief that is held to by many Americans and you'll even see it in the law. We have something called deregulation in administrative law that many of the republican leaders in Congress and the President, such as our President Reagan and President Bush, both Sr. and Jr. agree and believe in which is if possible, let's deregulate it and stop all government involvement. If we don't need to have an administrative agency tell us what to do any more, let's end it. And that's what we call deregulation. There's still a move for deregulation in America and we will talk about it more in this course when we talk about issues in administrative law today in American law. It is one of the examples of where America and American law continue to follow the proverb that the government that governs least governs best. We want government to stay out of our affairs in America; we want private enterprise to be able to succeed on its own without having government officials step in at every step and try to interfere.

III. NO WRONG WITHOUT A REMEDY - I don't know if you ever heard this saying, "For every wrong there is a remedy", but when I went to law school and I first learned about law, I learned that the legal system was devised so that no matter how a person was wronged; whether wronged by an individual, a group of individuals, a company, a labor union, the government, or a government official there was a remedy for that person to apply in the legal system and for going to court. Maybe that is why in America we think more of going to court than many other countries do. Sometimes the first thing an American thinks of is going to court rather than just going to City Hall or going to an administrative office to file a complaint. But, what we have is a whole series of remedies that the courts administer, the main ones being criminal – when someone does something wrong and breaks a criminal law – there's a criminal law remedy and a criminal prosecution by the government. Secondly, there are civil remedies for breaches of contracts – someone breaks a contract and doesn't honor his word or obligation, doesn't pay the money he agreed to pay, the law allows an action for a breach of contract. That's the second remedy. A third remedy is what we call Torts. It's a French word for wrongs. When someone is wronged or injured, personal injury law, car accident law is tort law. So when people get injured they sue for money damages in court for being injured. And we have a whole insurance system where people buy and purchase insurance in the event someone sues them for a tort, for being injured, especially in car accidents. But there is also insurance that pays for injuries in your condominium, your apartment, your house, if someone slips and falls in your house, there's insurance that will pay that. There's stores and office buildings that purchase insurance so if someone slips and falls and gets injured or an employee injures a customer in a building or store, something happens while you are shopping at the grocery store – the grocery stores and all stores carry insurance that will cover that legal action for a tortious wrong.

We have injunctions where the remedy of injunction means that someone will be enjoined. A husband will be enjoined from going into his wife's house if the husband is beating up the wife and causing a disturbance in the middle of a divorce. There's an injunction against going onto someone's land, an injunction that will enjoin or stop someone from doing something that is going to be dangerous or that the court says is wrong or illegal. We have mandamus actions, which is a remedy to compel a government official to do his job. If the court clerk isn't officially certifying the election that George Bush or Al Gore is President, Al Gore or George Bush will bring a legal action in court for the remedy of mandamus to compel the clerk or supervisor of elections, the official of government who handles elections and certifies who has won the election, to do his job, which is to certify who the winner of an election is. That of course can hide many things and can be the remedy that actually allows someone to go to trial and prove in court that he received more votes than someone else received or that some of the votes were fraudulent and should not count and that someone else's votes should.

We'll talk if we have time in our final class about the electoral process in the US, the democratic process that we boast about sometimes more than we should. Everyone knows we had a dispute in a close election in 2000 where there were more votes for president for one man, Al Gore, than for George Bush. We'll talk about how that happens in the American system and we'll talk about why there was a lawsuit and all the different levels of appeals in that lawsuit that led up to it. But that election was decided by judges of the US Supreme Court (there are 9 and they decided by 5-4 vote). And that incident tells you 2 important things about the American legal and political system: 1.) that we believe in court cases and lawyers more than any other democratic country (even when we disagree with the decision of a court we accept it rather than resort to a decision by guns and tanks), and 2.) the judicial branch is the most powerful of our 3 branches of government and probably stronger than in any other constitutional country with 3 branches of government: executive, legislative and judicial. Usually for every wrong there is a remedy, let me just say that one professor I once had described the legal system as a spider web – it catches everything that goes through it with the occasional exception of the very big and the very small. Any insect or bug that tries to fly through it will be caught, just as any wrongdoer will be dealt justice by the legal system. But in reality we know if something is too big it will break through the web or if too small it will fly between the threads of the spider web; the same is true of the legal system, but for the majority of wrongs that exist in life, the legal system will be like a spider web and stop them. I once was in court before a judge who told me that I needed to tell my clients, a group of elderly tenants, not to rely on laws and judges to solve every one of the problems of mankind. Courts are unable to do that he said. That's kind of contrary to what I like to think, so I told him what I thought the role of law was and I said, "Judge, for every wrong there is a remedy and my clients have been wronged. They are tenants who have been overcharged by their landlord. They have to have a remedy and going to

court is their legal remedy; we're hoping you will apply the law as their remedy for that wrong."

IV. DUE PROCESS - Another principle of American law that we brag about, which is really the basis of our whole legal system, comes from the US Constitution and that is that no person can be deprived of life, liberty or property without due process of law. Due process of law means the government must give notice and a right to a hearing to a person when it is taking his life from him or his liberty – if you put him in jail you have to give him the right to be heard, which we call a trial, and if you are taking his property from him, you must also give him the right to be heard. That's why when the government comes along and takes a person's property, for instance for a street or a highway or a park, the government must give that person a notice that they're going to do it and a right to be heard as to why they shouldn't do it or a right to be heard as to how much money the government should pay. This principle is right in the US Constitution, a copy of which I have posted on my website, johnaritter.com. It is Reading #5. The 5th Amendment to the Constitution says that no person may be deprived of life, liberty, or property without due process of law. And again, the 14th Amendment to the US Constitution, passed in 1865 after the Civil War, says that no person may be deprived of life, liberty, or property without due process of law. The 14th Amendment, was more important because it became the law after more people were legally considered as persons, and so slaves who had no rights, under the 1789 Constitution and no rights to due process because they were not legally considered persons, all of a sudden had to have due process before they could be jailed, deprived of their lives, or deprived of their property. This principle has been extended over the 220 year history of the US to many persons in many situations in the US, such as women and juveniles, so we find that the American system of no one can be deprived of life, liberty or property without due process of law is an expanding basic principle of the American legal system..

American due process has even been expanded to administrative law. The US has had a lot of difficulty with applying due process in administrative law because in many cases we did not like to admit these administrative agencies were dealing with people's life, liberty, or property. Are people entitled to due process when they are entitled to what we call "entitlements" – welfare? In the US poor people are entitled to welfare – food stamps, food, housing vouchers, which allow them money from the government for housing. If the government is going to terminate the welfare benefits of someone, such as their monthly money or food stamps or housing vouchers, it has been decided that government must give them due process. What does due process mean? The essentials of due process are notice, meaning you have to be told you are going to lose that right, and a right to a hearing. You have to have the right to reply, to be present at the questioning if someone says you should no longer have your welfare benefits, your housing voucher, or whatever else it is. In the US, one of the biggest systems we have of welfare money is Social Security. For everyone over 65, you get social security. For everyone who is disabled, you get social security. Social Security is a

pension for everyone over 65, but it is also a pension for anyone who is disabled. When people lose Social Security benefits they fight and they expect to have notice and a right to be heard. Social Security has a whole system of administrative law judges, thousands of judges, who hear nothing but social security administrative cases, appeals of denial of benefits and people who claim they should be receiving disability benefits. It is more of a problem in the US to extend due process to persons in immigration hearings. Why? Because they are not citizens or taxpayers. But they get due process too.

One of my favorite examples of the right to due process before someone takes something from you, is a recent case in our state of Wisconsin, in northern US, where there was a law that says that all public drunkards, people who drink too much and are alcoholics, must be placed on a list to be posted in taverns. Of course, the tavern then is not supposed to serve alcoholic beverages to or allow them to buy if they are public drunkards. One man that was on the list contested the fact that he had been put on the list and had not been given the right to present evidence that he was not a public drunkard. He wanted to be notified before being put on the list, have a right to prove he wasn't, the right to question whoever the bartenders and enemies were that said he was a public drunkard, and prove he should not be on that list. And he actually went to court over it and won and established his right to notice and a hearing. We don't know if he was actually able to prove he was not a public drunkard at that hearing, but he certainly had a right to a hearing and to confront the witnesses who said he was a public drunkard. In other words, a person's name, honor, integrity, and reputation are like property rights and have been interpreted as property rights in America and you can't take them away without due process. The principle of due process then becomes extended in very broad ways in America. In fact, some cases have been so broad and so liberal in interpretation of due process to people just to protect their name and reputation that even prisoners in penitentiaries and jails have claimed they have the right to due process before they can be put in solitary confinement, before they can be deprived of food, before they can be limited in their rights by the jail authorities. Actually prisoners have not been successful in these prison rights due process cases other than certain religious rights have been accorded to prisoners – prisoners who claim they are Muslims, Jews, and they want to have the right to pray in the way their religion gives to them.

To conclude due process, let me state the elements of due process that one of the welfare termination cases said must be given in an administrative matter. The court said the full elements of due process are: 1.) Notice of the charges against you, 2.) The right to confront at a hearing the witnesses against you, 3.) The right to cross examine those witnesses, 4.) The right to present your own witnesses and evidence on your side of the matter, 5.) The right to speak to the decision maker and state your point of view and why you should prevail, 6.) The right to an attorney if you want one, 7.) The right to a written decision from the decision maker, 8.) The right to a reason stated in that written decision from that decision maker, and 9.) The right to an impartial decision maker. This last point has been

very controversial in administrative law cases because there have been people who claim if you have an administrator from an administrative agency whose duty it is to supervise clean air and clean water, how can a member of that agency be named a decision maker in a case involving that agency when they are claiming someone is violating the rules about clean water and clean air. In other words, he is at the same time a legislator, a prosecutor, and a judge, so how can he be an impartial decision maker? So you can see why in America we have a whole body of people who do nothing but get appointed to be administrative judges and go to different agencies to be impartial decision makers because that has been one of the elements of due process as established in the US. One of the best parts of due process in Administrative Law in the US is that the Impartial Decision Maker is never a jury. In criminal and civil court cases, the US constitution gives a right to a jury of fellow citizens to decide the case, but NOT to decide Administrative Agency hearings.

Tomorrow we will talk about American Legal History.