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**McDANIELS v. FLICK: TERMINATING THE EMPLOYMENT OF TENURED PROFESSORS—WHAT PROCESS IS DUE?**

I. INTRODUCTION

The roots of “due process of law” are embedded deep within legal history. Prior to the American Revolution, the importance of citizens’ rights to life, liberty and property justified the existence of the State. In the spring of 1789, the First Congress adopted the Fifth Amendment to the United States Constitution, assuring that life, liberty and property would not be deprived without due process of law. After the Civil War,

1. See Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in *Due Process: Nomos XVIII* 3, 4 (J. Roland Pennock & John W. Chapman eds., 1977) (describing due process tradition and history in America). The concept of “due process of law” stems from the Magna Carta. Id. In Chapter 39 of the Charter of 1215, King John promised that “[n]o free man shall be taken or imprisoned or disseised . . . except by the lawful judgment of his peers or by the law of the land.” Id. (emphasis added). The phrase “law of the land” evolved into the constitutional concept of “due process of law.” Id. at 5-6. The original “law of the land” concept, however, included both procedural and substantive components. Id. See generally Edward S. Corwin, *The Doctrine of Due Process Before the Civil War*, 24 HARV. L. REV. 366, 368-70 (1911) (“It has . . . been demonstrated that the phrase ‘due process of law’ is a variation of Magna Carta’s ‘according to the law of the land,’ which restricted the enforcement procedures available to English monarchs.”); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 7-10 (1992) (examining Magna Carta as source of due process).

In addition, one commentator described the United States Supreme Court’s comparison of due process and the Magna Carta. Laurence H. Tribe, *American Constitutional Law* § 10-7, at 664 (2d ed. 1988). Professor Tribe stated that the Supreme Court analogized due process to the Magna Carta’s “‘guarantees against the oppressions and usurpations’ of the royal prerogative, in support of the basic conclusion that due process ‘is a restraint on . . . the government, and cannot be so construed as to leave congress . . . free to make any process “due process of law,” by its mere will.” Id. (footnotes omitted) (quoting Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856)); see also Hurtado v. California, 110 U.S. 516, 531-32 (1884) (discussing significance of Magna Carta in developing due process).

2. See Miller, *supra* note 1, at 6-7. Following the philosophy of John Locke, Sir William Blackstone expounded upon the notion that the State exists to protect life, liberty and property. Id. at 6. Blackstone’s “three absolute rights of individuals” included: “(1) ‘the right of . . . a person’s legal and uninterrupted enjoyment of his life . . .’ (2) ‘the personal liberty . . . of moving one’s person to whatsoever place one’s own inclination may direct . . .’ (3) ‘the third absolute right . . . of property; which consists in the free use, enjoyment, and disposal of all his acquisitions.’” Id. at 7 (quoting William Blackstone, *Commentaries* *129, 134, 138*).

3. Id. at 10. The Fifth Amendment states that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. This amendment was a culmination of similar concepts that, prior to the Fifth Amendment’s adoption, existed in other constitutional documents. See Miller, *supra* note 1, at 10. In addition, the Fifth Amendment changed the language in the Declaration of Independence, replacing the “pursuit of happiness”

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the Fourteenth Amendment was added to complement the Fifth Amendment, providing an analogous guarantee to the states. 4

Thus, while these amendments established the primacy of due process in our jurisprudence, uncertainty remained surrounding its definition, as well as the scope of the liberty and property it protected. 5 Even in their earliest interpretations, courts included nontraditional property within the reach of due process. 6 At the same time, however, the "doc-

phrase with "property." Id. This change demonstrated that the founders intended the Constitution to be a legal, rather than a purely political document, as judicial interpretation of the "pursuit of happiness" would be a difficult task for legal scholars. Id. This change also exhibited the nonrevolutionary temper of the Framers of the Constitution; property, as compared to happiness, warranted special attention in developing a system of government. Id.

Additionally, the "due process of law" language replaced the previous wording of the "law of the land." Id. This change may have stemmed from the Supremacy Clause's "law of the land" phrase. Id. at 10-11. If the Framers gave the phrase another meaning in the Fifth Amendment, confusion may have resulted. Id. For a general discussion of the scope of the Due Process Clause, see Leonard G. Ratner, The Function of the Due Process Clause, 116 U. Pa. L. Rev. 1048, 1050-75 (1968) (examining limitations placed upon Due Process Clause).

4. See Miller, supra note 1, at 16 (stating that Fourteenth Amendment reintroduced due process into constitutional language). The Fourteenth Amendment states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV. See generally Tribe, supra note 1, §§ 10-7 to 10-19, at 665-768 (providing historical overview of effect and significance of procedural due process in Fifth and Fourteenth Amendments).

Professor Tribe noted that the Fifth and Fourteenth Amendments are historically rooted "in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary government action." Id. § 10-7, at 501; see also Sanford H. Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 Yale L.J. 319, 340 (1957) (stating that due process is required even in areas of "legitimate governmental concern").


6. See Gamso, supra note 5, at 257 (stating Supreme Court has long recognized "property" to include some nonmaterial property). For example, in the 1901 case of Reagan v. United States, 182 U.S. 419 (1901), the question presented was whether the President could terminate for cause the petitioner's appointment as Commissioner in Indian Territory. Id. at 425. An appointment terminable for cause would entitle the Commissioner to due process protections. Id. The Court recognized the possible application of due process protections and was prepared to apply the "property" concept to an entitlement to employment. See Gamso, supra note 5, at 257 (discussing Supreme Court's interpretation of whether appointment as Commissioner was terminable for cause). In a similar manner, early cases recognized that a license to practice a certain trade could also be treated similarly to a property right. Id. See generally Barry v. Barchi, 443 U.S. 55, 63-64 (1979) (finding horse trainer's license similar to property right); Goldsmith v.
trine of privilege" restricted the constitutional rights of public employees by denying adequate due process protections. This doctrine eroded over time, laying the foundation for a protected property right in continued public employment. Nonetheless, an employer's termination of the right to public employment creates confusion regarding exactly what process the Due Process Clause dictates.


7. See McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 518 (Mass. 1892) ("The servant cannot complain, as he takes the employment on the terms which are offered him."); Lowell B. Howard, Jr., Cleveland Board of Education v. Loudermill: Procedural Due Process Protection for Public Employees, 47 OHIO ST. L.J. 1115, 1116-17 (1986) (detailing "doctrine of privilege"). Under this doctrine, courts considered it a privilege, rather than a right, to retain government employment. Howard, supra, at 1116. Consequently, the government could discharge an individual for no reason and deny him or her due process, without following any constitutional standard. Id.; see also Bailey v. Richardson, 182 F.2d 46, 59 (D.C. Cir. 1950) (defining civil service employment as statutory privilege, not constitutionally protected right); Erik K. Foster, Federal Pre-Termination Rights for State Employees: Cleveland Board of Education v. Loudermill, 54 U. Cin. L. Rev. 1069, 1071 (1986) (analyzing early characterization of public employment).

8. See Howard, supra note 7, at 1117 (discussing series of cases leading to Court's recognition of property interest in public employment). The "doctrine of privilege" remained in place until the late 1950s and 1960s, when the Warren Court began retreating from the right/privilege dichotomy. Id. See generally Charles A. Reich, The New Property, 73 YALE L.J. 733, 771-85 (1964) (arguing for expansion of rights requiring due process protection in light of increasing role of public sector); William W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 HARV. L. REV. 1439 (1968) (arguing that concept of privilege is no longer viable in light of size and power of governmental role in public sector). Instead, the Court advocated a shift from the focus on governmental action to a focus on the nature of the individually asserted interest. Howard, supra note 7, at 1117; see also Morrissey v. Brewer, 408 U.S. 471, 485-89 (1972) (concluding that impartial hearing officer must conduct informal inquiry near place of alleged parole violation in order to comply with due process); Fuentes v. Shevin, 407 U.S. 67, 80-93 (1972) (holding that state due process requires hearing before exercising writ of replevin); Bell v. Burson, 402 U.S. 535, 542 (1971) (finding that state must provide procedure for considering fault before revoking driver's license); Goldberg v. Kelly, 397 U.S. 254, 261-63 (1970) (finding that termination of welfare benefits required due process protection); Greene v. McElroy, 360 U.S. 474, 508 (1959) (holding that government violated employment statute when it denied public employee safeguards of confrontation and cross-examination); Slochower v. Board of Higher Educ., 350 U.S. 551, 559 (1956) (holding that employer violated discharged public employee's due process rights when it summarily fired him for invoking Fifth Amendment privilege against self-incrimination). In 1971, the Supreme Court marked the end of the right/privilege dichotomy. See Graham v. Richardson, 405 U.S. 365, 366 (1971) ("[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege.'"). But cf. Comment, Entitlement, Enjoyment, and Due Process of Law, 1974 DUKE L.J. 89, 98-99 (arguing that while Court explicitly rejected right/privilege distinction, emerging "entitlement" doctrine is similar "if not identical").

9. See generally Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 592, 563 (1985) (Rehnquist, J., dissenting) ("One way to avoid [the] subjective and varying inter-
The United States Court of Appeals for the Third Circuit addressed the requirements of the Due Process Clause in *McDaniels v. Flick*. In *McDaniels*, the court specifically explored the procedural due process rights of a tenured professor discharged for sexually harassing a student. The Third Circuit applied the general guidelines set forth by the United States Supreme Court in *Cleveland Board of Education v. Loudermill*. Interpreting *Loudermill* broadly, the Third Circuit held that because the college gave McDaniels adequate notice, explanation and opportunity to respond to the charges against him, the college did not violate McDaniels's due process rights.

This Note analyzes the Third Circuit's holding in *McDaniels v. Flick*. Part II discusses the background and precedent defining the requirements of a pretermination hearing, particularly analyzing *Loudermill*, the driving force behind due process discussion. Part III sets forth the underlying interpretation of the Due Process Clause.

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11. Id. at 452. McDaniels maintained that the sexual harassment allegations were false. *Id.* at 452.
12. 470 U.S. 532, 542-48 (1985). In *Loudermill*, the Supreme Court held that "all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the . . . statute." *Id.* at 547-48. For a further discussion of the facts and holding of *Loudermill*, see infra notes 54-65 and accompanying text.
13. *McDaniels*, 59 F.3d at 456-57. Specifically, the United States Court of Appeals for the Third Circuit held that Delaware County Community College ("DCCC") gave McDaniels adequate time to make a pretermination response to the allegations against him, and that DCCC's grant of a post-termination right of appeal to an impartial decision-maker sufficiently protected McDaniels's property rights. *Id.*
14. *Id.* Specifically, the Third Circuit held that the time between a pretermination meeting with administrators and the meeting at which the Board of Trustees voted for termination provided McDaniels with enough time to make an adequate response. *Id.* at 456. Accordingly, the Third Circuit held that DCCC did not improperly deny McDaniels due process, even assuming a "sham" pretermination hearing, because McDaniels had the opportunity of appealing the Trustees' decision to an impartial decision-maker. *Id.* at 461. For a discussion of the facts in *McDaniels*, see infra notes 108-35 and accompanying text.
15. For a further discussion of procedural due process rights and their development, see infra notes 19-107 and accompanying text. For a discussion of the *Loudermill* facts and opinion, see infra notes 54-65 and accompanying text. For an analysis of *Loudermill*'s impact upon procedural due process analysis, see Gamso, supra note 5, at 269-72 (discussing *Loudermill* Court's forceful rejection of "bitter with the sweet" principle); Howard, supra note 7, at 1125-30 (discussing *Loudermill* decision's mandate for pretermination hearing before government discharge of employee).
facts of the *McDaniels* case.16 Part IV analyzes the majority and dissenting opinions in *McDaniels* in light of Supreme Court precedent.17 Finally, Part V suggests that although the *McDaniels* decision is consistent with *Loudermill* and other procedural due process precedent, it will produce results favorable to public employers.18

II. BACKGROUND: THE HISTORY OF PROCEDURAL DUE PROCESS

A. Property Rights and Due Process Requirements

The Constitution affords due process protection of property through the Fifth and Fourteenth Amendments.19 Historically, property rights did not include the right to public employment.20 In the 1950s, however, the Supreme Court began to actively apply procedural due process protections to public employment and benefits.21 The Supreme Court's first
substantial development in this area came in the twin cases of *Board of Regents v. Roth*\(^{22}\) and *Perry v. Sindermann*.\(^{23}\)

In *Roth*, a Wisconsin state university did not renew a first-year professor's contract at the end of the academic year.\(^ {24}\) Roth had no tenure rights in continued employment.\(^ {25}\) In addition, the Rules of the Board of Regents provided no protection for a nontenured professor who is not re-

Almost a decade later, the Court rendered its next opinion involving procedural due process within public employment. *Cafeteria and Restaurant Workers Union Local 473 v. McElroy*, 367 U.S. 886 (1961). In *McElroy*, a naval commander barred a civilian cook from entering the naval base and required her to turn in her identification for security reasons. *Id.* at 887-88. The commander denied the cook's opportunity to have a hearing and did not tell the cook the nature of the charges. *Id.* at 888. In denying the cook's due process claims, the Court determined that due process determinations require an ad hoc balancing of the private interests in retaining employment against the governmental interests in economy and efficiency. *Id.* at 895. In addition, the Court stated that the due process clause does not require an evidentiary hearing each time the government impairs a private interest. *Id.* at 894. Finally, the Court held that in the absence of contrary legislation, appointing officers can revoke government employment at will. *Id.* at 896.

In its final due process decision before *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court held that the government must give welfare recipients a full evidentiary hearing before it terminates their benefits. *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970). In *Goldberg*, the Court held a New York statute unconstitutional because it allowed government discontinuation of welfare benefits, even absent the recipient's failure to appear in person to plead the case. *Id.* at 259-64. Most importantly, the Court stated that because welfare benefits were "a matter of statutory entitlement for persons qualified to receive them," these benefits were more like property than a privilege or gratuity. *Id.* at 261-62. Because the benefits were similar to property rights, proper due process safeguards must accompany any termination proceeding. *Id.* The Court utilized the balancing mechanism it established in *McElroy*, but added to its consideration the "extent to which [the welfare recipient] may be 'condemned to suffer grievous loss.'" *Id.* at 262-63 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). Because the livelihood of the recipient was at stake, the Court concluded that a full hearing must precede the termination of benefits. *Id.* at 266.

23. 408 U.S. 593 (1972).
24. *Roth*, 408 U.S. at 566. In 1968, Wisconsin State University-Oshkosh hired David Roth as an assistant professor of political science. *Id.* Roth completed his one-year term, at which time the University did not rehire him for the next academic year. *Id.* The University President gave Roth no reason for the decision and no opportunity for a hearing. *Id.* at 568. *See generally Tribe, supra note 1, § 10-9, at 689-90* (tracing Supreme Court's development of due process in *Roth*; Doug Rendelman, *The New Due Process: Rights and Remedies*, 63 Ky. L.J. 531, 546-50 (1975) (discussing development of due process requirements in public employment).
25. *Roth*, 408 U.S. at 566. The Wisconsin statute confers tenure status to employees after four years of year-to-year employment. *Id.* A new teacher, however, is entitled to nothing beyond the one-year appointment. *Id.* As there are no statutory or administrative standards that guide or define eligibility for reemployment, "[s]tate law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials." *Id.* at 566-67.
The professor, however, claimed that the university violated his right to freedom of speech as well as his due process right to notice. In assessing Roth's due process claim, the Supreme Court began with the premise that if a Fourteenth Amendment liberty or property interest is implicated, the "right to some kind of prior hearing is paramount." The Court then examined the nature of the interest to determine whether Fourteenth Amendment due process requirements applied.

26. Id. at 567. The Rules provided that February 1 was the cutoff date for the University to inform the nontenured professor of his nonretention for the following year. Id. The Rules also stated that the University need not provide a reason for nonretention and that due process required no review or appeal. Id. In accordance with these procedures, the University President did not give Roth a reason for his termination or an opportunity to challenge the decision at a hearing.

27. Id. at 568-69. First, the professor substantively claimed that the University did not rehire him because he made critical statements concerning the University, and that the University's alleged retaliation violated his right to freedom of speech. Id. Moreover, Roth alleged that the University's failure to give proper notice of the reason for his nonretention or an opportunity for rehearing violated his right to procedural due process. Id. at 569; see, e.g., Ori v. Trinter, 444 F.2d 128, 134-35 (6th Cir. 1971) (holding that due process does not require Board of Education to give nonrenewed teacher hearing or explanation of reasons for termination); Ferguson v. Thomas, 450 F.2d 852, 856 (5th Cir. 1970) (holding that right to hearing and explanation for nonretention are contingent upon employee's "expectancy" of continued employment); Freeman v. Gould Special Sch. Dist., 405 F.2d 1153, 1161 (8th Cir. 1969) (stating that procedural due process does not require hearing or right to cross-examine and confront witnesses).

28. Roth, 408 U.S. at 569-70; see Friendly, supra note 9, at 1268 (stating that since 1970, "we have witnessed a due process explosion in which the Court has carried the hearing requirement from one new area of government action to another"). The Court noted, however, that the "range of interests protected by procedural due process is not infinite." Roth, 408 U.S. at 570. The Court stated that the right to a hearing is applicable "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Id. at 570 n.7 (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)); see, e.g., Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598-600 (1950) (finding that due process does not require hearing before multiple seizures of misbranded vitamins); Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931) ("Where only property rights are involved, mere postponement of the judicial enquiry [sic] is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."); see also Tribe, supra note 1, § 10-14, at 718-31 (exploring issue of timing in pretermination hearing questions).

29. Roth, 408 U.S. at 570-72. The Court rejected Roth's claim that DCCC infringed upon his liberty, stating that nothing suggests that Roth's "good name, reputation, honor, or integrity" was at stake. Id. at 572-73. Addressing the procedural due process claim, however, the Court acknowledged that property interests take many forms. Id. at 576; see Connell v. Higginbotham, 403 U.S. 207, 209-10 (1971) (holding that due process requirements of hearing and inquiry applied to recently hired teacher without tenure or contract); Goldberg v. Kelly, 397 U.S. 254, 261-63 (1970) (describing application of due process to welfare benefits as statutory entitlements); Flemming v. Nestor, 363 U.S. 603, 611 (1960) (finding that Due Process Clause acts as restraint upon modification of Social Security statute and benefits); Slochower v. Board of Educ., 350 U.S. 551, 557-59 (1956) (finding that city's discharge of tenured college professor violated professor's protected property right in continued employment); Wieman v. Updegraff, 344 U.S. 183,
stated that "[p]roperty interests . . . 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." Therefore, the Court concluded that Roth had no property interest; as a first-year teacher, he was not yet eligible for the protections of the Wisconsin tenure statutes.

Using the Roth criteria, however, the Court found a property interest in continued employment in *Perry v. Sindermann*.

In *Sindermann*, a state college system that employed an untenured professor for ten years did not renew that professor's contract. The professor argued that the college's

191-92 (1952) (stating that due process protects college professors and staff members' continued employment interests where dismissed during contract term).

Although they take many forms, "property" interests have certain distinctive features: a person must have "more than an abstract need or desire," a "unilateral expectation" and a "legitimate claim of entitlement to" a property interest.

Roth, 408 U.S. at 577. Justice Stewart cited no authority for this proposition. Randall J. Andersen, Comment, Discharge of Employees Within the State Personnel System: The Due Process Requirements for the Deprivation of Property and Liberty, 20 WAKE FOREST L. REV. 413, 417 n.34 (1983). The Court's reliance on the state law for its argument that property was constitutionally protected effectively left the states with the task of interpreting federal constitutional law in this area. *Id.; see also* Peter N. Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry, 71 CAL. L. REV. 146, 192 (1983) (arguing that sovereign states define terms of property rights, but federal courts are "ultimate arbiters" of constitutional due process). *See generally* Rosario-Torres v. Hernandez-Colon, 889 F.2d 314, 319 (1st Cir. 1989) ("The sufficiency of a claim of entitlement to a property interest in public employment must be measured by, and decided with reference to, local law.").

30. Roth, 408 U.S. at 577. Justice Stewart cited no authority for this proposition. Randall J. Andersen, Comment, Discharge of Employees Within the State Personnel System: The Due Process Requirements for the Deprivation of Property and Liberty, 20 WAKE FOREST L. REV. 413, 417 n.34 (1983). The Court's reliance on the state law for its argument that property was constitutionally protected effectively left the states with the task of interpreting federal constitutional law in this area. *Id.; see also* Peter N. Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry, 71 CAL. L. REV. 146, 192 (1983) (arguing that sovereign states define terms of property rights, but federal courts are "ultimate arbiters" of constitutional due process). *See generally* Rosario-Torres v. Hernandez-Colon, 889 F.2d 314, 319 (1st Cir. 1989) ("The sufficiency of a claim of entitlement to a property interest in public employment must be measured by, and decided with reference to, local law.").

31. Roth, 408 U.S. at 578. The Court reasoned that the terms of Roth's employment created and defined his property interest. *Id.* The property interest assured Roth of employment only for one year; there was no provision for renewal. *Id.* Thus, Roth had no claim to a property interest sufficient enough to necessitate a hearing before DCCC declined to renew his contract. *Id.* In the dissenting opinion, Justice Marshall argued that "property" should be defined broadly. *Id. at 587-88* (Marshall, J., dissenting). Justice Marshall stated that "every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment." *Id. at 588* (Marshall, J., dissenting). He further explained that public employers must state why they deny or fail to renew employment for only in knowing the reasons underlying government action will citizens "feel secure and protected against arbitrary government action." *Id. at 589* (Marshall, J., dissenting). In addition, Justice Marshall quoted Justice Frankfurter, who stated that "[t]he history of American freedom is, in no small measure, the history of procedure." *Id. at 589-90* (Marshall, J., dissenting) (quoting Malinski v. New York, 324 U.S. 401, 414 (1945)).


33. *Sindermann*, 408 U.S. at 594-95. Robert Sindermann was a teacher within the Texas state college system from 1959-1969. *Id. at 594*. In 1965, Sindermann became a professor at Odessa Junior College. *Id.* The College employed him for four successive years under a series of one-year contracts. *Id.* In May 1969, the Board voted not to offer Sindermann a new contract for the next academic year. *Id. at 595*. The Board did not provide Sindermann with a statement of reasons for his termination, nor did it allow him an opportunity to be heard to challenge his
failure to have a hearing violated his Fourteenth Amendment guarantee of procedural due process.\textsuperscript{34} Citing \textit{Roth}, the \textit{Sindermann} Court noted that due process requirements did not mandate a hearing unless the professor could demonstrate that the college denied him a "property" interest in continued employment.\textsuperscript{35} Contrary to \textit{Roth}, the state statute in \textit{Sindermann} created a "de facto" tenure system.\textsuperscript{36} Therefore, the Court concluded that this system created a property interest that obligated the college to grant Sindermann a hearing at which he could challenge the grounds for his nonretention.\textsuperscript{37}

Thus, through its holdings in \textit{Roth} and \textit{Sindermann}, the Court defined the qualities of a property interest in continued public employment.\textsuperscript{38} Yet, because these two employment cases involved nonrenewal as opposed to termination, the Supreme Court did not identify what requirements are necessary to satisfy due process precisely.\textsuperscript{39}

With \textit{Roth} and \textit{Sindermann} forming a foundation, the Court forged forward with decisions concerning the termination of public employ-
ment. Specifically, an opportunity to address the need for pretermination hearings arose in *Arnett v. Kennedy*. In *Arnett*, after a tenured public employee’s dismissal, the supervisor gave the employee an opportunity to appear before a hearing officer. But, upon learning that this hearing officer was his supervisor, the employee objected procedurally and asked for an impartial decision-maker. The Court upheld the employee’s dismissal, holding that a property interest is defined by the terms of the statute that created the property interest. In the plurality opinion, Justice

40. At various points in its history, the Supreme Court has set forth “pieces” of the basic definition of procedural due process. For example, in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), the Court stated that “at a minimum . . . deprivation of life, liberty or property . . . [must] be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Id.* at 313. The Court also stated that such notice must be given “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Additionally, the Court stated that “[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.” *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). Similarly, Chief Justice Warren stated that “[d]ue process” is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts.” *Hannah v. Larche*, 363 U.S. 420, 442 (1960).


42. *Id.* at 137. In *Arnett*, a supervisor fired Kennedy, a non-probationary tenured federal employee, for making defamatory statements accusing his supervisor of offering bribes to a community organization. *Id.* at 136-37. The regional director of the Office of Economic Opportunity advised Kennedy of the charges against him and of his right to defend himself before a hearing officer in accordance with the Lloyd-LaFollette Act. *Id.* In addition, the director also advised Kennedy that the basis for the notice was available at the regional office. *Id.* See generally Philip A. Byler, Comment, *Fear of Firing: Arnett v. Kennedy and the Protection of Federal Career Employees*, 10 HARV. C.R.-C.L. L. REV. 472 (1975) (discussing facts and arguing for broad view of procedural due process).

43. *Arnett*, 416 U.S. 136-37. The Lloyd-LaFollette Act, which was the federal civil service statute, created a property right in continued employment. *Id.* at 151-52. It did not, however, require a pretermination hearing with an impartial decision-maker. *Id.* at 152. Rather, it provided that such a hearing may be provided at the discretion of the employer. *Id.* *But cf.* Foster, *supra* note 7, at 1077 n.54 (citing Justice White’s dissenting opinion in *Arnett*, which contends that due process requires right to impartial decision-maker). See generally Richard C. McCrea, Jr., *Loudermill—What Pretermination Process Is ‘Due’ Public Employees*, 60 FLA. B.J. 37, 37-38 (1986) (discussing plurality opinion in *Arnett*).

44. *Arnett*, 416 U.S. at 153-54. To hold otherwise, the Court stated, would present a “hobbling restriction” on legislative authority in this area. *Id.* at 154. The *Arnett* Court reasoned that because Congress chose to enact the Lloyd-LaFollette Act and unmistakably refused to grant a full adversary hearing for a determination of “cause,” to grant Kennedy such a hearing would give him what Congress expressly withheld from him in enacting this statute. *Id.* Further, the Court reasoned that the Due Process Clause did not require a restriction on legislative authority in this manner. *Id.*

On the contrary, in the concurring opinion, Justice Powell stated that the right to procedural due process is “conferred not by legislative grace, but by constitutional guarantee.” *Id.* at 167 (Powell, J., concurring). Utilizing a balancing test similar to the test set forth in *Mathews v. Eldrige*, 424 U.S. 319, 335 (1976), Justice Powell concluded that the procedure satisfied Kennedy’s due process require-
Rehnquist stated that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet."45

In the years following Arnett, the Third Circuit was the first circuit court to address the pretermination safeguards applicable to professors.46 First, the Third Circuit adopted a list of permissive pretermination safeguards in Chung v. Park.47 This list included written notice of the grounds for termination, as well as a neutral and detached hearing body.48

45. Arnett, 416 U.S. at 154. In simple terms, the "bitter with the sweet" principle states that "to take advantage of a government benefit which has strings attached is, necessarily, to acknowledge that right of the government to attach those strings." Gamso, supra note 5, at 262; see, e.g., United States v. San Francisco, 310 U.S. 16, 30 (1940) (upholding congressional attachment of conditions to grant of land); Daniels v. Tearney, 102 U.S. 415, 421-22 (1880) (forbidding challenge to ordinance's constitutionality where party avails himself of law for his or her benefit). But see Vitek v. Jones, 445 U.S. 480, 491 (1980) (stating that as minimum requirements of procedural due process are matter of federal law, "they are not diminished by the fact that the State may have specified its own procedures").

46. See Skehan v. Board of Trustees, 669 F.2d 142, 154 (3d Cir. 1982) (finding that college's notification of professor prior to hearing and granting him opportunity to be heard satisfied nontenured procedural due process requirements); Chung v. Park, 514 F.2d 382, 387 (3d Cir. 1975) (stating that due process was satisfied in view of interests of professor and college, if termination procedures were not unreasonable, arbitrary or capricious).

47. 514 F.2d 382, 386 (3d Cir. 1975). Mansfield State College employed Professor Chung from 1967-1972. Id. at 384. The College offered Chung a contract extension at the end of every year. Id. In 1971, however, the president recommended that the Board of Trustees not rehire Chung. Id. The parties setup an arbitration hearing to review the issue, at which time the president fully notified Chung of the reasons for termination and gave him documents upon which the College relied in making the decision. Id. The issue before the arbitration panel was whether the decision to deny continued employment was arbitrary or capricious. Id. The court of appeals upheld the arbitration panel's test, namely that "[i]f the procedure used by the college is adequate to prevent unreasonable, arbitrary or capricious termination decisions, it satisfies due process." Id. at 387. Thus, because the College informed Chung of the grounds for the pretermination hearing and gave him an opportunity to respond, the College fulfilled due process requirements. Id.; see also Perry v. Sindermann, 408 U.S. 593, 603 (1972) (stating that function of hearing is to inform professor of grounds for nonrenewal and to allow him or her to challenge their sufficiency).

48. Chung, 514 F.2d at 386. In total, the list of permissive standards included: (1) written notice of the grounds for termination; (2) disclosure of the evidence supporting termination; (3) the right to confront and cross-examine adverse witnesses; (4) an opportunity to be heard in person and to present witnesses and documentary evidence; (5) a neutral and detached hearing body; and (6) a written statement by the fact finders as to the evidence relied upon.

Id.
than a decade later, the Third Circuit adhered to the Chung decision in Skehan v. Board of Trustees.\footnote{49} In Skehan, a state college did not renew a nontenured professor’s contract.\footnote{50} The professor claimed that the college violated his due process rights because the college did not conduct a hearing at which the professor could have justified his actions or contested his dismissal.\footnote{51} The Third Circuit denied this claim, stating that the professor was entitled to “minimum procedural safeguards which are adapted to the particular characteristics of the interests involved and the limited nature of the controversy.”\footnote{52} Thus, even in the years preceding the pivotal Supreme Court decision in this area, the Third Circuit recognized minimum due process requirements for tenured and nontenured professors.\footnote{53}

This limited standard of procedural due process governed until Cleveland Board of Education v. Loudermill.\footnote{54} In Loudermill, school officials fired a school security guard without a hearing after finding that he lied on his job application about having no felony record.\footnote{55} Loudermill appealed

\footnote{49. 669 F.2d 142 (3d Cir. 1982).}
\footnote{50. Id. at 144. Bloomsburg State College employed Professor Skehan for one and a half years. Id. After this period, the College decided not to renew Skehan’s contract. Id. Skehan claimed that the nonrenewal decision violated his right to due process. Id. The district court found that Skehan’s one-year contract was a property interest within the meaning of Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972). Skehan, 669 F.2d at 144. Applying its prior holding in Chung, the Third Circuit held that the College’s pretermination procedures satisfied the due process requirements. Id. at 152. For a further discussion of the Roth and Sindermann decisions upon which the Skehan court relied, see supra notes 22-37 and accompanying text.}
\footnote{51. Skehan, 669 F.2d at 144. The College, however, notified Skehan of his termination and explained the hearing procedures to follow. Id. at 149-50.}
\footnote{52. Id. at 152 (quoting Chung, 514 F.2d at 386).}
\footnote{53. For a further discussion of other cases dealing with tenured professors and college faculty members, see infra notes 99-106 and accompanying text.}
\footnote{54. 470 U.S. 532 (1985). Prior to Loudermill, the Supreme Court set forth a confusing opinion in Bishop v. Wood, 426 U.S. 341 (1976). In Bishop, the Supreme Court upheld a policeman’s dismissal where the relevant city ordinance classified the officer as a “permanent employee.” Id. at 350. The Supreme Court followed the interpretation of both the North Carolina district court and the United States Court of Appeals for the Fourth Circuit, which held that a so-called permanent employee “held his position at the will and pleasure of the city,” if the contract did not specify a duration. Id. at 345 (quoting Bishop v. Wood, 377 F. Supp. 501, 505 (W.D.N.C. 1973)). Moreover, the Supreme Court held that because the city ordinance did not create a property interest in continued employment, the federal due process requirements did not apply. Id. at 347.}
\footnote{55. Loudermill, 470 U.S. at 534. Loudermill consisted of two petitions. Id. at 535. First, in 1979, the Cleveland Board of Education hired Loudermill as a security guard. Id. Loudermill stated on his job application that he had never been convicted of a felony. Id. Less than one year later, as part of a routine examination of employee records, the Board found that Loudermill had a grand larceny charge on his record. Id. In November 1980, the Board’s business manager sent Loudermill a letter, informing him that the Board voted to dismiss him because of his dishonest remark on the application. Id. The Board did not give Loudermill the opportunity to respond to this charge or to challenge his dismissal. Id.}
this dismissal under both state and federal law. The federal district court judge dismissed Loudermill's complaint because his employer followed the due process procedures set forth in the state statute. In a landmark decision, however, the Supreme Court held that an employer cannot discharge a tenured public employee without some pretermination right to respond to the charges, regardless of what procedures are set forth in the state statute. Although rejecting Arnett, the Loudermill Court cited its concurring opinion, which stated that the "right to due

Loudermill appealed his termination to the Cleveland Civil Service Commission, which upheld the dismissal. Id. at 535-36.

In the second petition, respondent Donnelly was a bus mechanic for the Parma Board of Education. Id. at 536. The Board fired Donnelly for failing an eye examination. Id. Although the Board gave Donnelly a chance to retake the test, Donnelly did not do so; instead, in a manner similar to Loudermill, Donnelly appealed to the Civil Service Commission and later to the district court, challenging the constitutionality of dismissal procedures. Id. at 536-37. The district court then consolidated the Loudermill and Donnelly cases for purposes of appeal. Id. at 537.

56. Id. State law classified Loudermill as a "classified civil servant." Id. at 535 (citing OHIO REV. CODE ANN. § 124.11 (1984)). As this provision granted Loudermill the opportunity for administrative review if discharged for cause, Loudermill filed an appeal with the Cleveland Civil Service Commission. Id. At his hearing, Loudermill stated "that he had thought that his 1968 larceny conviction was for a misdemeanor rather than a felony." Id. Despite the fact that the hearing referee recommended Loudermill's reinstatement, the Civil Service Commission upheld his dismissal. Id. at 535-36.

57. Id. at 536. In district court, Loudermill claimed that the Ohio statute was unconstitutional on its face because it "did not provide the employee [with] an opportunity to respond to the charges against him prior to removal." Id. The district court dismissed this complaint on the grounds that "the very statute that created the property right in continued employment also specified the procedures for discharge." Id.

58. Id. at 540-41. In so holding, the Court rejected the previous "bitter with the sweet" approach created in Arnett v. Kennedy, 416 U.S. 134, 154 (1974). Loudermill, 470 U.S. at 541. But see Jennifer Jaff, Hiding Behind the Constitution: The Supreme Court and Procedural Due Process in Cleveland Board of Education v. Loudermill, 18 AKRON L. REV. 631, 631 (1985) (arguing that Court should have affirmed Justice Rehnquist's majority opinion in Arnett because clearly articulated rules of law allow holders of entitlements to know "what procedures they would be afforded at the time the entitlement was granted").

Writing for the majority, Justice White stated that the "categories of substance and procedure are distinct." Loudermill, 470 U.S. at 541. But see id. at 560 (Rehnquist, J., dissenting) ("[W]e decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement."). In the concurring opinion, Justice Marshall explained the need for a rigorous pretermination hearing. Id. at 548 (Marshall, J., concurring). He stated that the individual's interest in continued employment mandates a pretermination hearing allowing the employee to test evidence against him "by confronting and cross-examining adverse witnesses and by presenting witnesses on his own behalf." Id. (citing Arnett, 416 U.S. at 214 (Marshall, J., dissenting)).

59. Arnett, 416 U.S. at 134. For a further discussion of the facts and decision in Arnett, see supra notes 41-45 and accompanying text.
process is ‘conferred, not by legislative grace, but by constitutional guarantee.’"

While the Loudermill Court created certainty regarding the necessity of procedural due process safeguards, the remaining question was exactly what process is due. The Court first determined that “some form of pretermination hearing” is necessary. The Court reasoned that the need for such a hearing “is evident from a balancing of the competing interests at stake.” Supplementing this rule, the Court stated that “[t]he essential

60. Loudermill, 470 U.S. at 541 (quoting Arnett, 416 U.S. at 167 (Powell, J., concurring)). The Loudermill Court further affirmed Justice Powell’s statement that “[w]hile the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.” Id. (quoting Arnett, 416 U.S. at 167 (Powell, J., concurring)). But see Tribe, supra note 1, § 10-12, at 709-10 (arguing that Loudermill Court “failed to provide fully convincing basis for rejecting Arnett decision). Professor Tribe stated that the Loudermill Court “merely reasserted the rationale . . . of limiting the government’s powers to dictate procedural protections.” Id. at 710. Professor Tribe concluded that the position of the Loudermill Court “must rest on a notion that the Constitution treats certain procedural protections as mandatory incidents in the creation of any relationship terminable only on stated substantive conditions.” Id.

61. Loudermill, 470 U.S. at 541. With respect to the “bitter with the sweet” confusion of the earlier courts, “Loudermill may finally put to rest that hoary relic of earlier due process theory.” Gamso, supra note 5, at 269. For a general historical analysis of the requirements of due process, see Note, Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing, 88 HARV. L. REV. 1510, 1537-38 (1974) (noting that natural law concepts defined early due process procedures).

62. Loudermill, 470 U.S. at 542; see also Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972) (“When protected interests are implicated, the right to some kind of prior hearing is paramount.”); Perry v. Sindermann, 408 U.S. 593, 599 (1972) (requiring opportunity for hearing when property interest is involved); Frederick v. Southeastern Pa. Transp. Auth., 892 F. Supp. 122, 126 (E.D. Pa. 1995) (requiring “some kind of hearing” prior to discharge of state employee) (quoting Loudermill, 470 U.S. at 542). The Court further stated that the pretermination hearing itself “need not be elaborate.” Loudermill, 470 U.S. at 545. In addition, the Court determined that the pretermination hearing should provide an initial check against mistaken decisions.

63. Id. at 542. In Mathews v. Eldrige, 424 U.S. 319 (1976), the Supreme Court defined the three competing interests:

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.

Id. at 335.

The Loudermill Court expanded upon these competing interests. Loudermill, 470 U.S. at 543-45. First, the Court recognized that while a fired worker may find employment elsewhere, the process will be time-consuming and the questionable circumstances under which the worker left his or her prior job may taint the worker. Id. at 543. Thus, the “severity of depriving a person of the means of livelihood” requires that employers utilize the pretermination hearing process. Id. In addition, the Court stated that allowing “meaningful opportunity to invoke the
requirements of due process . . . are notice and an opportunity to respond."64 In conclusion, the Court stated that "all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the . . . [state] statute."65

B. Post-Loudermill Attempts at Clarification

Although the *Loudermill* guidelines established the necessity of pretermination hearings, the circuit courts were left to discern the particulars of these general guidelines.66 First, the circuit courts addressed the timing and form of the notice requirement.67 Second, the circuit courts explored the role of pretermination and post-termination hearings in providing employees with an opportunity to respond to allegations.68 Finally, discretion of the decisionmaker before termination occurs will reduce the risk or erroneous decisions. *Id.*; see Goss v. Lopez, 419 U.S. 565, 583 (1975) ("Requiring effective notice and informal hearing . . . will provide a meaningful hedge against erroneous actions."); Gagnon v. Scarpelli, 411 U.S. 778, 784-86 (1973) (stressing importance of substantial protection against "ill-considered revocation"). For a detailed analysis of the *Mathews* factors, see Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 37-46 (1976).


Applying the second prong of the *Mathews* balancing test to the requirements of notice and opportunity to respond, the *Loudermill* Court held that an opportunity for respondents to be heard "would impose neither a significant administrative burden nor intolerable delays." *Loudermill*, 470 U.S. at 544. In light of the facts of *Loudermill*, the Court stated that keeping an employee on the payroll until the pretermination hearing may be beneficial to the employer. *Id.*

65. *Loudermill*, 470 U.S. at 547-48. The *Loudermill* Court previously stated that "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546.

66. For a further discussion of circuit court interpretations of the *Loudermill* decision, see *infra* notes 70-107 and accompanying text.

67. For a further discussion of the notice requirement, see *infra* notes 70-79 and accompanying text.

68. For a further discussion of pretermination hearing requirements, see *infra* notes 80-94 and accompanying text. For a further discussion of post-termination hearing requirements, see *infra* notes 95-98 and accompanying text.
recent circuit court decisions provide guidance in discerning what due process requires for termination of a tenured professor.\textsuperscript{69}

In \textit{Gniotek v. City of Philadelphia},\textsuperscript{70} the Third Circuit discussed whether city police inspectors satisfied due process in their dismissal of city police officers for accepting unlawful bribes.\textsuperscript{71} The Third Circuit held that a police inspector provided police officers with adequate due process protections where the official first gave the officers notice and an opportunity to be heard at the initial pretermination hearing.\textsuperscript{72} In summary, the Third Circuit stated that no advance notice of a pretermination hearing is re-

\textsuperscript{69}. For a further discussion of recent circuit opinions addressing due process requirements relating to the termination of tenured professors, see infra notes 99-106 and accompanying text.

\textsuperscript{70}. 808 F.2d 241 (3d Cir. 1986).

\textsuperscript{71}. \textit{Id.} at 242-43. The \textit{Gniotek} case arose out of events surrounding the 1984 Philadelphia Police corruption trials. \textit{Id.} at 242. At these trials, witnesses identified Gniotek and other appellants as police officers who received unlawful bribes. \textit{Id.} Investigators reported this information to the Police Commissioner, who commanded an office investigator to investigate Gniotek and others. \textit{Id.} The next day, the office investigator issued Gniotek and others a "Notice of Suspension with Intent to Dismiss." \textit{Id.} Each police officer appeared before the investigator, who explained the charges and immediately enforced the suspension. \textit{Id.} In addition, the investigator gave the officers the opportunity to make a statement. \textit{Id.} Each officer chose to remain silent. \textit{Id.} Four days later, the investigators served the officers "Notices of Intention to Dismiss." \textit{Id.} The notices provided the option to exercise the right of review within ten days. \textit{Id.} Because Gniotek nor the other officers chose this option, the investigator subsequently dismissed them. \textit{Id.}

\textsuperscript{72}. \textit{Id.} at 244. The court noted that "[n]otice is sufficient (1) if it apprises the vulnerable party of the nature of the charges and general evidence against him and (2) if it is timely under the particular circumstances of the case." \textit{Id.} (citing \textit{Goss v. Lopez}, 419 U.S. 565, 581 (1975)). Applying these standards, the court found that the summary of evidence provided to Gniotek and the others was of "such specificity" as to allow them to determine what evidence to present in mitigation of the charges. \textit{Id.} In addition, the court stated that "[l]ack of advance notice . . . does not constitute a \textit{per se} violation of due process." \textit{Id.; see, e.g., Goss}, 419 U.S. at 582 (stating that "[t]here need be no delay between the time 'notice' is given and the time of hearing"). The Third Circuit, however, reitered the necessity of balancing the timing and content of notice with the competing interests involved. \textit{Gniotek}, 808 F.2d at 244-45 (citing \textit{Goss}, 419 U.S. at 579); see also \textit{Bradley v. Pittsburgh Bd. of Educ.}, 913 F.2d 1064, 1077-78 (3d Cir. 1990) (holding that suspension without pay requires prior notice and hearing).
required. In addition, the Third Circuit has found that notice given at a pretermination hearing may even be given orally.

The Third Circuit also addressed the notice requirement in Morton v. Beyer. In Morton, a prison investigator informed Morton, a corrections sergeant, that there would be a meeting to address a "general allegation of inmate abuse." At the hearing, the prison investigator provided Morton with a copy of the incident's investigative reports, to which Morton declined to respond. Based on this information, the Third Circuit concluded that the "presentation of adverse evidence within minutes of ineffective notice simply does not comport with the due process require-

73. Gniotek, 808 F.2d at 244. Similarly, the United States Court of Appeals for the First Circuit held that giving notice at a deprivation hearing satisfies due process requirements. Brasslett v. Cota, 761 F.2d 827, 836 (1st Cir. 1985). In Brasslett, a town fired its former fire chief for remarks he made during a television show. Id. at 827-28. Brasslett argued that the town denied his procedural due process rights under the Fourteenth Amendment because he did not receive a pretermination hearing and because there was not an impartial decision-maker. Id. at 833. The Brasslett court determined that the one-hour deprivation hearing was adequate because the town notified Brasslett of discharge possibility and provided him with an opportunity to defend the allegations. Id. at 836. In reaching its decision, the court relied on the principle that a pretermination hearing "need only be extensive enough to guard against mistaken decisions." Id.

74. Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1145 (3d Cir. 1988). A commanding police officer dismissed Copeland, a policeman, from the department for using illegal drugs. Id. at 1142. Copeland relied upon the Third Circuit's opinion in Gniotek, claiming that the written notice provided in Gniotek created a higher standard regarding notice, which the commanding officer did not meet when he failed to provide him with any information concerning the charges. Id. at 1145. The commanding officer told Copeland both before and during his pretermination hearing that tests indicated marijuana use. Id. The Third Circuit found such notice to be sufficient, given Copeland's status as a police officer and his knowledge of the positive drug test. Id. In addition, the court found that these factors satisfied the requirement that Copeland be aware of "the substance of relevant supporting evidence." Id. (quoting Brock v. Roadway Express, Inc., 481 U.S. 252, 264 (1987)).

75. 822 F.2d 364 (3d Cir. 1987).

76. Id. at 370. Morton was a corrections sergeant at Trenton State Prison. Id. at 366. In September 1985, an inmate filed charges against Morton and other officers alleging that the officers entered the inmate's cell and assaulted him. Id. An investigator interviewed Morton on the day of the alleged incident, and Morton denied any encounter with the inmate. Id. The investigator did not decide to take action against Morton until March 1986. Id. At that time, the investigator sent Morton a memo advising him of his immediate suspension from duty. Id.

77. Id. The prison investigator informed Morton that the meeting "was intended to provide Morton with a hearing." Id. After Morton declined to offer his version of the alleged incident, the investigator informed him that he was suspended without pay. Id. According to Morton, this "hearing" lasted only ten minutes. Id. The investigator gave Morton a written report, entitled "LOUDERMILL HEARING," which summarized the meeting. Id. at 366-67.
ments set forth in *Loudermill.*\(^78\) The *Morton* decision would prove to be important in defining the concept of notice in *Loudermill.*\(^79\)

The United States Court of Appeals for the Tenth Circuit attempted to clarify the adequacy of response time in *Derstein v. Kansas.*\(^80\) In *Derstein,* a judge dismissed a tenured court employee accused of sexually harassing other employees in a case with facts strikingly similar to those in *McDaniels v. Flick.*\(^81\) The judge gave the employee ten days to resign, after which the

\(^78\) *Id.* at 371. Similarly, the Third Circuit noted that the administrator did not afford the employee “timely notice of the nature of the charges or the general evidence against him.” *Id.* The *Morton* court distinguished its holding from the holding in *Gniotek v. City of Philadelphia,* 808 F.2d 241 (3d Cir. 1986). *Morton,* 822 F.2d at 371. Both cases concerned individuals who were silent when given the opportunity to respond at a pretermination hearing. In *Gniotek,* corrupt police officers remained silent, fearful of the consequences attending future statements, after their commanding officer told them about criminal investigations beginning against them. *Gniotek,* 808 F.2d at 244. The court found that the commanding officer gave Gniotek and the others adequate notice. *Id.*

In contrast, Morton did not respond in this case because he was not aware of the content and ramifications of the case against him. *Morton,* 822 F.2d at 371. The *Morton* court believed that Morton was silent because he did not receive notice of the charges against him. *Id.* Notably, the prison investigator presented Morton with evidence underlying the charges. *Id.* The investigator, however, did not properly inform Morton about the actual charge. *Id.* The prison investigator urged the Third Circuit not to allow Morton’s silence to “obscure the adequacy of the opportunity provided to him.” *Id.* at 369. Moreover, six months elapsed between the time of the alleged incident and the suspension. *Id.* at 370. Although the investigator initially questioned Morton about the allegation, Morton did not know that an investigation was ongoing six months later. *Id.* Moreover, the brief notice on the day of the “hearing” did not set forth specific charges against Morton; consequently, Morton was unable to properly respond. *Id.*

\(^79\) As *Morton* was important in further defining *Loudermill,* so also was a recent Third Circuit opinion in which the court held that the Borough Council did not violate a city patrolman’s due process rights when it provided the patrolman notice of the charges against him. *Edmundson v. Borough of Kennett Square,* 4 F.3d 186, 194 (3d Cir. 1993). At several points during the meeting between the patrolman and the Borough Council, the patrolman protested his termination. *Id.* Although the mayor was impatient with the patrolman, the mayor granted the patrolman an adequate opportunity to respond to the charges. *Id.* The Third Circuit held that the due process procedures complied with *Loudermill* standards because the mayor gave the patrolman an appropriate post-termination hearing. *Id.* Thus, the *Edmundson* decision reaffirmed the Third Circuit’s trend of interpretation, as well as the trend among the other circuit courts—namely, that the *Loudermill* standards require only a minimal pretermination process. For a further discussion of Third Circuit cases interpreting *Loudermill,* see supra notes 70-79 and accompanying text. For a further discussion of how other circuit courts interpret *Loudermill,* see infra notes 80-106 and accompanying text.

\(^80\) 915 F.2d 1410 (10th Cir. 1990).

\(^81\) *Id.* at 1411. In *Derstein,* employees complained to the Kansas Judicial Branch that Derstein, a tenured employee, sexually harassed other employees. *Id.* at 1412. After some investigation, the state administrative judge asked Derstein to meet with him in chambers the next day. *Id.* The judge did not inform Derstein of the meeting’s purpose until the meeting began. *Id.* The judge subsequently gave Derstein ten days within which to resign or be terminated. *Id.* The judge also informed Derstein about his right to appeal. *Id.* Ten days later, the judge provided Derstein with a termination letter that further described his appeals rights.
judge would terminate his employment. The Tenth Circuit found that the court's procedures did not violate the employee's procedural due process rights, stating that the pretermination meeting "provided Derstein all that was necessary under Loudermill—notice . . . and an opportunity to respond."

Likewise, the United States Court of Appeals for the Eleventh Circuit adhered to the Tenth Circuit's reasoning in holding that a county employer denied due process protections to a county employee in Adams v. Sewell. In Adams, the county employer provided Adams with no notice or opportunity to prepare for his pretermination hearing. While the court stated that a flaw in a pretermination hearing is not necessarily fatal, the court concluded that the three-step post-termination hearing process that the employer granted Adams did not cure the pretermination procedural flaws. Therefore, although reaching a conclusion opposite to that of the Derstein court, the Eleventh Circuit reaffirmed the principle that pretermination and post-termination hearings must be analyzed in conjunction when determining whether due process requirements are satisfied.

Another issue needing definition after Loudermill was whether due process requires an impartial decision-maker at the pretermination hearing and provided details concerning the charges against him. Derstein appealed, but the board of appeals dismissed his appeal as "frivolous." Derstein appealed, but the board of appeals dismissed his appeal as "frivolous." Derstein appealed, but the board of appeals dismissed his appeal as "frivolous." Derstein appealed, but the board of appeals dismissed his appeal as "frivolous." Derstein appealed, but the board of appeals dismissed his appeal as "frivolous." Derstein appealed, but the board of appeals dismissed his appeal as "frivolous." Derstein appealed, but the board of appeals dismissed his appeal as "frivolous."
Although the Third Circuit addressed this question in a separate context, the Eleventh Circuit dealt with the issue more recently in *McKinney v. Pate*, where a county employee challenged the Board of Commissioners' termination procedures. McKinney acknowledged that the Board followed "facially" adequate due process, but alleged that the Board was determined to find against him, regardless of the evidence presented. The Eleventh Circuit stated that in an employment termination case, "due process [does not] require the state to provide an impartial decisionmaker at the pretermination hearing." The state is only

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88. See Schweiker v. McClure, 456 U.S. 188, 191-94 (1982) (stating that while due process demands impartiality on part of hearing officers, presumption exists that such officers are unbiased); Maslan, *supra* note 19, at 1093 (stating that courts disagree over extent to which personal bias may invalidate pretermination hearings).

Some courts conclude that where biased decision-makers oversee hearings, the hearing is inherently unfair. See, e.g., Arnett v. Kennedy, 416 U.S. 134, 199 (1974) (White, J., concurring in part and dissenting in part) (stating that some situations present risk of bias too great to tolerate); Matthews v. Harney County Sch. Dist. No. 4, 819 F.2d 889, 893 (9th Cir. 1987) (holding that pretermination hearing before school board violated due process where board decided to terminate employee prior to meeting); Washington v. Kirksey, 811 F.2d 561, 564 (11th Cir. 1987) (finding that decision-maker violated due process by failing to honor agreement made at pretermination hearing); Salisbury v. Newport Hous. Auth., 615 F. Supp. 1433, 1441 (E.D. Ky. 1985) (determining that housing authority members personally involved in termination process could not conduct pretermination hearings). Other courts hold that bias at the pretermination hearing is not a due process violation. See, e.g., Duchesne v. Williams, 849 F.2d 1004 (6th Cir. 1988) (en banc) (concluding that meaningless due process hearing did not offend due process); Schaper v. City of Huntsville, 813 F.2d 709, 716 (5th Cir. 1987) (same).

89. See Rosa v. Resolution Trust Corp., 938 F.2d 383, 396-97 (3d Cir. 1991) (holding that decision-maker's alleged bias did not violate due process because of opportunity for post-deprivation review of claim).


91. *Id.* at 1554-55.

92. *Id.* at 1561. In particular, McKinney acknowledged that the Board provided him with written notice of the charges against him and that he received an explanation of the Board's evidence at the Board meeting. *Id.* Additionally, McKinney had the opportunity to present his side of the story with the assistance of counsel. *Id.* Thus, as the Board satisfied the essential Loudermill requirements, only the allegation of bias stood in the way of sufficient due process. *Id.* at 1561-62. The *McKinney* court stated, however, that "[a] demonstration that the decisionmaker was biased... is not tantamount to a demonstration that there has been a denial of procedural due process." *Id.* at 1562.

93. *Id.* (quoting Schaper v. City of Huntsville, 813 F.2d 709, 715-16 (5th Cir. 1987)); see also Withrow v. Larkin, 421 U.S. 35, 58 (1975) ("That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high."); Crocker v. Fluvanna County Bd. of Pub. Welfare, 859 F.2d 14, 17 (4th Cir. 1988) (finding that state employee received due process when given notice, hearing, opportunity to respond and full post-termination adversarial hearing before an impartial panel); Garraghty v. Jordan, 830 F.2d 1295 (4th Cir. 1987) (deciding that Loudermill did not require pretermination hearing to be held before impartial decision-maker). Compare Walker v. City of Berkeley, 951 F.2d
required to provide an employee with the "means by which [the employee] can receive redress for the deprivations." 94

The Eleventh Circuit based its holding upon the Supreme Court’s decision in Parratt v. Taylor. 95 In Parratt, the Supreme Court responded to a prison inmate’s allegation of a Fourteenth Amendment violation, holding that either “necessity” or “impracticality” may justify lesser pretermination due process standards. 96 The Court provided, however, that “meaningful means” to assess the lower standards must be available to comply with due process. 97 Therefore, as long as post-termination hearings are available to resolve conflicting issues from the pretermination hearing, employers are not required to grant extensive pretermination hearings. 98

182, 184 (9th Cir. 1991) (holding that pretermination hearing does not require presence of impartial decision-maker, provided that post-termination decision-maker is impartial) with Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773, 779 (9th Cir. 1982) (holding that school board’s participation in pretermination decision did not render school board impermissibly biased in conducting post-termination hearing).

94. McKinney, 20 F.3d at 1562 (quoting Schaper, 813 F.2d at 715-16).
96. Id. at 539. In Parratt, a state prison inmate ordered hobby materials through the mail with money from his prison account. Id. at 580. The package arrived at the prison and two employees of the prison hobby center checked the package in. Id. Because the inmate was in the segregation unit when the package arrived, prison officials did not permit him to have the package; however, upon his release from this unit, prison officials could not find the package. Id. The inmate brought an action under the Fourteenth Amendment, seeking to recover the materials that the prison hobby manager negligently lost. Id.; see also Hudson v. Palmer, 468 U.S. 517, 530-36 (1984) (holding that intentional destruction of prisoner’s personal property during “shakedown” did not violate due process because of availability of post-deprivation remedies); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598, 601-02 (1950) (upholding seizure and destruction of drugs without pre-seizure hearing under Fifth Amendment); Fahey v. Mallonee, 332 U.S. 245, 257-58 (1947) (upholding seizure of property without prior hearing in order to protect public against economic harm of incompetently managed bank).

98. Parratt, 451 U.S. at 538. The Parratt Court also noted that a "full and meaningful hearing" is often difficult for employers to provide and is not required by due process. Id. at 541. But see Maslan, supra note 19, at 1102 (“While a post-termination hearing reviews the merits of the termination, it cannot cure defects in the pretermination hearing itself.”). In addition, courts often hold that public employees have the responsibility of utilizing available post-termination procedures. See, e.g., Rathjen v. Litchfield, 878 F.2d 836, 839-40 (5th Cir. 1989) (finding that although city personnel director fraudulently induced employee to accept voluntary demotion, failing to utilize city’s grievance procedure for remedy did not violate employee’s due process rights); Riggins v. Board of Regents, 790 F.2d 707, 711-12 (8th Cir. 1986) (holding that employee who failed to utilize post-termination process waived any denial of procedural due process claim); Dwyer v. Regan,
Finally, in recent opinions, circuit courts have specifically addressed the relationship between procedural due process and the termination of tenured professors.\textsuperscript{99} Most notably, in \textit{Cotnoir v. University of Maine Systems,}\textsuperscript{100} a public university provost recommended in a report that Cotnoir, a tenured professor, be dismissed for improperly granting numerous credits to a student.\textsuperscript{101} During a meeting, however, the president did not show Cotnoir the report, nor did Cotnoir ask to see it.\textsuperscript{102} Therefore, the United States Court of Appeals for the First Circuit held that the University's failure to provide notice of its intention to terminate a tenured professor's employment violated the professor's due process rights.\textsuperscript{103} Similarly, in \textit{777 F.2d 825, 834-35 (2d Cir. 1985) (same), modified on other grounds, 793 F.2d 457 (2d Cir. 1986); Dusak v. Hannon, 677 F.2d 538, 542-43 (7th Cir. 1982) ("The availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative procedure."); Correa v. Nampa Sch. Dist. No. 131, 645 F.2d 814, 817 (9th Cir. 1981) (holding that school employee cannot claim denial of due process where employee did not utilize post-termination procedures).}

A recent Supreme Court case, however, stated that a violation of procedural due process "is not complete when deprivation occurs; it is not complete unless and until the State fails to provide due process." \textit{Zinermon v. Burch, 494 U.S. 113, 126 (1990).} Under this approach, an inquiry "would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute." \textit{Id.} See \textit{generally} \textit{Weimer v. Amen, 870 F.2d 1400, 1403-05 (8th Cir. 1989) (finding post-deprivation remedies adequate when state officials committed random and unauthorized acts).}

99. \textit{See, e.g.,} \textit{Cotnoir v. University of Maine Sys., 35 F.3d 6, 11 (1st Cir. 1994) (holding that University did not inform professor of employment termination prior to decision to terminate); Calhoun v. Gaines, 982 F.2d 1470, 1476-77 (10th Cir. 1992) (finding that college's failure to reveal intention to terminate full-time professor and denial of post-termination hearing denied professor of due process); Collins v. Marina-Martinez, 894 F.2d 474, 480-81 (1st Cir. 1990) (finding that university's disguise of pretermination hearing's purpose, failure to provide information regarding specific charges against professor and denial of post-termination procedures improperly denied professor due process).}

100. \textit{35 F.3d 6 (1st Cir. 1994).}

101. \textit{Id. at 8.} Cotnoir was a tenured professor at the University of Maine. \textit{Id.} A fellow professor sent a letter to the Dean of Students stating that a student within Cotnoir's department had received 56 credits without attending classes. \textit{Id.} The University Provost interviewed Cotnoir and others regarding this matter, and then presented a report to the University President. \textit{Id.} This report contained an "explicit recommendation" for Cotnoir's dismissal. \textit{Id.} The President then sent Cotnoir a letter in which he asked Cotnoir to meet with him to "clarify [his] role in this series of events." \textit{Id.} The letter indicated that "disciplinary action may result from my investigation of your participation in this serious academic matter." \textit{Id.}

102. \textit{Id.} In addition, Cotnoir did not make a statement, but answered twelve questions about the student receiving the credits. \textit{Id.} Ten days later, the University President informed Cotnoir that Cotnoir's employment would be terminated in four days. \textit{Id.}

103. \textit{Id. at 11.} The University argued that because it informed Cotnoir of the charges against him, it complied with procedural due process requirements. \textit{Id.} Finding this procedure inadequate, however, the First Circuit held that the Univer-
Calhoun v. Gaines, a public college official withdrew a one-year contract offer from Professor Calhoun and refused to schedule a hearing or comply with due process provisions. The Tenth Circuit held that the failure to provide a professor with post-termination procedures violated due process. Thus, the guiding principles of Loudermill, intertwined with circuit court interpretations of specific due process issues, provided a generous, albeit confusing, backdrop against which the Third Circuit would undertake its analysis in McDaniels v. Flick.

III. FACTS

Mr. McDaniels was a tenured college professor at Delaware County Community College ("DCCC") in Pennsylvania. In 1990, two male students complained that McDaniels sexually harassed them. In the following year, John Federici, a student in McDaniels’s class, became irate concerning the "D" that Mc Daniels gave him in the course. During the university did not provide Cotnoir a hearing "where he had a fair opportunity to present his side of the story." Moreover, the First Circuit found that the University did not properly notify Cotnoir about its proposed action.

104. 982 F.2d 1470 (10th Cir. 1992).
105. Id. at 1473. Calhoun, a full-time professor at Oklahoma City Community College, accepted his tenth one-year employment contract according to College’s procedure. Id. at 1472. After receiving complaints about Calhoun’s performance, the College’s Vice-President withdrew the employment offer. Id. at 1473. The College did not inform Calhoun of his right to a due process hearing, as provided in the College’s written policies.

106. Id. at 1467-77. The court further stated its belief that a “reasonable official would have known that the process afforded, . . . was constitutionally inadequate.” Id. at 1476.

107. For a further discussion of the Loudermill principles, see supra notes 54-65 and accompanying text. For a further discussion of the Third Circuit interpretation of the notice requirement, see supra notes 70-79 and accompanying text.


109. McDaniels, 59 F.3d at 449. DCCC investigated these allegations, deciding to send McDaniels a letter stating that he violated DCCC’s sexual harassment policy. Id. DCCC warned McDaniels that “reoccurrence of such incidents will result in serious disciplinary action including termination of employment.” Id. at 449-50. McDaniels sent a written response to DCCC, along with a signed copy of DCCC’s letter to indicate that he reviewed it.

110. Id. McDaniels gave Federici a “D” for various reasons, including Federici’s failure to turn in a term paper on time. Id. Originally, McDaniels gave him an “Incomplete” for the course. Id. at 450 n.3. Regardless, Federici was particularly upset because he needed at least a “C” in the course to transfer the credit to a degree he was working on at Pennsylvania State University. Id. at 450. McDaniels claimed that Federici “became irate and threatened to get him.” Id. Conse-
resolution of this dispute, Federici informed the Assistant Dean that McDaniels sexually harassed him.\footnote{Id. The Assistant Dean contacted McDaniels, after Federici contacted him concerning the “D” on the final term paper. Id. McDaniels explained that Federici’s paper was of poor quality. Id. Figuring that Federici misunderstood McDaniels, the Assistant Dean called Federici, suggesting that he again contact McDaniels in order to clear up the situation. Id. Federici refused, stating something similar to “I can’t do that.” Id. Federici ultimately told the Assistant Dean that McDaniels “always wanted to counsel [him] and always wanted to see [him],” and that McDaniels talked to him about “tough love.” Id.}

On November 18, 1991, Federici met with the Director of Personnel Services (“Director”) to further explain his various encounters with McDaniels.\footnote{Id. At the meeting on November 18, 1991, Federici additionally explained that he had difficulty with McDaniels’s class and that he was seeing a counselor regarding anxiety and stress problems. Id. The Director of Personnel Services (“Director”) compiled his meeting notes into summary form, which Federici later reviewed and signed. Id.} Federici alleged, among other things, that McDaniels massaged his neck in the library, spoke to him on repeated occasions about “tough love” and made sexual innuendos and explicit sexual advances during on-campus appointments with Federici.\footnote{Id. Portions of the summary of Federici’s meeting with the Assistant Dean read:

While in the library studying [John Federici] fell asleep & awoke to see [Frank McDaniels] who was massaging John’s neck. . . . After that incident, [McDaniels] came into the library more & more as if he was looking for John.

John was in the library on another occasion with his friend Tom & [McDaniels] came in to talk to them. [McDaniels] seemed to keep looking at the “lower half” of John’s body while he spoke. [McDaniels] did not make eye contact with John but continued to stare at his lower body.

John made an appointment to speak . . . about the added class work to improve his grade. [McDaniels] repeatedly said he wanted to help John & counsel him. [McDaniels] asked if John had heard of tough love & John said no. With this, [McDaniels] proceed (sic) to say that he would help him & “If I need to I will hug you, beat the crap out of you or put my penis in your mouth.” [McDaniels] reached over & put both of his hands on John’s face & seemed to be about to cry & said, “I really want to help you.”

At the appointment [McDaniels] discussed make-up work & repeating the final exam but then went into another description of the tough love thing with another explicit reference to sexual matters. . . . [McDaniels] also said John should not discuss this with anyone since he could loose (sic) his job. [McDaniels] said he would “get him” if he mentioned their conversations to anyone.

Id. at 450-51 (footnote omitted) (citation omitted) (alterations in original).} On November 27, 1991, the Director requested that McDaniels meet him in his office that afternoon and asked McDaniels to bring his
Before the scheduled meeting, McDaniels spoke with the Director and inquired about the reason for the meeting. The Director told him only that it concerned a “student problem.”

At the outset of the meeting, the Director told McDaniels about the student’s sexual harassment claim. Additionally, the Director stated that he and the Dean would recommend McDaniels’s termination. The Director told McDaniels “that the purpose of the meeting was to understand what the charge was, to have an opportunity for [the Director] to relay to [McDaniels] what the charges were specifically and for him to have a chance to respond.” Yet McDaniels later testified that he “did not comprehend” that the meeting was a “pretermination hearing.”

After explaining the purpose of the meeting, the Director told McDaniels that it was Federici who had lodged the charges against him and further discussed the student’s allegations. Upon being questioned, however, McDaniels denied each alleged sexual encounter. At trial, the

114. Id. at 451. McDaniels’s secretary gave him a note at 11:30 a.m. asking him to call the Director. Brief for Appellee at 13, McDaniels v. Flick, 59 F.3d 446 (3d Cir. 1995) (Nos. 94-1838 & 94-1935). McDaniels spoke with the Director at 12:15 p.m. regarding a possible afternoon meeting. Id. McDaniels and the Director scheduled the meeting for 2:30 that afternoon. Id. Prior to scheduling this meeting, the Director verified Federici’s enrollment in McDaniels’s marketing class. McDaniels, 59 F.3d at 451. The Director additionally consulted the Dean of the College, as well as the college doctor, to determine if Federici had a record of unusual behavior. Id.

115. McDaniels, 59 F.3d at 451.

116. Id.

117. Id. Those present at the meeting were the Dean, the Director and McDaniels. Id.

118. Id. McDaniels later testified that when he heard this statement, he was “shocked, dismayed . . . thrown offguard.” Id.

119. Id. The Dean confirmed the Director’s statement. Id. Later, both the Director and the Dean testified that the Director told McDaniels that he could adjourn the meeting at any time. Id.

120. Id. McDaniels also explained:

Well, if they did say it, they said it in the same sentence whereby they said they were recommending my termination to the board of trustees. If they did say it, they had blown my mind so bad at that point, they had disorganized me—disoriented me so much that I didn’t remember them saying it, if they did say it.

121. Id. Upon hearing this news, McDaniels told those at the meeting that Federici threatened to “get” him. Id. The Director and the Dean testified that at this point in the meeting, McDaniels asked if he could save his job if he agreed to get counseling. Id. at 452.

122. Id. The Director did not read or show the written summary to McDaniels, and it is unclear whether the Director described these allegations in a direct manner. Id. The Director asked whether McDaniels touched Federici’s neck or face in the library; McDaniels responded no, but that he recalled an instance where he saw Federici sitting in the library. Id. McDaniels also denied staring at the lower part of Federici’s body in the presence of another student. Id. Upon being questioned about his “tough love” statement, McDaniels responded that Federici initiated the topic. Id. In testimony, McDaniels denied that the Director
Director and the Dean testified that they told McDaniels to contact them if he had any additional information about the matter, and that they subsequently terminated the meeting.\textsuperscript{123} In addition, the Director and Dean testified that they advised McDaniels of the various options available to him in dealing with the problem.\textsuperscript{124}

On December 4, 1991, the Director sent McDaniels a letter informing him that DCCC had investigated the sexual harassment charges and that, consequently, he "would recommend that the Board of Trustees terminate McDaniels' [s] employment for sexual harassment."\textsuperscript{125} This letter also set forth McDaniels's post-termination rights.\textsuperscript{126} On December 9, 1991, the Director sent McDaniels a similar letter, again informing him of the right to a further investigation of the charges against him.\textsuperscript{127} The letter informed McDaniels that he had five days within which to exercise this right.\textsuperscript{128}

On December 12, 1991, McDaniels wrote to the college's President, requesting that the President further investigate the sexual harassment charges.\textsuperscript{129} McDaniels stated that he "formally filed a grievance with the intent of going all the way through the grievance procedure (arbitration) & beyond to civil action to avoid termination."\textsuperscript{130} The President replied ever questioned him about the sexually explicit remark quoted by Federici or about McDaniels's alleged warning that Federici must keep their conversations quiet. \textit{Id.} Finally, the Director brought McDaniels's prior reprimand for sexual harassment to his attention. \textit{Id.} McDaniels stated that the present allegations, however, were false. \textit{Id.}

\textsuperscript{123} \textit{Id.} McDaniels did not recall this discussion. \textit{Id.} Instead, McDaniels testified that the Director told him to "leave campus speedily" and to return only "to the extent necessary to gather his possessions." Brief for Appellee at 15, McDaniels v. Flick, 59 F.3d 446 (3d Cir. 1995) (Nos. 94-1838 & 94-1935). According to McDaniels's deposition testimony, the pretermination meeting lasted approximately 45 minutes. \textit{Id.} at 10.

\textsuperscript{124} \textit{McDaniels,} 59 F.3d at 452. DCCC reminded McDaniels of his collective bargaining agreement with DCCC, DCCC's sexual harassment policy and Pennsylvania Local Agency Law. \textit{Id.} In addition, McDaniels could appeal a decision to the President of DCCC. \textit{Id.}

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{Id.} The letter stated:  
As I mentioned during the pre-termination meeting last Wednesday, you may want to have the [Board of Trustees's] action heard through the grievance procedure as provided under the terms of the collective bargaining agreement or you may elect to have a hearing before a committee of the Board of Trustees. \textit{Id.}

\textsuperscript{127} \textit{Id.} The letter stated that DCCC's sexual harassment policy provided McDaniels with the option to have the President of DCCC or his designee investigate and review the complaint. Brief for Appellant at 13, \textit{McDaniels} (Nos. 94-1838 & 94-1935).

\textsuperscript{128} \textit{McDaniels,} 59 F.3d at 452. In addition, the letter encouraged McDaniels to telephone the Director if he had any questions. \textit{Id.}

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{Id.} at 453. Later, however, McDaniels testified that he did not ever initiate a grievance procedure. \textit{Id.} Rather, he was merely "looking into it." \textit{Id.} Mc-
to McDaniels on December 18, 1991, expressing his belief that DCCC had adequately reviewed the allegations against McDaniels and stating that he would recommend McDaniels's termination at that evening's Board meeting.131

At the Board of Trustees's meeting, the Board voted unanimously to terminate McDaniels's employment.132 In response, McDaniels began arbitration procedures as provided within DCCC's collective bargaining agreement.133 Before arbitrators could be selected, however, McDaniels filed a section 1983 suit against the college and the Board of Trustees, along with a state law claim under Pennsylvania Local Agency Law, alleging a violation of his procedural due process rights.134 Adhering to numerous decisions in the district court, the Third Circuit held that because DCCC held a pretermination hearing and encouraged post-termination responses, McDaniels received adequate due process protections.135

Daniels additionally included in the letter: “Enclosed is a chronologized transcript of my total contact with this student. I emplor (sic) you to thoroughly investigate his allegations (sic) personally & overturn the termination decision. . . . Every single meeting [with Federici] was for class business only.” Id.

131. Id. Before writing his response to McDaniels on December 18, 1991, the President reviewed the documents relating to the allegation, and also met with the Director, Dean and Assistant Dean to further review their findings. Id.

132. Id. The Board voted unanimously to dismiss McDaniels only after they discovered that other students previously charged McDaniels with violations of DCCC's sexual harassment policy in 1990 and 1991, and that DCCC investigated the charges, held a pretermination hearing and provided McDaniels with an opportunity to respond. Brief for Appellant at 14, McDaniels (Nos. 94-1838 & 94-1935). Prior to the Board meeting, however, DCCC did not supply McDaniels with copies of the March 1990 and November 18, 1991 reports describing the conduct justifying his termination. Id.

133. McDaniels, 59 F.3d at 453. McDaniels did not appeal or ask for a hearing before the Board of Trustees. Id.


McDaniels initially filed charges against the Board of Trustees of DCCC, both individually and in their official capacity, and against DCCC. McDaniels, 59 F.3d at 448. As a result of McDaniels’s claim, DCCC stayed arbitration proceedings pending its disposition. Id. at 453.

135. McDaniels, 59 F.3d at 446-47. The unusual procedural background of this case warrants description. Id. at 448. After McDaniels filed his initial action against DCCC in February of 1992, DCCC filed a motion for summary judgment. Id. The district court denied DCCC’s motion. Id. Upon denying a motion for reconsideration, the district court stated that there was an issue of material fact surrounding DCCC’s actions in providing McDaniels with notice of the charges against him or of the pretermination hearing's purpose. Id. An additional issue before the court was whether DCCC properly informed McDaniels of the specific accusations during the meeting. Id.

Both sides moved for summary judgment after discovery. Id. The court granted partial summary judgment on liability to McDaniels; however, after commencing the jury trial for damages, the court determined that a genuine issue of
IV. ANALYSIS

A. The Applicable Standard

The United States Court of Appeals for the Third Circuit stated that the starting point in determining the procedural due process rights of tenured professors is the decade-old standard set forth by the Supreme Court in Cleveland Board of Education v. Loudermill.136 The Third Circuit traced the reasoning of Loudermill to provide a framework against which it could compare the actions taken in McDaniels.137

fact existed concerning the presence of a procedural due process violation. Id. McDaniels elected to have the court declare a mistrial. Id. In response, the court issued a written opinion stating that it would dismiss the trustees as defendants because they were not involved in the pretermination events leading to McDaniels's termination. Id. at 448-49.

The court divided the second trial into three phases, with the first phase focusing on liability. Id. at 449. At the close of McDaniels's case, both McDaniels and DCCC moved unsuccessfully for summary judgment. Id. In response to specific questions, however, the jury returned a verdict that:

(1) the college adequately notified McDaniels that the November 27, 1991 meeting was a pretermination hearing on Federici's sexual harassment charges; (2) the college informed McDaniels of the substance of the case against him during that meeting; but (3) McDaniels was not given a meaningful opportunity to respond and tell his side of the story. Id. Thus, in view of the third finding, DCCC could be liable. Id. Accordingly, in the second phase, the jury determined that if DCCC had provided McDaniels with an adequate opportunity to respond, it would not have terminated his employment. Id. Consequently, the court entered an order reinstating McDaniels as a faculty member and awarded him $134,081 in lost wages. Id. In the third phase, the jury did not award McDaniels damages for noneconomic harm. Id.

DCCC then moved for judgment as a matter of law. Id. In addition, McDaniels filed a post-trial motion for a new trial on the issue of damages. Id. In opposing DCCC's motion, McDaniels argued that DCCC was "estopped" from moving for judgment as a matter of law "because the college's attorney in his closing argument at the third phase led the jury to believe that the college agreed to 'make peace' with McDaniels and make him whole." Id. The court did not estop DCCC, but denied both post-trial motions. Id. DCCC immediately filed a notice of appeal, and McDaniels filed a notice of cross-appeal. Id.

In the Third Circuit, McDaniels moved to dismiss the appeal and cross-appeal, relying again on the DCCC attorney's statements made during closing arguments at the third phase. Id. The district court then filed a memorandum opinion explaining its reasoning behind rejecting the "judicial estoppel" argument. Id. Agreeing with the district court, the Third Circuit denied the motion to dismiss the appeal and cross-appeal. Id.

On appeal, DCCC argued that the district court improperly denied its motions for judgment as a matter of law. Id. McDaniels cross-appealed from the district court's dismissal of his case against the individual members of the Board of Trustees and from the denial of his post-trial motion requesting a new trial for noneconomic damages. Id. See generally Federal Court Says Delco College Gave Man a Chance, PHILA. INQUIRER, July 12, 1995, at W3 (summarizing recent trial).

136. McDaniels, 59 F.3d at 453-54 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)). For a further discussion of the Loudermill facts and opinion, see supra notes 54-65 and accompanying text.

137. McDaniels, 59 F.3d at 454. See generally Foster, supra note 7, at 1079-82 (setting forth and discussing Supreme Court's reasoning in Loudermill); Howard, supra note 7, at 1124-25 (same); Gamso, supra note 5, at 266-71 (same).
First, the Third Circuit affirmed the existence of a property right in continued employment that is inherent in state law.\footnote{McDaniels, 59 F.3d at 454 (citing Loudermill, 470 U.S. at 598-39). In McDaniels, property rights grew out of Ohio state law. Id. For a further discussion of the historical development of property rights, see supra notes 19-65 and accompanying text.} Interpreting the Fifth and Fourteenth Amendments, the Third Circuit quoted the \textit{Loudermill} Court and stated that "[a]n essential principle of due process is that a deprivation of . . . property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"\footnote{McDaniels, 59 F.3d at 454 (quoting Loudermill, 470 U.S. at 542) (citation omitted).} The Third Circuit restated this requirement, agreeing with the \textit{Loudermill} Court that due process requires "some kind of hearing" prior to discharging an employee with a constitutionally protected property interest in employment.\footnote{Id. (quoting Loudermill, 470 U.S. at 542). The \textit{Loudermill} Court relied upon the prior Supreme Court holdings in \textit{Board of Regents v. Roth}, 408 U.S. 564, 569-70 (1972) and \textit{Perry v. Sindermann}, 408 U.S. 593, 599 (1972), which discussed the hearing requirement in the context of college professors. For a further discussion of Roth's development of the hearing concept, see supra notes 24-31 and accompanying text. For a further discussion of the hearing concept in Sindermann, see supra notes 32-37 and accompanying text.}

Moreover, in light of \textit{Loudermill}, the Third Circuit recognized that an additional element essential to ensuring due process is a pretermination opportunity to respond.\footnote{McDaniels, 59 F.3d at 454 (citing Loudermill, 470 U.S. at 542). For a general discussion of a public employee's right to a pretermination hearing, see Maslan, supra note 19, at 1094-96 ("The essence of [the right to a hearing] 'reflects a fundamental value in our American constitutional system.'" (quoting Boddie v. Connecticut, 401 U.S. 371, 374 (1971))).} Following the \textit{Loudermill} precedent, the Third Circuit stated that the "pretermination 'hearing,' though necessary, need not be elaborate."\footnote{McDaniels, 59 F.3d at 454 (citing Loudermill, 470 U.S. at 545). After the first phase of the trial, the district court charged the jury that "[t]he notice may be written or oral . . . [i]t need not be advance notice, . . . the notice of the charges may be given at the hearing itself." Id.} Rather, the "procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."\footnote{McDaniels, 59 F.3d at 454 (citing Loudermill, 470 U.S. at 545). For a further discussion of the balancing test utilized in considering competing interests, see supra note 63.} The Third Circuit adhered to the \textit{Loudermill} Court's holding that an employer must balance the interests of the employer and employee in making pretermination decisions.\footnote{McDaniels, 59 F.3d at 454. Specifically with regard to the employee, the \textit{Loudermill} Court held that "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. (quoting Loudermill, 470 U.S. at 546). See generally McCrea, supra note 43, at 38 (discussing respective interests of public employers and employees).} The Third Circuit concluded that a pretermination opportunity to re-

138. McDaniels, 59 F.3d at 454 (citing Loudermill, 470 U.S. at 598-39). In McDaniels, property rights grew out of Ohio state law. Id. For a further discussion of the historical development of property rights, see supra notes 19-65 and accompanying text.

139. McDaniels, 59 F.3d at 454 (quoting Loudermill, 470 U.S. at 542) (citation omitted).

140. Id. (quoting Loudermill, 470 U.S. at 542). The Loudermill Court relied upon the prior Supreme Court holdings in Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972) and Perry v. Sindermann, 408 U.S. 593, 599 (1972), which discussed the hearing requirement in the context of college professors. For a further discussion of Roth's development of the hearing concept, see supra notes 24-31 and accompanying text. For a further discussion of the hearing concept in Sindermann, see supra notes 32-37 and accompanying text.

141. McDaniels, 59 F.3d at 454 (citing Loudermill, 470 U.S. at 542). For a general discussion of a public employee's right to a pretermination hearing, see Maslan, supra note 19, at 1094-96 ("The essence of [the right to a hearing] 'reflects a fundamental value in our American constitutional system.'" (quoting Boddie v. Connecticut, 401 U.S. 371, 374 (1971))).

142. McDaniels, 59 F.3d at 454 (citing Loudermill, 470 U.S. at 545). After the first phase of the trial, the district court charged the jury that "[t]he notice may be written or oral . . . [i]t need not be advance notice, . . . the notice of the charges may be given at the hearing itself." Id.

143. Id. (citing Loudermill, 470 U.S. at 545). For a further discussion of the balancing test utilized in considering competing interests, see supra note 63.

144. McDaniels, 59 F.3d at 454. Specifically with regard to the employee, the Loudermill Court held that "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. (quoting Loudermill, 470 U.S. at 546). See generally McCrea, supra note 43, at 38 (discussing respective interests of public employers and employees).
spond, coupled with post-termination administrative procedures, meets the due process requirements of Loudermill.145

The Loudermill framework allowed the Third Circuit to determine whether DCCC had satisfied these due process requirements.146 Despite the established Loudermill requirements, McDaniels claimed that tenured professors deserve more substantial due process protections than other public employees.147 The Third Circuit disagreed, rejecting McDaniels's argument that unlike other types of public employees, a tenured professor's right to teach implicates "the societal value of academic freedom."148

The Third Circuit further rejected McDaniels's reliance upon Skehan v. Board of Trustees149 to bolster his argument for enhanced procedural due process rights.150 The Third Circuit explained that the Skehan holding adhered to an earlier Third Circuit opinion, Chung v. Park.151 In Chung, the Third Circuit set forth pretermination safeguards that colleges may grant to tenured professors.152 Thus, given the permissibility of the safeguards and the fact that both cases were pre-Loudermill, the Third Circuit reemphasized that only Loudermill adequately defined the minimum

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145. McDaniels, 59 F.3d at 454 (citing Loudermill, 470 U.S. at 547-48). For a further discussion of the Loudermill standard's impact, see Foster, supra note 7, at 1084 ("The major questions that the Court left unanswered is the appropriate depth of a pre-termination hearing when there are factual disputes between employer and employee."); Howard, supra note 7, at 1125-28 (arguing that Loudermill should have addressed property interests beyond scope of right of continued employment); Gamso, supra note 5, at 271-72 (arguing that Loudermill enhances authority of balancing test approach).

146. McDaniels, 59 F.3d at 454. The parties agree that as a tenured college professor, McDaniels had a protected property interest in continued employment. Id. For a further discussion of the historical development of property rights in continued employment, see supra notes 19-65 and accompanying text.

147. McDaniels, 59 F.3d at 455.

148. Id. McDaniels further stated that "[t]enure is the pillar upon which academic freedom rests." Id. The court did not dispute this assertion, but instead questioned its relevancy. Id. Because DCCC did not discharge McDaniels in retaliation for exercising First Amendment rights, free speech was not an issue in this matter. Id. In further attacking McDaniels's claim for greater due process rights, the Third Circuit pointed to the lack of a basis on which to distinguish his case from Loudermill. Id.

149. 669 F.2d 142, 152 (3d Cir. 1982). For a further discussion of Skehan's facts, see supra notes 49-52 and accompanying text.

150. McDaniels, 59 F.3d at 455.

151. 514 F.2d 382 (3d Cir. 1975).

152. Id. For a complete list of the pretermination safeguards set forth in Chung, see supra note 48. Neither Chung nor Skehan held that procedural due process required all six of the pretermination safeguards. Skehan, 669 F.2d at 152; Chung, 514 F.2d at 386. Additionally, neither case distinguished the use of these safeguards based on the fact that the employees were professors whose employers owed them extra protection of their academic freedom. See McDaniels, 59 F.3d at 455 (stating neither Chung nor Skehan required all six safeguards, nor required extra protection for professors).
due process requirements for the instant proceeding. The Third Circuit also rebutted McDaniels’s claim by balancing the respective interests of the parties involved.

### B. The Standard Applied to McDaniels

Finding that the *Loudermill* requirements of notice, explanation of the charges and an opportunity to respond were applicable to the case at hand, the Third Circuit faced the task of properly applying these decade-old concepts. In so doing, the Third Circuit reversed the trial court’s decision. The Third Circuit stated that, under the *Loudermill* principles, DCCC gave McDaniels adequate notice concerning the November 27, 1991 meeting and subsequently gave him an explanation of the charges brought against him. Accordingly, the court found that the time between the November meeting and the Board of Trustees’s December meeting at which DCCC terminated McDaniels was sufficiently long enough for him to make an appropriate pretermination response. The *McDaniels* court further concluded that because the President read and answered McDaniels’s letter, DCCC allowed him sufficient opportunity to

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153. *McDaniels*, 59 F.3d at 456. The Third Circuit particularly noted the incompleteness of the *Skehan* decision. *Id.* *Skehan* did not consider post-termination remedies, which the *Loudermill* Court later required. *Id.* Thus, the Third Circuit further diminished the effectiveness of McDaniels’s *Skehan* argument. *Id.*

154. *Id.* The Third Circuit noted that DCCC had an interest in protecting its reputation. *Id.* Conversely, the Third Circuit was aware of DCCC’s sexual harassment policy and of its commitment to protecting its students. *Id.*

155. *Id.* In order to support the general application of *Loudermill*, the *McDaniels* court cited prior Third Circuit cases. *Id.; see* Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1077-78 (3d Cir. 1990) (holding that suspension without pay also required prior notice and hearing); Copeland v. Philadelphia Police Dep’t, 840 F.2d 1139, 1144-46 (3d Cir. 1988) (holding that suspension complied with due process where employer held interview to orally notify employee of charges, allowed employee to explain and notified him of suspension); Gniotek v. City of Phila., 808 F.2d 241, 244 (3d Cir. 1986) (holding that due process does not require advance notice of pretermination hearing; “Notice is sufficient, (1) if it apprises the vulnerable party of the nature of the charges and general evidence against him, and (2) if it is timely under the particular circumstances of the case.”).

156. *McDaniels*, 59 F.3d at 456. For an in-depth discussion of the procedural history in *McDaniels*, see *supra* note 115.

157. *McDaniels*, 59 F.3d at 456. For a further discussion of the nature of the notice that DCCC granted McDaniels, see *supra* notes 114-20 and accompanying text. For a further description of the alleged incidents of sexual harassment, see *supra* note 113 and accompanying text.

158. *McDaniels*, 59 F.3d at 456. Records of the meeting demonstrate that both the Director and the Dean solicited initial responses from McDaniels throughout the pretermination hearing. *Id.* In addition, the Director and Dean encouraged McDaniels to respond to these charges at any time after the hearing. *Id.* For a further discussion of the various communications between DCCC and McDaniels after the pretermination hearing, see *supra* notes 125-31 and accompanying text.
respond. Thus, the Third Circuit rejected McDaniels's allegation that DCCC afforded him insufficient due process rights.

The Third Circuit first addressed the issues of advance notice and explanation of the charges. The court cited its earlier ruling in *Gniotek*, where the court held that advance notice is not required. Like the court in *Gniotek*, the Third Circuit in *McDaniels* rejected McDaniels's notion that DCCC did not adequately explain the charges against him.

Both parties agreed that DCCC did not give McDaniels a written summary of the charges against him. The Third Circuit held, however, that charges against an individual "need not be in great detail as long as it allows the employee 'the opportunity to determine what facts, if any, within his knowledge might be presented in mitigation of or in denial of the charges.'"

159. *McDaniels*, 59 F.3d at 456. Moreover, the court stated that McDaniels's denial of charges and attribution of them to Federici's emotional problems manifested his response during the pretermination meeting. *Id.* Additionally, McDaniels's letter to the President provided further evidence that McDaniels responded after the meeting and that DCCC provided him with ample opportunity to "tell his side of the story before termination." *Id.* at 456-57.

160. *Id.* at 457. McDaniels claimed that the process was not sufficient because DCCC did not provide him with notice until the beginning of the pretermination meeting. *Id.*

161. *Id.*

162. *Id.* (citing *Gniotek* v. City of Phila., 808 F.2d 241, 244 (3d Cir. 1986)). The Third Circuit cited its decision in *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139 (3d Cir. 1988), to further legitimize its interpretation of the notice requirement. *McDaniels*, 59 F.3d at 457. In *Copeland*, the Third Circuit held that an employer satisfies due process requirements (and integrally, the notice requirement) "where a policeman was told that he had tested positive for illegal drug use, was allowed to respond, and was told that he would be suspended with intent to dismiss." *Id.* (quoting *Copeland*, 840 F.2d at 1142-46). These events happened within the course of a single interview. *Copeland*, 840 F.2d at 1142. For a further discussion of the *Copeland* facts and opinion, see *supra* note 74.

163. *McDaniels*, 59 F.3d at 457. For a further discussion of DCCC's procedure in explaining the charges to McDaniels, see *supra* notes 114-24 and accompanying text.

164. *McDaniels*, 59 F.3d at 457; see Brief for Appellant at 25-26, McDaniels v. Flick, 59 F.3d. 446 (3d Cir. 1995) (Nos. 95-1838 & 95-1935) (arguing that due process did not obligate DCCC to share "every detail" of its evidence with McDaniels or to allow him to confront his accusers); see also Linton v. Frederick County Bd. of County Comm'rs, 964 F.2d 1436, 1440 (4th Cir. 1992) (stating "[d]ue process does not mandate that all evidence on a charge or even the documentary evidence be provided"); Green v. Board of Sch. Comm'rs, 716 F.2d 1191, 1193 (7th Cir. 1983) (finding that due process does not require opportunity to attack credibility of accuser). But see Brief for Appellee at 24, *McDaniels* (Nos. 95-1838 & 95-1935) (arguing that DCCC's neglecting to show statement to McDaniels significantly affected his opportunity to respond).

165. *McDaniels*, 59 F.3d at 457 (quoting *Gniotek*, 808 F.2d at 244). Thus, the Third Circuit accorded the term "adequate explanation" a liberal interpretation. See generally Derstein v. Kansas, 915 F.2d 1410, 1413 (10th Cir. 1990) (holding that employer did not violate due process even where employee did not know all relevant facts and employer did not give employee copy of investigative transcript).
Having discussed the issues of notice and explanation of the charges, the Third Circuit next turned to the adequacy of the time during which DCCC asked McDaniels to respond. 166 First, the Third Circuit distinguished this case from the Eleventh Circuit opinion in Adams v. Sewell. 167 In Adams, a county administrator placed an employee on paid personal leave at the end of a meeting. 168 In McDaniels, however, DCCC gave McDaniels more than three weeks to respond to the allegations against him; therefore, the court found that Adams was not comparable. 169 Instead, the Third Circuit relied upon the Tenth Circuit opinion in Derstein, where a court administrator gave an employee ten days to respond to charges against him. 170 In addition, the Third Circuit distinguished its prior ruling in Morton in which a prison administrator suspended an employee without pay at the pretermination hearing, as opposed to after the hearing. 171

In responding to McDaniels’s contention that DCCC’s termination procedure violated Pennsylvania Local Agency Law, the Third Circuit brought the issue of procedural due process rights full-circle. 172 The

For a further discussion of the facts of Derstein, see supra notes 81-83 and accompanying text.

166. McDaniels, 59 F.3d at 457. McDaniels claimed that he was in a state of shock during the meeting, primarily because DCCC did not give him prior notice of the meeting’s purpose. Id. McDaniels also claimed that this affected his opportunity to respond to the charges. Id.

167. 946 F.2d 757 (11th Cir. 1991). For a further discussion of the facts in Adams, see supra notes 85-86 and accompanying text.

168. Adams, 946 F.2d at 761.

169. McDaniels, 59 F.3d at 457. DCCC held the initial pretermination hearing on November 27, 1991. Id. at 451. The Board of Trustees terminated McDaniels’s employment at their meeting on December 18, 1991. Id. at 453.

170. Derstein, 915 F.2d at 1410. For a further discussion of the facts of Derstein, see supra notes 81-83 and accompanying text.

171. McDaniels, 59 F.3d at 458 (citing Morton v. Beyer, 822 F.2d 364 (3d Cir. 1987)). In Morton, because the employee could not convince the administrators at the pretermination hearing to delay his suspension, the employee suffered adverse employment action. Morton, 822 F.2d at 366. For a further discussion of the Morton decision, see supra notes 76-78 and accompanying text. Comparatively, DCCC held McDaniels’s pretermination hearing on November 27, 1991 and terminated McDaniels on December 18, 1991. McDaniels, 59 F.3d at 451-53.

172. McDaniels, 59 F.3d at 458. The Third Circuit stated that this argument “flies in the face of both logic and law.” Id. Returning to the foundations of property rights in continued employment, the court stated that whether such right exists is a matter of state law. Id. (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). For an in-depth discussion of the state/federal relationship surrounding property rights and procedural due process, see supra notes 29-30 and accompanying text.

Both parties agreed that DCCC is a “local agency” for purposes of Pennsylvania Local Agency Law. McDaniels, 59 F.3d at 460-61. The relevant Pennsylvania statute defines "local agency" as "[a] government agency other than a Commonwealth agency." Id. at 461 n.8 (quoting 2 Pa. CONS. STAT. ANN. § 101 (West Supp. 1994)). Sections 752 and 754 provide employees with a right to appeal a college decision in state court. Id. at 461; see Monaghan v. Board of Sch.Dirs., 618 A.2d 1299, 1241 (Pa. Commw. Ct. 1992) (noting that state court can
court reiterated that minimum procedural due process requirements are "a matter of federal law"; consequently, they are "not diminished by the fact that the State may have specified its own procedures that it may deem adequate." 173

C. Pretermination Hearings and Impartial Decision-makers

The Third Circuit next addressed McDaniels's claim that the DCCC's failure to provide an impartial decision-maker at the pretermination hearing violated his due process rights. 174 The Third Circuit had not yet addressed such a claim in the employment termination context. 175

review final decision of local agency). In addition, the court can modify or set aside an agency decision if there are violations of an "employee's constitutional rights, an error of law, or . . . necessary findings of fact were not supported by substantial evidence." 2 Pa. Cons. Stat. Ann. § 754(b) (West Supp. 1994); see Coyle v. Middle Bucks Area Vocational Technical Sch., 654 A.2d 15, 16 (1994) (noting that court must affirm local agency decision unless substantial evidence does not support finding); Gabriel v. Trinity Area Sch. Dist., 350 A.2d 203, 205 (Pa. Commw. Ct. 1976) (same); Springfield Sch. Dist. v. Shellam, 328 A.2d 535, 537-38 (Pa. Commw. Ct. 1974) (same). Thus, with these options available, the Third Circuit concluded that the state offered sufficient due process protection of McDaniels's property rights. 176


174. Id. at 459. This issue is important because McDaniels argued that the pretermination procedure applied to his case was a "sham." Id. at 458. McDaniels argued that DCCC never believed Federici's allegations. Id. Rather, DCCC used these allegations to reduce the number of faculty in order to save money. Id. In addressing this issue, the district court relied upon an Eleventh Circuit case, McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), cert. denied, 115 S. Ct. 898 (1995). McDaniels, 59 F.3d at 459. The district court stated that even if McDaniels substantially proved his allegations, these allegations would be "irrelevant to the claim that pretermination procedural due process was denied because the sufficiency of post-termination protection was not at issue." Id.

For a general discussion of bias and its affect upon a Loudermill hearing, see Maslan, supra note 19, at 1098-1104 (arguing that "[w]here the decisionmaker is impermissibly biased against the employee, both the initial review of factual conclusions and the opportunity to invoke the employer's discretion are lost").

175. McDaniels, 59 F.3d at 459. The Third Circuit dealt with a similar situation in Rosa v. Resolution Trust Corp., 938 F.2d 383 (3d Cir. 1991). In Rosa, a bank placed its pension plan under the conservatorship of the Resolution Trust Corporation (RTC). Id. at 388. Initially, the RTC decided to continue the plan and assume payment obligations. Id. at 389. Later, however, after two contribution payments, the RTC decided to stop contribution and consequently sent out notices that the plan would be terminated in two months. Id. The plan's beneficiaries sued the RTC. Id. at 390. The Financial Institutions Reform and Recovery Enforcement Act, however, required that some of the plaintiffs' claims first be presented to the RTC for review first. Id. The plaintiffs stated that this claims procedure violated due process because it required them to submit their claims to a biased entity without the benefit of a hearing. Id. at 396. Nevertheless, the Third Circuit held that the claims procedure did not violate due process. Id. at 397. The court reasoned that even after the exhaustion of the RTC claims procedure, the plaintiffs had the post-deprivation option of obtaining a de novo court evaluation of their claims. Id.
Therefore, the court looked to the Eleventh Circuit decision in *McKinney v. Pate* for persuasive authority.\(^{176}\) Relying upon *McKinney* and upon similar rulings of the Fifth, Sixth and Ninth Circuits that due process does not require impartial decision-makers at the pretermination hearing as long as post-termination hearing decision-makers are impartial, the Third Circuit buttressed its finding that DCCC fulfilled McDaniels's due process rights.\(^{177}\)

Finally, the Third Circuit re-emphasized the importance of the Supreme Court precedent set forth in *Parratt v. Taylor*.\(^{178}\) Applying the Court's reasoning in *Parratt* to the employment termination context, the Third Circuit noted that an "unduly cumbersome" and "unreasonably invasive" procedure may result if due process required impartial decision-makers to be present at the pretermination stage.\(^{179}\)

### D. The Dissent: A View of "Fundamental Fairness"

The *McDaniels* dissent hinged its argument upon the notion that "[f]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause."\(^{180}\) Like the majority, the dissent also

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\(^{176}\) 20 F.3d 1550 (11th Cir. 1994). For a general discussion of the facts of *McKinney*, see *supra* notes 91-92 and accompanying text.

\(^{177}\) *McDaniels*, 59 F.3d at 459-60; see, e.g., Zinermon v. Burch, 494 U.S. 113, 126 (1990) (holding that "[t]he constitutional [procedural due process] violation . . . is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process"); Walker v. City of Berkeley, 951 F.2d 182, 184 (9th Cir. 1991) (holding that due process does not require impartial decision-maker at pretermination hearing, if post-termination decision-maker is impartial); Duchesne v. Williams, 849 F.2d 1004, 1005 (6th Cir. 1988) (holding that *Loudermill* only requires a "right of reply" in front of official responsible for discharge); Schaper v. City of Huntsville, 813 F.2d 709, 715 (5th Cir. 1987) (holding that in employment termination cases, due process does not require states to have impartial decision-maker at pretermination hearing).

\(^{178}\) 451 U.S. 527 (1981). For a further discussion of the facts of *Parratt*, see *supra* note 96. See also Tribe, *supra* note 1, § 10-14, at 726-29 (arguing that meaningful post-deprivation hearing satisfies requirements of due process).

\(^{179}\) *McDaniels*, 59 F.3d at 460. The Third Circuit reasoned that employee's direct supervisors often make termination decisions because such individuals are aware of the "employee's abilities and shortcomings as well as the needs and interests of the employer organization." *Id.* Therefore, simply by virtue of their positions, such individuals are "likely targets" for claims of bias or improper motive, as in McDaniels's claim that budget constraints motivated DCCC to fire him. *Id.* Moreover, the court reasoned:

While these charges may have merit in certain cases, to require that the state ensure an impartial pretermination hearing in every instance would as a practical matter require that termination decisions initially be made by an outside party rather than the employer as charges of bias always could be made following an in-house discharge.

*Id.*

In addition, the Third Circuit stated that neutral tribunals at the post-termination stage are adequate, thereby reducing the need for "excessive pretermination precaution." *Id.*

\(^{180}\) *Id.* at 461 (Aldisert, J., dissenting).
founded its argument upon the _Loudermill_ principles.\textsuperscript{181} While acknowledging the importance of the _Gniotek_ holding, however, the dissent supplemented it by stating that "the timing and content of notice . . . will depend on appropriate accommodation of the competing interests involved."\textsuperscript{182} Thus, the dissent concluded that the particular circumstances in _McDaniels_ required advance notice.\textsuperscript{183}

The dissent compared the circumstances of _McDaniels_ to those in the Third Circuit case of _Morton_, where an administrator gave an employee vague notice of a meeting to take place later that day.\textsuperscript{184} In _McDaniels_, the dissent found that DCCC gave McDaniels notice with even less detail than that given in _Morton_, as well as an inadequate opportunity to review the evidentiary report against him.\textsuperscript{185} Thus, the dissent argued that the requirement of advance notice was not properly fulfilled. Accordingly, the dissent stated that because DCCC did not give McDaniels adequate notice of the subject or purpose of the pretermination hearing, it unfairly denied him a "realistic opportunity" to mount a defense and to respond to the

\textsuperscript{181.} Id. (Aldisert, J., dissenting); see also Cleveland Bd. of Educ. v. _Loudermill_, 470 U.S. 532, 547-48 (1985) (summarizing due process requirements). In particular, the _McDaniels_ dissent noted that "[t]o ensure that the pretermination hearing is a meaningful one, the employee 'is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.'" _McDaniels_, 59 F.3d at 461-62 (Aldisert, J., dissenting) (quoting _Loudermill_, 470 U.S. at 546). For a further discussion of the _Loudermill_ decision, see supra notes 54-65 and accompanying text.

\textsuperscript{182.} _McDaniels_, 59 F.3d at 462 (Aldisert, J., dissenting) (quoting Goss v. _Lopez_, 419 U.S. 565, 579 (1975)). The Third Circuit has held that advance notice is not necessary to meet procedural due process requirements. _Gniotek_ v. City of Phila., 808 F.2d 241, 244 (3d Cir. 1986). For a complete discussion of the _Gniotek_ decision, see supra notes 70-73 and accompanying text.

\textsuperscript{183.} _McDaniels_, 59 F.3d at 462 (Aldisert, J., dissenting). The dissent noted that DCCC did not give McDaniels adequate notice of the subject or purpose of the November 27, 1991 meeting. Id. (Aldisert, J., dissenting).

\textsuperscript{184.} Id. at 462-63 (Aldisert, J., dissenting) (citing _Morton_ v. _Beyer_, 822 F.2d 364 (3d Cir. 1987)). For a further discussion of the facts and holding of _Morton_, see supra notes 76-78 and accompanying text.

\textsuperscript{185.} _McDaniels_, 59 F.3d at 462 (Aldisert, J., dissenting). The dissent broke down its _Morton_ comparison into several components. Id. (Aldisert, J., dissenting). First, although the Director called McDaniels to the meeting many months after the alleged incident, unlike the corrections sergeant in _Morton_, McDaniels was never aware that he was being investigated at any time prior to this meeting. Id. (Aldisert, J., dissenting). Second, the Director gave McDaniels vague notice of the meeting; the Director did not inform McDaniels that the meeting was a pretermination hearing or that a student filed a sexual harassment complaint against him. Id. (Aldisert, J., dissenting). Third, a legal representative did not accompany McDaniels at the meeting, nor did he have the opportunity to review Federici's signed three-page statement. Id. (Aldisert, J., dissenting). Finally, while the prison administrator in _Morton_ provided the corrections officer with a departmental hearing after the initial hearing, DCCC refused to give McDaniels further pretermination review or investigation. Id. (Aldisert, J., dissenting).
allegations. In light of Third Circuit precedent, the dissent reasoned that DCCC violated McDaniels's due process rights.

E. McDaniels and Due Process: A Critical Analysis

In finding that DCCC did not violate McDaniels's due process rights, the Third Circuit took a necessary step toward clarifying the application of the general guidelines set forth in Loudermill. First, the court accurately applied the Loudermill principles in view of Third Circuit precedent. Next, the Third Circuit struck an appropriate balance between the interests of McDaniels and those of DCCC. The Third Circuit, however, could have given further attention to recent cases from other circuit courts discussing the due process rights of tenured professors. Nevertheless, the Third Circuit rendered a comprehensive analysis upon which its district courts and other circuit courts may rely in the future.

First, the Third Circuit correctly interpreted and applied the question of "what process is due," as addressed in Loudermill. The Third Circuit

186. Id. at 462-63 (Aldisert, J., dissenting); see also Bignall v. North Idaho College, 538 F.2d 243, 247 (9th Cir. 1976) (stating that "purpose of notice is to allow a complainant to marshall a case against the firing body"). The dissent stated that DCCC provided McDaniels with only an "impromptu" opportunity to hear some of the evidence against him and present his side of the story. McDaniels, 59 F.3d at 462 (Aldisert, J., dissenting). Moreover, the court noted:

Particularly in light of the significant lapse in time between the alleged improper conduct and the hearing in [the Director's] office, [McDaniels] should have been provided sufficient time, at the very least, to recount the facts in his own mind and thus to prepare himself to demonstrate to [the Director and Dean] that reasonable grounds to believe that the charges were true did not exist.

Id. at 463 (Aldisert, J., dissenting) (quoting Morton v. Beyer, 822 F.2d 364, 371 n.11 (3d Cir. 1987)). The dissent further stated that the college "intentionally flung [charges] upon him out of the blue." Id. (Aldisert, J., dissenting).

187. Id. (Aldisert, J., dissenting). The dissent did not expressly address the question of whether due process requires the presence of an impartial decision-maker at the pretermination hearing; rather, the dissenting opinion focused primarily upon the adequacy of notice. Id. (Aldisert, J., dissenting). In deciding that DCCC denied due process, however, the dissent compared the post-termination rights available in Morton with those that DCCC afforded McDaniels. Id. at 462 (Aldisert, J., dissenting).

188. For a further discussion of the general Loudermill principles, see supra notes 54-65 and accompanying text.

189. For a further discussion of the Third Circuit's application of Loudermill principles, see supra notes 156-60 and accompanying text. For an analysis of the Third Circuit's application of its precedent, see infra notes 195-203 and accompanying text.

190. For a statement of the Mathews balancing test, see supra note 63.

191. For a further discussion of recent circuit court cases involving the due process rights of tenured professors, see supra notes 99-106 and accompanying text.

192. For an in-depth discussion of the Third Circuit analysis in McDaniels, see supra notes 136-79 and accompanying text.

193. For a further discussion of due process requirements as set forth in Loudermill, see supra notes 54-65 and accompanying text.
utilized Loudermill's general holding and accurately supplemented it with other Third Circuit opinions. For example, the Third Circuit relied upon the examination of the notice requirement in Gniotek v. City of Philadelphia. While Gniotek did not mandate advance notice, it further indicated that the nature of notice depends upon an "appropriate accommodation of the competing interests involved."

In light of Gniotek, the Third Circuit balanced the competing interests in determining whether McDaniels's notice, pretermination hearing and opportunity to respond satisfied procedural due process requirements. Because McDaniels had essentially three weeks in which to respond to the allegations of sexual harassment, DCCC sufficiently protected his property rights in continued employment. On the other hand, DCCC had a responsibility to protect its students, and particularly the interests of John Federici, the alleged victim. Thus, the college's procedure satisfied the "fundamental fairness" sought after by the dissent.

The Third Circuit also weighed the competing interests recognized by the dissent, and specifically relied upon Third Circuit precedent in Morton v. Beyer. As the majority stated, the fact that the administrator's suspension of Morton at his pretermination hearing violated due process demonstrates that Morton is distinguishable from McDaniels, where the termination occurred three weeks after the hearing. Thus, it is clear

194. For discussions of prior Third Circuit cases utilized by the McDaniels court, see supra notes 149, 151, 155.
195. 808 F.2d 241, 244 (3d Cir. 1986). For a further discussion of the facts of Gniotek, see supra notes 71-72.
196. Gniotek, 808 F.2d at 244 (quoting Goss v. Lopez, 419 U.S. 565, 579 (1975)). For a further discussion of the competing interests, see supra note 63.
198. Id. The Director gave McDaniels notice of the nature of the November 27, 1991 meeting. Id. The Board of Trustees did not hold their termination meeting until December 18, 1991. Id. During this time, DCCC encouraged McDaniels to respond, and he did so. Id. The Supreme Court has previously pointed out, however, that in some circumstances, a valid public interest may justify postponing a pretermination hearing. Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972) (citing Boddie v. Connecticut, 401 U.S. 371, 379 (1971)). For a further discussion of limitations upon the necessity of a pretermination hearing, see supra note 28 and accompanying text.
199. McDaniels, 59 F.3d at 456. For a further discussion of Federici's sexual harassment claims, see supra note 113 and accompanying text.
200. See McDaniels, 59 F.3d at 461 (Aldisert, J., dissenting) ("Fundamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause."). For a further discussion of the dissent's rationale, see supra notes 180-87 and accompanying text.
201. McDaniels, 59 F.3d at 458 (citing Morton v. Beyer, 822 F.2d 364 (3d Cir. 1987)). For a further discussion of the facts and holding of Morton, see supra notes 76-78 and accompanying text. For a further discussion of the dissent's reliance upon Morton, see supra notes 184-87 and accompanying text.
202. See McDaniels, 59 F.3d at 452-53, 458 ("[Morton] is completely distinguishable from this case."); Morton, 822 F.2d at 366. In holding that the administrator
NOTE

that the *Loudermill* due process requirements must be carefully viewed in a specific context and balanced with the competing interests involved.\footnote{203}{The Third Circuit could have strengthened its opinion by using recent First and Tenth Circuit opinions involving the procedural due process rights of tenured professors.\footnote{204}{For example, in *Cotnoir v. University of Maine System*,\footnote{205}{the First Circuit held that a university violated a tenured professor’s due process rights by neglecting to notify the professor of its plan to terminate his employment.\footnote{206}{The Third Circuit could have utilized this holding to contrast the adequacy of the notice given to McDaniels at the pretermination hearing.\footnote{207}{In addition, the Third Circuit could have used circuit court decisions involving tenured professors to diffuse McDaniels’s claim that tenured professors deserve more due process protection than the “run-of-the-mill, *Loudermill*-type employee.”\footnote{208}{Although in *Cotnoir* and *Calhoun* the First and Tenth Circuits respectively found that a college violated a tenured professor’s due process rights, neither circuit based such a finding upon an amplified *Loudermill* standard.\footnote{209}{V. IMPACT

The Third Circuit’s interpretation of the *Loudermill* requirements for upholding procedural due process rights provided helpful guidance within the Third Circuit in dealing with the termination of tenured profes-

violated Morton’s due process rights, the Third Circuit stated that Morton’s hearing was “in no way comen[su]rate with the gravity of the sanction” to be imposed on him. *Id.* at 368 (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547 (1985)).\footnote{203}{For a statement of the competing interests in *McDaniels*, see supra note 154.\footnote{204}{For a list of cases dealing specifically with procedures involved in terminating the employment of tenured professors, see supra notes 99-106 and accompanying text. The *McDaniels* court considered, however, a Tenth Circuit case with facts very similar to *McDaniels*, in which the employer did not violate a tenured employee’s procedural due process rights because he was not terminated at his pretermination meeting, and the employer granted the employee ten days to respond. *Derstein v. Kansas*, 915 F.2d 1410, 1413 (10th Cir. 1990). For a further discussion of *Derstein*, see supra notes 81-83 and accompanying text.\footnote{205}{35 F.3d 6 (1st Cir. 1994).\footnote{206}{*Id.* at 11. For a further discussion of the facts of *Cotnoir*, see supra notes 101-03 and accompanying text.\footnote{207}{See *McDaniels*, 59 F.3d at 451. At the beginning of the pretermination hearing, DCCC told McDaniels about Federici’s allegations and about the possibility of his termination. *Id.*\footnote{208}{See *id.* at 455. For a further discussion of McDaniels’s claim to heightened due process protections, see supra notes 147-48 and accompanying text. For a further discussion of the Third Circuit’s rebuttal to this claim, see supra notes 148-54 and accompanying text.\footnote{209}{For a discussion of the facts of *Cotnoir*, see supra notes 101-03 and accompanying text. For a discussion of the facts of *Calhoun*, see supra notes 105-06 and accompanying text.}}
sors' employment. In holding that due process does not require an impartial decision-maker at a pretermination hearing, the Third Circuit expanded the realm of acceptability under *Loudermill*. This expanded concept of what constitutes due process, however, extends far beyond the scope of tenured professors. As the Third Circuit determined that the termination of a tenured professor does not require a heightened *Loudermill* approach, *McDaniels* will influence the termination procedures of all public employees with a property interest in continued employment.

Moreover, *McDaniels* reinforces an employer's duty to balance competing interests when deciding what termination procedures are appropriate. Consequently, in view of the employer's flexibility in making this determination, *McDaniels* will likely restrict tenured professors and other public employees from appealing employer decisions to the courts.

Finally, despite the employer's balancing task, the *McDaniels* decision provides public employers and employees with a reminder of their mutual

210. See Howard, supra note 7, at 1125-29 (discussing impact of *Loudermill*). In the *Loudermill* majority opinion, Justice White failed to consider other issues surrounding the hearing, including whether a discharged employee has a right to a "neutral decision maker; to present evidence and witnesses, and to confront and cross-examine evidence and witnesses used by the opposition before the decisionmaker; the right to have an attorney make the presentation; a decision based on the record; and a statement of the reasons for the decision." Id. at 1127 (citation omitted). On the contrary, in view of those issues that the Third Circuit expounded upon in *McDaniels*, the court did not overturn any of its prior cases dealing with procedural due process rights of public employees. For a further discussion of Third Circuit cases involving public employees, see supra notes 70-79 and accompanying text.

211. See *McDaniels*, 59 F.3d at 460. The court limited this dismissal of "excessive pretermination precaution" to instances where the state provides a neutral tribunal at the post-termination stage that can address charges of improper motives. Id.

212. See id. at 458 (discussing employees' general property rights in continued employment). For a discussion of the early expansion of due process and property rights, see supra notes 8 & 21.

213. See *McDaniels*, 59 F.3d at 455-56 (dismissing *McDaniels's* claim that college professors deserve more due process than "run-of-the-mill, *Loudermill*-type employees"). For a more detailed discussion of *McDaniels's* claim to heightened due process, see supra notes 147-48 and accompanying text.

214. See *McDaniels*, 59 F.3d at 455-56 (discussing necessity of balancing competing interests); see also McCre, supra note 43, at 38-39 (discussing employers' termination and disciplinary procedures). In certain emergency situations, an employer may balance the interests at hand and may determine that a pretermination hearing is not appropriate. Id. In addition, employers are accorded a certain measure of leniency in that the notice they give may be written or oral. Id.

215. See generally *McDaniels*, 59 F.3d at 462-63 (Aldisert, J., dissenting) (arguing insufficiency of *McDaniels's* post-termination rights). Because of the availability of post-termination remedies and an employer's ability to balance competing interests, employers may, inadvertently or not, deny employees adequate pretermination proceedings. Thus, employers may restrict employees' due process to the post-termination hearing stage.
obligations during termination proceedings. By following the Third Circuit's approach to these obligations, other courts can insure that if public entities retain the ability to use proper discretion in employment decisions, the roots of procedural due process will remain firmly grounded.

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216. See generally McCrea, supra note 43, at 38. Public employers should review and become familiar with their termination and disciplinary procedures to ensure they grant adequate pretermination due process. Id. Similarly, public employees must be aware of the importance of responding to pretermination proceedings and of utilizing all post-termination remedies available. Id. For a more detailed view of the consequences of failing to utilize post-termination proceedings, see supra note 98.

217. See generally Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (stating that right to due process is guaranteed by Constitution). For a further discussion of the foundations and purposes of the Due Process Clause, see supra notes 1-4 and accompanying text.
With great admiration for his commitment to the Villanova University School of Law, the editors of the *Villanova Law Review* dedicate this issue to its first Editor-in-Chief, Dean Robert P. Garbarino, as he begins his retirement. Since he first entered the School of Law as a member of the Class of 1956, Dean Garbarino has been a dedicated and vibrant member of the Villanova community. He has touched the lives of many, particularly those of the hundreds of students who sought his wisdom and guidance during his tenure as Associate Dean for Administration. Those who do not know him personally are undoubtedly familiar with his perpetual smile and good humor. The following pages contain sentiments expressed by the friends and colleagues who know him best and truly understand the depth of his character and the extent of his commitment to the School of Law. These tributes serve as a brief chronological summary of Dean Garbarino's career accomplishments. As editors, we thank Dean Garbarino for the instrumental role he played in the creation and development of the *Villanova Law Review*. As students, we thank him for his years of service, wisdom and friendship.