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"What's Due Process Got To Do With It":
The True Danger of "Robo Signings" and "Rocket Dockets"

The recent reports of "Robo Signing" of affidavits where evidentiary proof intended for foreclosure proceedings is prepared under oath without scrutinizing the evidence that is being attested to or "Rocket Dockets" where foreclosure cases are rushed through the courts with minimal scrutiny are disturbing and should be closely monitored – but not for the reason that one might think. The chief concern raised by these cases is not the ultimate substantive result. There is no question that in the vast majority of the cases the debt is owed to the lender, the lender will be entitled to the collateral and should, in fact, be able to obtain control of the collateral with reasonable dispatch. Nor need one be concerned with the existing procedure for the foreclosing of mortgages. Even the procedures for non-judicial foreclosure have been well-tailored to harmonize the requirements for swift action with the constitutional imperative of procedural due process. *See e.g.*, *Turner vs. Blackburn*, 389 F. Supp. 1258 (W.D.N.C. 1975)

The chief concern raised by the above practices is no less than the integrity of the judicial system. To state that the money is clearly owed by the borrower and that subsequent procedures to enforce borrower's obligations to lenders can therefore be loosened ignores the profound risk to the social fabric, ultimately social order, that such a lax attitude will create. Just as one may be justly concerned about the consequences of the recent severe recession (of which the housing bubble is a major part) on the future economic standing of the United States, one should be similarly concerned as to whether the United States can continue to function as a world leader, both economically and otherwise, with a compromised and opaque judicial system.

So what does due process have to do with it? In essence, in the English law system, due process is the mediating concept which prevents the sovereign from declaring itself a law unto itself and depriving its subjects of freedom and property. Thus, Clause 39 of the 1297 Magna Carta, which is still valid English law, states:

> No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

English law, as subsequently influenced by the monarchial tradition, was not necessarily hospitable to the full flowering of due process of law as a core jurisprudential concept and it took force of arms and a revolution on new soil to firmly establish the concept in the United States Constitutional Convention. *See* U.S. Const., amend V, amend XIV. *See generally*, John V. Orth, Due Process of Law, A Brief History (University Press of Kansas 2003). It may be said that procedural due process, at minimum, is embedded in the United States Constitution and has become an immutable concept of American jurisprudence. The doctrine of judicial review established in the seminal case of *Marbury vs.*

Madison, 5 U.S. 137 (1 Cranch) (1803), further encroached on the power of the legislative and executive branches to curtail these hard won freedoms.

The quotation to the magisterial language of the Magna Carta and the brief history lesson are designed to remind us of what is at stake when participants play fast and loose with hard won procedural protections. Procedural due process is nothing less than one of the bedrock principles of our society. To give short shrift to procedural requirements in foreclosure proceedings is to erode the constitutional doctrine of procedural due process upon which these procedures are based. To erode this doctrine brings us one step closer to lawlessness and either tyranny, anarchy, or both.

Thus, Robo Signing and Rocket Dockets have everything "to do" with due process in that these practices encourage a lack of adherence to and respect for one of our most basic societal protections. The issue being raised in this article is not that the legal system has failed to establish a procedure to protect a borrower, but that the alleged unwillingness to administer these procedures puts the fabric of society at risk. To paraphrase the popular song referenced in the title of this article, due process should not be treated as the equivalent of a "second-hand emotion." As stated in *Louk vs. Haynes*, "[d]ue process requires that the appearance of justice be satisfied." 159 W.Va. 482, 499, 223 S.E. 2d 780, 791 (1976) (holding that a judge's failure to perform his duty in recusing himself where a personal conflict existed was a denial of plaintiffs due process rights). "A fair trial in a fair tribunal is a basic requirement of due process." *Id.* (citing *Tumey vs. Ohio*, 273 U.S. 510, 532, 47 S. Ct. 437, 444, 71 L.Ed. 749 (1927)).

In times of crisis it is very tempting to subvert our hard-won freedom and reach for easy solutions which bypass well established procedural norms. Ironically, it would appear that the sloppy procedures allegedly being used to administer foreclosure cases mirror the sloppy underwriting that created the foreclosure crisis. Ignoring procedural requirements embarks on a slippery slope which risks not only the unique liberties we enjoy as Americans but risks our economic system falling into chaos and illiquidity because our superior and world changing capitalist free market system owes much to the predictability, transparency and integrity of our legal institutions. *See e.g.*, Hernando de Soto, The Mystery of Capital: Why Capitalization Triumphed in the West and Fails Everywhere Else (Basic Books 2000). Thus, to encourage shoddy and unprincipled adjudications in the foreclosure arena in the name of expediency surely will have a devastating effect (with broad unintended consequences) on the ability of our nation to heal itself from the economic calamity that has befallen it. It will also compromise one of our key competitive advantages: the persistent dynamism of free market capitalism. The recent recriminations in the press and the concerted actions of the State Attorneys General and other governmental agencies are to be welcomed to the extent they help right the constitutional ship. On the other hand, one sincerely hopes that these enforcement actions are not used as populist fodder to denigrate and dismantle our financial system. Throwing the baby out with the bath water and dismantling the financial system is not an option. We do not have the luxury of mishandling this issue. The economic stakes are too high and we now have international competition that will immediately seize on our missteps.

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