

## The Breakfast Club

### Constitutional Minute for 21 March 2023

#### Right #9: Right to be Secure in Your Property

"Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can. These are evident branches of, rather than deductions from, the duty of self-preservation, commonly called the first law of nature." Samuel Adams<sup>i</sup>

"The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If "Thou shalt not covet," and "Thou shalt not steal," were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free." John Adams<sup>ii</sup>

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,..." Fourth Amendment

Property, the right to acquire it, privately own it and enjoy its use, was central to the Founder's worldview. Some went so far as to suggest the right to property was central to the enjoyment of all other rights. Without the right to purchase or rent an abode, how do you even begin to enjoy life itself?

James Madison, in a 1792 essay [published](#) in his Princeton classmate's Philadelphia newspaper, identified the entirety of our rights as our "property."

"As a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions." <sup>iii</sup>

While protection of property was not mentioned in the English Bill of Rights of 1689, the right can trace its lineage at least to 1215 and Magna Carta:

"39. No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."<sup>iv</sup>

John Locke thought that the "great and chief end... of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property."<sup>v</sup>

I'll cover the search of your property next week; this week let's examine when it is proper for government to legitimately seize or take your property?

One very controversial policy concerning the seizure of property is called [Civil Asset Forfeiture](#) (CAF).<sup>vi</sup> Civil Asset Forfeiture allows the government, at federal down to local level, to file a civil suit against the *property* they believe was used in or resulted from a crime. Weapons, vehicles, cash, houses, almost anything you can imagine can be and probably has been seized through this program. Civil actions are handled differently (and separately) than criminal actions and rules of evidence are different. Your

property can be seized without ever bringing criminal charges against you. If a charged individual is found innocent of the alleged crime, the individual must still petition the court for the return of their seized property, an expensive and lengthy process. In 2014, the federal government seized more property through CAF than citizens lost through burglary. Many innocent citizens have been caught up in CAF.

At the federal level, the Supreme Court has upheld the principle of civil asset forfeiture but has nevertheless put some curbs on it. The Court ruled in [Austin v. United States \(1993\)](#) that civil forfeiture, can be treated as a punitive action. If so, it would be considered a fine and come under the Excessive Fines clause of the Eighth Amendment. In [United States v. Ursery](#), the court ruled that charging the person under criminal law and his property under civil law did not constitute double jeopardy. In [Timbs v. Indiana \(2019\)](#), the Supreme Court incorporated the Excessive Fines clause against the states. In [Mapp v. Ohio \(1961\)](#), the Court incorporated the entirety of the Fourth Amendment against the states.

You should realize by now that the Fourth Amendment only protects you against **warrantless** seizure of property. If police can convince a magistrate or judge to sign a warrant, *any* property can be seized. But police can also seize property on your person while you are being arrested if the arrest is conducted with probable cause of your involvement in a crime. "Seizure" of property occurs whenever there is "meaningful interference with an individual's possessory interests in that property."<sup>vii</sup>

What about seizing phone records? In [ACLU v. Clapper](#), a U.S. *district* court ruled that gathering of global telephone data is necessary to detect potential terrorist attacks, and therefore acceptable, but only if *everyone's* calls are included. The court concluded that the telephone data did not belong to individual users, but to the telephone companies themselves.

We will encounter the concept of property again in the Fifth Amendment.

Some of you will have noticed by now that I have not addressed unreasonable search, which is also part of the 4<sup>th</sup> Amendment, nor the question of what is considered property. We'll address both next week.

For further reading:

[Cornerstone of Liberty, Property Rights in the 21st-Century America, by Timothy Sandefur](#), 2006.

[Property and Freedom, by Richard Pipes](#), 1999.

Next week: Right #10: The Right to be Secure Against Unreasonable Searches

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<sup>i</sup> Samuel Adams, The Rights of the Colonists, The Report of the Committee of Correspondence to the Boston Town Meeting, Nov. 20, 1772.

<sup>ii</sup> John Adams, A Defence of the Constitutions of Government of the United States of America, 15 January 1787.

<sup>iii</sup> James Madison, On Property, found at: <https://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html>.

<sup>iv</sup> <https://studenthandouts.com/texts/historical-documents/magna-carta-1215.htm>.

<sup>v</sup> John Locke, Second Treatise on Government,

<sup>vi</sup> See <https://www.heritage.org/research/reports/2014/03/civil-asset-forfeiture-7-things-you-should-know>.

<sup>vii</sup> United States v. Jacobsen, 466 U.S. 109 (1984), p. 113.