Bound By Oath | Season 3, Episode 10 | Special Weapons and Tactics

John: Hello and welcome to Episode 10 of Season 3 of Bound By Oath. I'm John Ross from the Institute for Justice's Center for Engagement. Thus far into the season, we have talked about the government's power to regulate property and its power to take property. On this episode, we'll talk about what happens when the government damages property. There are all kinds of ways the government causes damage to private property, and for all kinds of reasons. Sometimes it has to do with fire, sometimes flood. On this episode, we'll range far and wide in the caselaw and back into history; we'll talk about larger principles; but our focus is going to be on a particular kind of damage that's of relatively recent vintage: Damage caused by SWAT raids.

> **Glenpool, Okla. wrong house raid**: Police! Search warrant. Go, go, go, go, go. Get on the ground! On the ground!

John: SWAT stands for special weapons and tactics. At IJ, we litigate cases where SWAT teams made unacceptable and reckless mistakes. At this moment, we are asking the Supreme Court to take up not one, but two cases where officers raided the wrong house. Those cases involve issues we talked about last season like qualified immunity and sovereign immunity and whether the officers' conduct was reasonable. And we will talk briefly about those cases in just a minute. However, the focus of the episode will be on an entirely different type of claim: Cases where officers were at the right address and everything went according to plan, but an innocent person's property was damaged or destroyed in the process.

> **Jake Tapper, CNN**: During an hours-long standoff, a SWAT team fired more than 30 rounds of tear gas.

> **Local news**: [anchor] The house was so badly damaged it had to be demolished. … [property owner] The insurance company said it was an act of the government – that they would not pay for it.

John: As it turns out, for the most part property owners cannot buy insurance for damage caused by the government. It's simply not a product that's on the market in many places. On this episode, we'll ask whether forcing innocent property owners to bear the cost of enforcing the law violates the Fifth Amendment.

Jeffrey Redfern: The Fifth Amendment says that private property can't be taken for public use without just compensation. But right from the very beginning, courts have understood that taking doesn't just mean that the government literally takes title and keeps the property. It also encompasses actions that destroy private property.

John: Also on this episode, we'll do one of our very favorite things. We'll look at state constitutions, 27 of which have something called a damagings clause that you won't find in the federal Constitution and that were the result of a major movement in state constitutional lawmaking that's mostly been forgotten about today.

Molly Brady: The damagings clauses arose in the late 19th century as a way to provide protection for property that was devalued by public works, but not directly appropriated.

BBO Montage

> **Glenpool, Okla. wrong house raid**: Police! Search warrant. Go, go, go, go, go. Get on the ground! On the ground! [Family screaming and crying]

Patrick Jaicomo: We expect the police – before they launch an extremely dangerous and violent raid – to take all the necessary precautions to make sure that they're not raiding the wrong house.

John: That's my colleague Patrick Jaicomo. Patrick and the team that works on immunity and accountability issues here at IJ are currently representing the victims of wrong-house raids in several different cases around the country, including two cases that we are asking the Supreme Court to take up. The first of those involves the Martin family in Atlanta.

Patrick Jaicomo: The whole family awoke to the explosion of the flashbang grenade. And the family thought initially that they were being attacked by criminals. You have a seven-year-old who's trapped away from his mother in his room, hiding under his sheets. And then you have a terrified mother and her partner pulling her into a walk-in closet to barricade themselves from whatever is coming.

John: The agents were at the wrong address. The house they meant to raid was five houses away on the other side of the street.

Patrick Jaicomo: Ultimately what the FBI agent who led the team to the wrong house blamed was his personal GPS device. He said, Oh, I typed in one address, and it took me to another. And the plaintiffs said, Okay, well, give us the GPS device. We want to see if we can recreate that issue. And he said, Oh, actually, I threw it away.

John: The legal claims in the case involve the Federal Tort Claims Act, known as the FTCA, which we talked about on Season 2. Congress enacted the FTCA to waive the federal

government's sovereign immunity and allow claims against it for certain kinds of negligent or wrongful conduct by federal employees. In the 1970s, after a series of botched raids by federal narcotics agents, Congress specifically amended the Act to ensure that the innocent victims of such raids would have a cause of action.

> **Senate report**: The subcommittee heard testimony on two Collinsville, Illinois drug raids, which were made in error on the homes of two innocent families. … [The] families testified that they were terrorized by gun-wielding unshaven, shabbily dressed intruders who shouted obscenities, destroyed property and threatened their very lives.

John: Nevertheless, over the years courts have chipped away at the FTCA to the point where, earlier this year, the U.S. Court of Appeals for the Eleventh Circuit ruled that it does not provide a cause of action to the Martin's. The other wrong-door raid case that we're asking the Supreme Court to take up comes from Texas.

Patrick Jaicomo: The Waxahachie Police Department SWAT team had a warrant for a specific address. And the thing that's really remarkable is that the SWAT team lined up at the house. They're ready to go in, and someone realized they were at the wrong house. So in the first instance, they went to the wrong house, and then, rather than take a step back and regroup, the SWAT commander just picked the house to the left and said, Let's raid that house instead. And guess what, it was also the wrong house.

John: The SWAT team raided the house two doors down from their intended target. And it should have been immediately obvious they were at the wrong address. Our clients, the Jimerson family, have a very prominent wheelchair ramp leading to their front door. The target

house did not have a ramp. Also, the target house had a garage, which officers suspected was being used as a meth lab.

Patrick Jaicomo: And they actually had a separate detachment of officers who were supposed to go to this large garage and simultaneously raid it. But the house that they accidentally raided, the house of Karen Jimerson and her family, didn't even have a garage.

John: The family includes three children who were showered in glass from broken windows and dragged out of their beds at gunpoint. And everyone recognizes that the officer who was in charge messed up big time. Here's his lawyer at oral argument.

> **Lawyer for police commander**: I'm not going to stand before this court in any way at all and say mistakes weren't made that night. There were mistakes made that night. And we stand by the fact that that's certainly something we have to live with. But we have to look at … what would a reasonable officer have done under the circumstances. … Again this is in the dead of night. This is dark. Lieutenant Lewis didn't just send them into another house either. He looks, and he says in his affidavit – again, undisputed – I attempted to look at the house number on the house. Due to the glare of the light on the post, I could not see it. Instead of saying 573 it should have been 593.

John: Last year, the Fifth Circuit granted qualified immunity to Lieutenant Lewis. It said he'd at least made an effort, though admittedly a deficient one, to identify the right house, and that is all the law requires. So stay tuned. If the Court takes either of those cases up, we'll be sure to let you know. In the meantime, what about cases where officers were at the right address? Cases where the claim is not that officers were unreasonable or negligent but simply that they damaged an innocent person's property – damage that somebody has to pay for.

RBG: This case concerns the Takings Clause of the Constitution.

Justice Kennedy: The Takings Clause of the Fifth Amendment.

Assistant Solicitor General: This is a taking case.

Lawyer for McKinney: the Fifth Amendment takings clause.

Lawyer for YMCA: This is an action for just compensation under the Fifth Amendment to the United States Constitution.

Assistant Solicitor General: The purpose of the just compensation clause is to address the situation where the Government has taken lawful action that benefits the entire community in a way that it's unfair to visit that cost on a particular individual.

John: In 2020, police officers in McKinney, Texas, which is a suburb of Dallas, took lawful action to benefit the entire community. And in the process, they destroyed Vicki Baker's house.

Vicki Baker: I can't really explain the devastation that a person feels, and I guess it's because of the injustice.

John: That's Vicki, who was 79 years old and in the process of selling her house in McKinney and moving to Montana. She had just undergone chemotherapy, was in remission, and was ready to retire. But then a fugitive showed up at her doorstep with a 15-year-old girl.

Vicki Baker: He wanted to come in with the young girl, and he wanted a room for the night, and he wanted to basically hide his car in our garage.

John: Vicki knew who he was; he had worked as a handyman at the house, although she hadn't seen him in over a year. At the time, she was in Montana but her daughter, Deanna, was at the

home. And Deanna knew from news reports that he was running from the law and had successfully evaded police after a dangerous high-speed chase. She let him in and then promptly alerted the authorities.

Vicki Baker: When we when we spoke with the police, they kept promising me they were not going to damage the home. They said that was not what they were about.

John: Officers surrounded the house and tried to persuade him to come out.

Vicki Baker: This was a seven-hour standoff, seven hours. So they did try with their megaphones. They tried with many different things. The girl came out on her own three hours into the standoff. And after that, when they were using the megaphone asking him to come out now, he told them there was no way he was coming out alive. And they waited a few more hours, then they breached the home with tear gas canisters. They went through, broke through six windows. They broke through my front door. They blew off the garage door, and they used a Humvee to plow down my back fence.

John: At which point, officers discovered he had taken his own life.

Vicki Baker: When it was all over with, the following day, my daughter Deanna, went to the home, and she videoed the interior, and I got to see all the damage. She was only in for one minute when she came out. She was in extreme distress. And she was choking. The tear gas leaves a horrible residue on everything.

[Deanna breathing heavily]

Vicki Baker: The house was totally unlivable. It was toxic. All my floors were destroyed because this residue is very thick and very sticky You have to remove the drywall and the insulation and replace that. We did call out a hazmat team to neutralize as much as they could. They had to throw all the furniture out, even the refrigerator, all the coffee makers, toasters, dishes. Everything went.

John: Vicki's insurance company paid for some of the cleanup. But, citing an exclusion in her policy for acts of government, it declined to pay for any new materials or repairs, leaving her with a gutted house and around $60,000 in costs, which Vicki had to pay for out of her retirement accounts. When she turned to the city for help, she was told that McKinney never pays when law enforcement damages property.

Vicki Baker: I waited a couple of weeks and actually called back and called back and spoke with their insurance department, and their insurance actually told me – laughed at – I mean, she was very rude. She laughed at me and said, you know, you can file whatever you want, but there is no recovery. There is nothing that can be done.

John: So Vicki sued. And after several years of litigation, on the eve of trial, the City did actually finally offer to compensate her and settle the case. But she refused. By that time, it was more important for her to have precedent on the books protecting everyone, not just her. People like IJ client Carlos Pena, whose print shop in Los Angeles was destroyed by a SWAT team.

> **Jake Tapper, CNN**: It took a lifetime for Carlos Pena to realize his American Dream and build his business, a print shop. It took mere hours for a LA SWAT team to destroy it through no fault of Pena's. … During an hours-long standoff, a SWAT team fired more than 30 rounds of tear gas. … The fugitive got away, leaving behind a disaster caused

> by the cops with serious damage to all Pena's equipment. And the building. … Pena's inventory ruined. His equipment unusable.

John: Insurance did not cover the bill. Carlos had to take out loans to purchase older, secondhand equipment. And he had to move his shop into his garage at home, where it still is today over two years later. His wife, who had retired, had to go back to work.

Carlos Pena: It's not fair that a citizen like me that has never been in trouble, always paid my taxes on time, and you know I've been a hard worker, fulfilling the American Dream. I'm filing this lawsuit not only because of me but because this shouldn't happen to anybody.

John: At IJ, we are representing both Carlos and Vicki as well as other property owners in similar straits across the country. And our claim is simple: The Fifth Amendment says that the government must pay just compensation when it takes private property for a public use. And the Supreme Court says that damaging property is the same thing as taking property.

Jeffrey Redfern: The Fifth Amendment says that private property can't be taken for public use without just compensation. But right from the very beginning, courts have understood that taking doesn't just mean that the government literally takes title and keeps the property. It also encompasses actions that destroy private property.

John: That's my colleague Jeffrey Redfern, who is a litigator at the Institute for Justice.

Jeffrey Redfern: For over 150 years, the Supreme Court has held that the takings clause is not limited to property that is just literally taken. They said that would be a perversion of this legal principle.

John: The principle that damage is a taking goes back further than 150 years, and we'll get that. But the issue reached the Supreme Court for the first time in 1872, and that's where we'll start. With the case of *Pumpelly v. Green Bay & Mississippi Canal Company*.

Jeffrey Redfern: In *Pumpelly*, there was a private company that had been authorized by a legislature to construct a dam, and the dam caused a lot of flooding on private property.

John: The Wisconsin legislature authorized the canal company to fix up and add to a dam in order to improve navigation on the Fox River. Which caused flooding on the majority of George Pumpelly's 640-acre property. According to Pumpelly's declaration, the flooding was so violent that it tore out over 500 trees by the roots. It ruined crops. It washed away his a thousand tons of hay and, when the water receded, left sand and other debris all over. All of which served to quote: "annoy and incommode him in the use, possession, and enjoyment, of the said last-mentioned lands and premises."[1] The defendants, on the other hand, said: we're not using eminent domain. We're not trying to take ownership of the property. And therefore there's no taking and no compensation is owed.

Jeffrey Redfern: And the Supreme Court said, Look, this isn't a taking in the most narrow, literal sense of the term. But clearly this property has been taken in the sense that it's been inundated. This was always considered compensable at common law.

John: Quote:

[1] Pumpelly declaration page 4.

> ***Pumpelly***: It would be a very curious and unsatisfactory result, if … it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, … without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law.

John: Reading the word “take” expansively to include “damage” is very much consistent with how the Supreme Court interprets other rights in the Bill of Rights. For instance, as we talked about on Episode 1, the freedom of speech includes all kinds of expression, not just literal talking. Anyway, after the Supreme Court’s ruling, Pumpelly’s claims went back to state court, where a Wisconsin jury determined that 1) the dam was in fact the cause of the flooding – it wasn’t a natural occurrence – and 2) that the federal government, which by then had taken ownership of the dam, owed $285,000 in inflation-adjusted dollars.

Jeffrey Redfern: So you might say, *Pumpelly*, this is a really old 19th century case. Aren't there a lot of these old cases that, even if they haven't been overruled, maybe they're not exactly good law now. Well, the Supreme Court just keeps citing *Pumpelly* over and over. In the 1980s, it said that we endorse *Pumpelly* “unhesitatingly.” And then as recently as about a decade ago, in a case called *Arkansas Game & Fish*, the Supreme Court cited it again.

John: *Arkansas Game & Fish Commission v. United States*, which the Supreme Court decided in 2012, is very nearly the same case as *Pumpelly*.

Jeffrey Redfern: And what basically happened was that some farmers asked the Army Corps of Engineer to change their schedule for releasing water from a dam on the Black River.

John: And the federal government obliged. Which was good for the farmers because it kept their properties dry for a longer period during the growing season and allowed them to harvest more crops. But the water had to go somewhere, and where it wound up – every summer for seven years – was a hundred miles downstream onto a wildlife management and recreation area owned and managed by the State of Arkansas.

Jeffrey Redfern: This necessitated really costly reclamation measures. It was millions and millions in damage, and Arkansas sued the federal government and said, Look, you need to compensate us for this damage.

John: State officials repeatedly pleaded with the Army Corps of Engineers to stop. Here's their lawyer, arguing at the Supreme Court.

> **Lawyer for commission**: And the commission could not get their attention to stop it until our director … brought the appraisal to the Corps of Engineers' office … and placed that report that said over $4 million in valuable timber is gone, please stop.

John: The federal government, on the other hand, denied that the Corps had caused the flooding. But, in the alternative, even if it had, they argued that any damage was just in the nature of owning property along a river.

> **Justice Scalia**: The issue is who is going to pay for that wonderful benefit to these farmers. Should it be everybody, so that the government pays, and all of us pay through

taxes, or should it be this -- this particular sorry landowner who happens to lose all his trees?

Assistant SG: It is in the nature …

Justice Scalia: … that doesn't seem to me particularly fair.

Assistant SG: It is in the nature of living along a river. Riparian ownership carries with it certain risks and uncertainties ….

Justice Scalia: I don't think one of those risks has to be the government's going to make you pay for protecting somebody else.

John: And the federal government argued that if it could be held liable for what happens downstream of dam then it would be exposed to massive liability. A flood of liability.

Assistant SG: The Corps requires a broad ambit of discretion in managing a river over time, and it has to be able to change to update circumstances without exposing the United States to massive liability.

John: But the Supreme Court said unanimously, so be it.

Jeffrey Redfern: It was a unanimous decision where they said if you physically invade someone's property and cause damage, that's going to be a taking.

John: In its opinion, the Court did include some caveats and qualifications. It said, for instance, that the damage has to be intentional and foreseeable. It can't be an accident or the result of mere negligence. Which can be really hard to prove. You have to show that not only did the government cause the flooding, but that it knew or should have known it was causing the flooding. But on remand, a trial court found that indeed the property owners had proved their

case and awarded just compensation. Which was upheld on appeal. In any event, none of the caveats and qualifications impact cases about takings resulting from SWAT raids.

Jeffrey Redfern: None of those concerns are ever going to be an issue in a SWAT case like Vicki's. Obviously the police know when they're launching tear gas canisters at a house, it's going to damage the house. So there isn't going to be any issue with intentionality or foreseeability.

John: Another thing the Supreme Court said in *Arkansas Game & Fish* was that nothing in its holding was limited to flooding cases. Quote: "There is [] no solid grounding in precedent for setting flooding apart from all other government intrusions on property." End quote. Which is important because lawyers for the government really want to limit the principle that damage can be a taking to flooding cases. For example, this is from oral argument in a case that we're litigating in Tennessee:

> **Lawyer for Rutherford County**: Flooding cases are different because there is a lot of causation, complex causation issues. … But I'm not aware of any case where a flooding was done to prevent the death of people, and that's what we're talking about here. … We're in the arena of having split-seconds decisions having to be made by law enforcement to prevent the death of people.
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> **CA6 judge**: So, I mean, I think their point would be, those are all great arguments for why the conduct is lawful, … and all the takings clause says is that for lawful conduct where you take somebody's property, you have to pay compensation.
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> **Lawyer for Rutherford County**: And as your honor pointed out earlier, it doesn't say anything about damage. … So I think that when we're talking about that, it would be extending the text of the Constitution.

Jeffrey Redfern: If you just follow *Pumpelly*, you follow *Arkansas Game & Fish* that's enough to decide these cases. Unfortunately, the lower courts are kind of doing their own thing at this point, so we really do need the Supreme Court to step in.

John: In a few minutes, we're going to dive into a whole bunch of modern and historic cases as about damage in a variety of contexts. But before we do that, there is another big Supreme Court case that matters very much to our argument. It's a case that I have been metaphorically dying to tell you about all season. It's one that is known to every property scholar and litigator. An opinion of towering importance, deep eloquence, and obvious legal and moral correctness. The case of *Armstrong v. United States* from 1960.

> **Chief Justice Warren**: Number 270. Cecil W. Armstrong et al., Petitioners, versus United States.
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> **Lawyer for petitioners**: Mr. Chief Justice and may it please the Court. The action in the Court of Claims was brought by the 27 petitioners, all of whom were suppliers and materialmen to a government contractor, the Rice Shipbuilding Corporation, to recover just compensation.

John: The case involved a group of subcontractors who had furnished materials and supplies to the Rice Shipbuilding Corporation in Maine. Rice had a contract to build boats for the Navy. However, before they could be completed, Rice went bankrupt. At which point, the Navy took possession of the unfinished products and materials.

> **Lawyer for petitioners**: Now, in acquiring title, the government acted in accordance with Section 11(D) of the contract. … This clause provided that, in the event of a default

> termination, the government had an option to acquire title to any completed supplies and any uncompleted supplies.

John: The Navy had paid Rice. Rice had not paid the subcontractors. And the subcontractors had liens on the supplies that were enforceable under state law.

> **Lawyer for petitioners**: [T]heir property rights, that is the right to enforce their liens against the contractor's property, were taken from them….

John: And the question was, on whom should the loss fall: the Navy or the 27 subcontractors? The government said: definitely not on us.

> **Lawyer for feds**: Now, you have to pay us again because Rice didn't pay us. And that's about what this case is I believe. We're being asked, really, to pay first $141,000 to Rice … We had to pay a lot more than that to get the boats finished. And now we're being asked to pay these or any other people who dealt with Rice, subsequent to the time we entered the contract, and whom Rice didn't pay.

John: I will concede that a dispute over Navy procurement might not at first excite the same passion that other major civil rights cases in the constitutional canon might. And yet, the Supreme Court's holding in *Armstrong v. United States* is right up there with the great, liberty-protecting opinions.

Jeffrey Redfern: It's the first case in the 20th century that really articulated an underlying theory of the takings clause. And it's cited over and over again every time a takings case comes before the Supreme Court.

John: And that underlying theory, articulated by Justice Hugo Black, is this, quote:

> ***Armstrong v. U.S.***: The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole.

John: Which is exactly the principle we're asking courts to apply in the SWAT takings cases. Taking a fugitive into custody is a public benefit, and the public should pay. It's a principle that – as we'll see – dates way back. And it's what Justice Scalia was paraphrasing at the oral argument that we played moments earlier.

> **Justice Scalia**: The issue is who is going to pay for that wonderful benefit to these farmers. Should it be everybody, so that the government pays, and all of us pay through taxes, or should it be this -- this particular sorry landowner who happens to lose all his trees?

Jeffrey Redfern: It's a great touchstone for how to look at novel cases. If you keep your eye focused on this question, is one person alone being forced to bear the burden for advancing some sort of broader social good, that's a great theory of the takings clause. And it really gets at at what's fair about takings jurisprudence.

John: And just out of curiosity, I did ask around about the effect of the *Armstrong* ruling on the world of military procurement. And it's a bit of a mixed bag. As you might expect, the government reworked how it writes its contracts so that the kinds of liens at issue in the case

cannot attach. So the government is not in danger of having to pay twice, but subcontractors have to mitigate against risk using other measures.

Jeffrey Redfern: I don't think the strange facts of Armstrong make it less persuasive. If anything, I think they make it more persuasive. Because we're dealing with a contemporary commercial arrangement. And the Court is saying, Look, just because this is a new situation, doesn't mean we lose sight of what the takings clause is all about. Unfortunately, I don't think courts always follow the *Armstrong* advice. Lower courts will rule for the government against the unlucky property owner whose house or property was destroyed. And the court will say: “This seems really unfair, but there's nothing we can do about it.” And I think that if you are keeping *Armstrong* in mind, “this seems really unfair” is not really a sound sentence to include in the disposition of your takings decision.

John: For example, in a case decided by a federal appeals court in 2008, the government allowed pharmaceuticals that were being held as evidence in a criminal case to expire, destroying their value completely. The owner of the pharmaceuticals was a totally innocent third party. But the court said: no compensation. Quote:

> ***AmeriSource* ruling**: It is unfair that any one citizen or small group of citizens should have to bear alone the burden of the administration of a justice system that benefits us all. But the war memorials only a short distance from the Federal Circuit courthouse remind us that individuals have from time to time paid a dearer price for liberties we all enjoy.

John: The judge who wrote that served in the Army, so I guess he gets to invoke dead soldiers. But the thing about our men and women who fight wars to protect the Constitution is that they

are compensated. Anyway, just a few years later, in 2011, the U.S. Court of Appeals for the Seventh Circuit cited and adopted that reasoning and rejected a similar takings claim – in just two sentences. The case involved a landlord whose rental home was damaged by police during a murder investigation. If you are a true-crime aficionado, you will very likely recognize that home from the Netflix documentary, Making A Murderer.

[Making a murderer documentary promo.]

John: The Seventh Circuit ruled that the landlord was just quote “unlucky.” Similarly, the state of Washington’s Supreme Court denied a takings claim even though a homeowner had suffered a quote: “tragic loss.” Her home was the scene of murder that she had no part in. And police removed a load-bearing wall from the house as evidence, rendering the house uninhabitable. Here’s her lawyer arguing at oral argument.

> **Lawyer for Eggleston**: She doesn't have the money to fix this. She lives on $400 of Social Security income. She has no money, and she couldn't live there if they would let her, because there's no wall holding up the roof.

John: Police initially thought that there was blood on the wall. But that turned out not to be the case, and the wall was not ever used as evidence. By the time the case made it to the state supreme court, the police had held onto it for seven years. One of the arguments her lawyer made was that the government and society as a whole paid all kinds of expenses to investigate and prosecute the murder, including paying one expert more than the house was worth.

> **Lawyer for Eggleston**: The government paid Rod Englert more than Linda Eggleston's house was worth to do his criminal reconstruction, and he didn't have to give that for

> free. … He didn't have to bear that burden. And I don't see why, constitutionally, Linda Eggleston does.

John: Elsewhere, in the case of *Lech v. Greenwood Village*, Colorado, the U.S. Court of Appeals for the Tenth Circuit rejected a takings claim from an innocent homeowner like Vicki, whose house was blown up by a SWAT team after a fugitive barricaded himself inside. The government's lawyer argued that really the only thing the court needed to know to decide the case was that it was very important to capture the suspect.

> **Lawyer for Greenwood Village**: There is an emergency situation. … We have someone here who's trying to kill people. … The police go in and they have to make decisions that are life-and-death decisions.
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> **Judge Holmes**: I'm not second guessing that decision. I'm just saying that they made a decision they had to pay for it. … All of these takings cases, one can debate whether the government did a good thing. I mean, they had a public use. Wonderful. Pay for it.

John: And although the city got some pushback from the judges, ultimately the court decided that the cost of the raid would fall on the unlucky homeowner. Neither the Tenth Circuit, nor any of the other courts I just mentioned, reckoned with the Supreme Court's actual precedents on damage.

Jeffrey Redfern: None of these circuit court decisions engage really at all with all of these older cases saying that damage is a taking. They just skip over that.

John: Instead, what the courts held is that there is an exception to the takings clause. The so-called police powers exception. As we have talked about on past episodes, the police power

is the government's power to take action, as long it's a reasonable action, to protect the public welfare. The Tenth Circuit said it was reasonable to raid the house to protect the public, therefore no compensation. But that doesn't make any sense. Because in a takings case, it is presumed that the government has a good reason for what it's doing. It just has to pay.

Jeffrey Redfern: The bottom line is that this police power exception basically means that if the government has a good reason for taking your property, then it doesn't have to pay. That's a rationale that you just can't square with the entire premise of the takings clause. The whole idea is, if the government has a good reason to take your property, it still has to pay you for it.

John: And the result of collapsing those two distinct inquiries into one is doctrinal confusion. It requires courts to distinguish between damage that is for the public welfare or the public good and purportedly not compensable, and, on the other hand damage that's for public use, which is.

> **Judge Moritz**: An exercise of police power is for the public good, and we distinguish that from the public use.
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> **Lawyer for Greenwood Village**: They did not take the house for the use of the public. They took the house for the public welfare.
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> **Lawyer for Rutherford County**: And that's what we're talking about here, and why it is not a public use, and instead, it is for the public benefit.
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> **Lawyer for Tacoma**: I think it hinges on whether it's for the protection of the public or something that's just something to benefit the public. I think that's the key difference.

Washington SC judge: The argument that it is for the benefit of the public to seize evidence and preserve evidence for a criminal prosecution, and therefore the public should pay for it. … What's the matter with that?

Lawyer for Tacoma: The matter with that is it's not a benefit, it's a necessity. It's protection of the public.

Judge Higginson: The courts have distinguish between government action that destroys property but is for the benefit of the public, as opposed to the use of the public?

Lawyer for McKinney: That's my argument, yes.

Judge Higginson: That is your argument.

John: And that just can't be right.

Jeffrey Redfern: Unfortunately, it has been very, very widely cited by lower courts, trial courts, in particular. I've counted, I think, over 35 citations to this police power exemption in recent years.

John: And when Vicki Baker's case, *Baker v. City of McKinney*, got to the U.S. Court of Appeals for the Fifth Circuit, that's what the city argued.

Judge Smith: Are you arguing for a categorical exemption for exercises of the police power?

Lawyer for McKinney: I am because that's what all the cases have done.

> **Judge Higginson**: None of those circuits have taken the time to say, well, over the history of application of the takings clause, there's been an exception for any police powers damages.

John: As it happens, Vicki won her case in the trial court. A district judge disagreed with the other courts that there is a police power exception and sent the case to trial. Where a jury found in favor of Vicki and ordered the city to pay about $60,000.

Jeffrey Redfern: In Vicki's case, we went to a jury verdict. But basically all we were doing at trial was going through receipts. This is how much it costs to fix the garage. This is how much it costs to replace windows. And the jury pretty much added that up and came out with a number around $60,000. And I think that's what's going to happen in the future. Local governments will say, okay, your property was damaged. Send us the receipts and we'll mail you a check. There isn't going to be huge awards for emotional pain and suffering. That's just not compensable under the takings clause. So I think as a practical matter, it isn't going to lead to a ton of litigation.

John: Even so, up on appeal, the lawyer for the city argued that there will be massive liability if property owners can make out a takings claim in these situations.

> **Lawyer for McKinney**: To say that any damage caused by a governmental entity is public use damage. Well then the sky's the limit.
>
> **Judge Higginson**: But here we've got state courts that have already interpreted their constitutions that way, including Minnesota, and the sky hasn't fallen … so therefore that policy argument of: It can't be done. It'll be too costly, or it might deter legitimate police

activity. You haven't cited how in Minnesota everything's going wrong or bankrupting municipalities.

Lawyer for McKinney: Well no, but I'm still relying on the states to figure that out.

John: It's true. There are a handful of jurisdictions that do require the public to bear the cost when police damage property, and there is no evidence whatsoever that municipalities there are going bankrupt or that police are hesitating to take lawful actions for fear of municipal liability. Instead, what the Fifth Circuit was interested in hearing about was history and tradition. That is, what happened historically in cases about damage? We talked about flooding. But there were also lots of cases about fire.

Judge Higginson: I guess you heard me asking about history and tradition. So I'm grateful you're going back a century or two so we sort of can maybe guess at what the framers meant by the Fifth Amendment. And aren't I right that – and I'm sure you're very prepared – that the line of authority from the Supreme Court and even predating Supreme Court – relating to the government's power to stop fires, that's the hardest line for you.

Jeffrey Redfern: So I'm glad you asked the question.

John: Going back hundreds of years, when a fire threatened a city, buildings would be pulled down to contain the fire.

Jeffrey Redfern: Prior to modern technology and modern fire departments, the main way that you would stop a fire is by creating fire breaks. So they would oftentimes tear down buildings surrounding the fire so that it wouldn't be able to jump from building to building, and it would be contained in a small area. Now, if you as a private citizen went and tore down a warehouse or a

house or something in order to contain the fire, you have committed a trespass. But you have a defense, you could say, Look, this is this was a public necessity. It was something that had to be done, and so you couldn't be held personally liable. Someone couldn't sue you and force you to pay for the damage. But you're also taking a risk. You have to be pretty certain that the defense is going to apply, or else you could be on the hook.

John: In the common law, public necessity was a defense against individual, personal liability.

Jeffrey Redfern: When you're looking at these old cases most firefighting was actually done by private individuals. Typically, there's no discussion of the takings clause and government liability because the government just wasn't the defendant in these cases.

John: But.

Jeffrey Redfern: But there are a handful of cases from the early Republic era where state courts did squarely address the interplay between public necessity and the takings clause. Every time that issue came up courts said, Look, if there's a real emergency here and somebody's destroying private property, they, as a private individual, are obviously not liable, but the government is liable because this is a taking of private property for public use.

John: For example, the case of *Bishop v. Mayor and City Council of Macon*, decided by the Georgia Supreme Court in 1849. Quote:

> ***Bishop v. Mayor****:* [I]n a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity, the private property of an individual may be lawfully taken, and used or

> destroyed for the relief, protection or safety of the many. And in all such cases, while the agents of the public who officiate are protected from individual liability, the sufferers are nevertheless entitled, under the Constitution, to just compensation from the public for the loss.
>
> **Judge Higginson**: The line of authority … relating to the government's power to stop fires, that's the hardest line for you.

John: Au contraire, the early takings cases say what the Supreme Court said in *Armstrong* a hundred and some years later: that the cost of any kind of public emergency – be fire, be it war, be it disease – should be borne by society as a whole rather than some unlucky individual. Nevertheless, I'm sorry to say that the Fifth Circuit ruled against Vicki and reversed the jury's verdict.

Jeffrey Redfern: *Baker* was a bit of a surprise to us because the court's holding in that went way outside of anything that the government was arguing. In fact, the court said that everything the government was arguing is wrong. The police power is not exempt from the takings clause. But then the court went ahead and said, We found a new exception to the Fifth Amendment. They said that public necessity, this tort defense, is actually a defense against takings claims.

John: On the one hand, the court rejected the so-called police power exception. But then it invented a new exception, the public necessity exception. Which the Supreme Court *also* has never adopted – despite being asked to adopt it. For instance, in the case of *YMCA v. United States* from 1969.

> **Lawyer for YMCA**: Mr. Chief Justice. May it please the Court. … This is an action for just compensation under the Fifth Amendment to the United States Constitution. It arises out of the United States Army's seizure and use of private property, in this case buildings, belonging to petitioners during the Panamanian riots.

John: The case was about a riot in Panama, where a mob that was none too pleased with United States' presence in the country threw Molotov cocktails, looted, and fought with American residents of the Canal Zone. U.S. Army troops were called in, and they were fired upon by snipers, who killed one soldier and wounded several others. The troops were under orders not to return fire, so they took refuge in two privately owned buildings, the YMCA and the Masonic Temple.

> **Lawyer for YMCA**: There were rioters in the Masonic Temple and the YMCA that were looting and to some extent destroying the interior when the Army first arrived.

John: Before the soldiers went in to those buildings, rioters were already there and causing damage. The Army kicked them out but then eventually left, and rioters went back in and caused more damage.

> **Lawyer for YMCA**: Once the property is taken for a military use, the government is responsible for a subsequent injury.

John: The building owners said that the government had occupied their properties. There was damage. That's a taking. But the Supreme Court rejected the claim.

Jeffrey Redfern: It said there was no taking, but the reason was because it said what the Army was doing here was not appropriating YMCA's property for its own uses. It was just trying to protect the property from third-party looters and any damage that happened in the course of that operation isn't a taking because the YMCA was the – and the phrase the Court used was the – particular intended beneficiary of government action.

John: The Court drew an analogy to firefighters.

Jeffrey Redfern: Suppose your own house is on fire and the fire department breaks some windows to get inside and start hosing it down. It would be a little weird to say that that's a taking and that they have to compensate you for that.

John: In dissent, two justices said that the reason the Army went into the buildings was to take cover from sniper fire. They weren't trying to save the buildings; they were temporarily turning them into command posts, which is surely a public use requiring compensation. But in any case, the formal outcome of the *YMCA* case is that in takings litigation, there's something called the intended beneficiary test, which gets the government out of liability if it can show it was acting like a firefighter and trying to help a property owner. In Vicki Baker's case, we don't think that hurts our claims, and the Fifth Circuit did not say otherwise. The government obviously didn't blow up Vicki's house in order to help her. Rather, all of the helping went the other way. The fugitive had escaped and law enforcement didn't know where he was. Vicki's daughter kept him in one place until the police arrived. Nevertheless, the *YMCA* case is important to our argument, not for what it holds, but for what it does not hold.

Jeffrey Redfern: In the *YMCA* case, the Supreme Court had the opportunity to apply a public necessity exception to the takings clause. That was really what the government was arguing.

They said, Look, it was an emergency, so any damage that happened as a result of that isn't compensable.

John: Here's the lawyer for the government.

> **Lawyer for feds**: The public necessity exception it's to permit the officers to concentrate on the most efficient way of dealing with the danger.

John: The government argued that in a big public emergency, like a war or riot, that the takings clause just goes away.

> **Lawyer for feds**: It seems to me that the principal task I have to carry out here is to make a case for what we have called the public emergency exception for temporary use during and under the compulsion of war.

John: The case generated four opinions – a majority, a dissent, and two concurrences – and not one justice adopted that position. Nevertheless, that's how the Fifth Circuit decided Vicki's case. And just a few weeks ago, the Supreme Court declined to take up the issue. Fortunately, that's not the end of the road for Vicki, whose story we will return to at the end of the episode. For now though, we'll stay in the lower courts where we have several other similar cases making their way up to the Supreme Court. For instance, the case of *Mollie Slaybaugh v. Rutherford County, Tennessee*, where police were trying to apprehend a murder suspect who had holed up in his mother's house. The suspect did not live there. His mother was not harboring him; she wanted him to surrender. And the officers refused to let her try and coax him out of the house before they raided it. At oral argument and in the briefs, the government's lawyers did not come up with any new arguments for why the destruction of Mollie's house was not compensable.

> **Lawyer for Rutherford County**: Actions taken in furtherance of a police power are exempt from the takings clause.

John: And this time, the court understood our argument that at common law individual officers were protected from personal liability for trespass but that doesn't shield the government from takings liability.

> **Lawyer for Rutherford County**: If the Court were to accept the appellant's proposed rule, I believe it could send a shockwave across the nation. These law enforcement officers. … there could be hesitancy in their actions, in their split second decisions, which really shouldn't impede their ability to try and save lives and care for the safety of others.
> **CA6 Judge**: I think the response on the other side would be, that's precisely why the officers themselves are not personally liable.
> **Lawyer for Rutherford County**: So the trespass argument, I understand it, but I don't want to get us lost in a super, hyper technical, academic idea. These are real human beings on the ground that are trying to do their job.

John: But unfortunately, earlier this year, the U.S. Court of Appeals for the Sixth Circuit invented yet another exception to the takings clause. It joined the Fifth Circuit in rejecting the police power exception, but it also declined to rely on the Fifth Circuit's reasoning.

Jeffrey Redfern: They said we found a different exception to the Fifth Amendment for lawful actions taken by the police – specifically search and arrest – pursuant to a warrant. If you damage property while executing a search warrant or an arrest warrant that is just outside of the takings clause according to the Sixth Circuit.

John: It's true that if police have a proper, lawfully issued warrant, they can break into a home or a building without being personally liable for any resulting damage to windows or doors.

Jeffrey Redfern: The search-and-arrest privilege is an old common law defense against tort liability. And if you look at all of the old cases that recognize this defense, all of these are cases brought by private parties against law enforcement officers in their individual capacity, they're trying to sue these law enforcement officers and get them to pay money out of their own pocket for damage that was done. None of these cases are takings cases, and none of them addressed whether the government itself can be liable.

John: Ultimately, what probably explains the courts' hesitance to just follow the Supreme Court's caselaw is probably this:

> **Judge Murphy**: I have found not a single case that has ever suggested that it qualified as a taking when the officer engaged in this damage. And if your rule was correct, I would think we would find some caselaw until, I mean, there's case law recent times, but I'm talking about historically.
>
> **Judge Higginson**: Can you point to any case, ever, where the United States has paid for property damage … when law enforcement is responding to an exigent emergency situation.

Jeffrey Redfern: It seems like the judges really want to see a historic case dealing with law enforcement damage that was compensable, and we don't really have anything like that. We're relying on the flooding and the fire cases. There's just nothing that's that's really on point.

John: What we're asking courts to do is apply old principles to a new set of facts. And the fact that there are no historic cases right on point shouldn't count against Vicki Baker or Carlos Pena or Mollie Slaybaugh. On the contrary, it's the government's burden to establish that there is a exception to takings liability that's deeply rooted in the law, and the absence of any such precedent means that there is no exception. This month, we'll make that argument to the Ninth Circuit. And sooner or later, we hope to the Supreme Court. So that's our show about the takings clause and damage. But, as promised, now I would like to tell you about a different provision in state constitutions that may offer some relief.

Molly Brady: The damagings clauses arose in the late 19th century, as a way to provide protection for property that was devalued by public works, but not directly appropriated.

John: That is Professor Molly Brady of Harvard Law School. She's written a pathbreaking article on the lost history of so-called damagings clauses. And I do mean lost – Prof. Brady's article was the first in over 100 years about the clauses, which have also unfortunately been neglected by litigators as well. But unlike the federal takings clause, which generated virtually no commentary from the Founders when it was enacted, in many states there's a pretty good documentary record about what people were thinking when they enacted the clauses.

Molly Brady: There are just volumes and volumes of transcripts that reveal what these delegates were thinking, what cases they thought were wrongly decided. So there's tons of color in a bunch of different state conventions about why these damagings clauses were put in, why they perceived this sort of action to be unfair, that it was just really fun to get to dig into and surface for the first time.

John: And what those state constitutional delegates had in mind was a particular type of damage caused by the government. Damage caused by public works where the government wasn't necessarily physically invading your property.

Molly Brady: Which tended to arise from one of two things, either street railways or street regrading. In cities like Seattle, San Francisco, you had a lot of effort to drop the levels of streets or make them consistent, which often necessitated leaving buildings literally in the air.

John: All across the country, governments were undertaking dramatic infrastructure improvements, and, especially in hilly, populated areas that meant raising or lowering streets, which left buildings way up in the air on piles of dirt, several stories above the road. You'd need a ladder to get from the street to your front door. Or alternatively, buildings could get buried, turning what had been first and second floors into basement levels without light or access to the air.

Molly Brady: And these people were not compensated. That's actually how I came to this project at all. I saw it in a Seattle history book, a picture of a house on top of a cliff. And it said, These people were not compensated. I said, Wait a second, that doesn't really make any sense.

John: Just for fun, if you want to press pause and do a google image search for Seattle street regrading, now's a good time. And you'll get an idea of what we mean. The images are really stark.

Molly Brady: Hills were a serious problem when you had to pay the costs of horse-drawn transport, which to those of us who are now so accustomed to driving seems like an insane thing to be worried about.

John: Additionally, delegates were concerned with things like having a new railroad right outside your front door. The smoke and the vibration could be extremely disruptive to one's use and enjoyment of their property.

Molly Brady: The idea of a damaging, it's very connected to nuisance and the idea is the government when it devalues property through its work by, for instance, causing smoke or loss of light and air. All these sorts of things that we now think of as a traditional province of nuisance. That's what damagings were meant to cover – basically devaluative acts short of an actual trespass or an interference with the right to exclude.

John: When people had gone to court seeking compensation, they tended not to prevail. For instance, the case of *O'Connor v. Pittsburgh* decided by the Pennsylvania Supreme Court in 1851.

Molly Brady: It was actually a cathedral in Pittsburgh that soon after being constructed, was dug out and left on top of one of these embankments, making it really hard for parishioners to access. We don't have photographs of this, but we do actually have some contemporary drawings of it So you can see there's steps, a huge number of steps going up the side of this embankment.

John: The first sentence of the court's opinion reads thusly:

> ***O'Connor***: We have had this cause reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law; but I grieve to say we have discovered none.

Molly Brady: Because there was no invasion of the right to exclude, there was no taking. So, takings were for either changes in title or else interferences with the right to exclude, and not for acts that were non trespassory but devalued property.

John: Nobody was setting foot on the cathedral's land, and the government wasn't appropriating title to the land. So there was no taking.

Molly Brady: It's one of these opinions where they say: Our hands are tied. It's for the legislature to provide compensation, not for us. But there's obviously a feeling that an injustice has occurred. And so, delegates in Pennsylvania, certainly, which did adopt some version of damagings clause after this case, pointed to that opinion.

John: And so because of cases like that, states began to add damagings clauses to their constitutions.

Molly Brady Almost all of the states that draft new constitutions in the 35ish years following 1870 adopt damaging clauses, I think it's 20 of 26. And no one gets rid of it once it's in there.

John: In total, 27 states now have damagings clauses. So what do the clauses say? One form simply adds the words "or damaged" to their takings provision: no taking *or damaging* property for public use without compensation. Others, like Pennsylvania's were more specific, saying that not just any type of damage was compensable, but specifically damage caused by public works.

Molly Brady: Illinois is the first state, in 1870, to adopt a damagings clause. And there's a few pages of debate, where they think about whether this is a wild experiment that will drastically reduce railroad's willingness to expand in the state, which is a big concern for rural populations

that are hoping this is going to affect their local economies. Cities, on the other hand, were bearing the brunt of the really aggressive interferences. So I think most of the people that were harmed tended to be people that lived in cities.

John: Opponents of damagings clauses worried that the clauses could lead to vexatious litigation and that the cost of building new infrastructure would spiral out of control.

Molly Brady: There was a lot of worry about the breadth. Who knows what this is going to sweep in and how courts are going to construe it and also fear about tons of litigation, that every person along public work or anybody who thought that they could make a damages claim would go into courts and flood them even in cases where the harm was trivial.

John: And to be frank, proponents didn't do a lot to quiet those fears. They just said: eh, the courts and juries will be able to figure out who has really suffered a major loss that in fairness and justice should be reimbursed by the public and who hasn't.

Molly Brady: I do think that on the part of some of the most aggressive proponents, there was a belief that courts would find ways of doing justice here would fix the problem. So there's a few pages of debate, but it ends up passing and going into the Illinois Constitution. And a lot of the early development on the doctrine also occurs in Illinois as a result of it being first.

John: In 1882, the Illinois Supreme Court decided a case called *Rigney v. Chicago*, which laid out a test specifying when a damaging would be compensable. Several years later, the U.S. Supreme Court cited that test favorably. And subsequently the *Rigney* case became the most influential case about whether a compensable damaging had occurred.

Molly Brady: In *Rigney versus City of Chicago* they draw directly a parallel to nuisance and say, in order for a litigant to make out a damagings claim, they have to show a direct physical disturbance to a valuable right. And they also have to show some kind of special damage.

John: Michael Rigney was a carpenter who owned a rental home near a major thoroughfare. But the building's access to it was cut off when the city elevated the street in order to construct a viaduct. Instead of a stroll out onto the road, renters now had to walk up a several flights of stairs. Which, according to Rigney, reduced what renters were willing to pay by more than half. And in 1881, the Illinois Supreme Court ruled that he should be compensated.

Molly Brady: The *Rigney* test, it has three parts that says that there has to be a disturbance, a direct physical disturbance of a, second, valuable right. And third, the person has to suffer special damage to bring the claim. Third one usually isn't an issue. But the physical disturbance and the valuable right aspect do get narrowed as courts apply *Rigney*.

John: Unfortunately, however, within only a few decades of enactment, courts turned their backs on damagings clauses, interpreting them narrowly so that they didn't provide much, if any, additional protections beyond the federal takings clause.

Molly Brady: Eventually, it pretty much in most states provides protection against flooding and little else. And so that is, I think, a real loss.

John: For instance, in one case from 1913, the Washington State supreme court ruled against a homeowner near a newly built railroad spur. Black smoke routinely filled up their house. Vibrations shook them awake at night. The property lost value, so selling it and moving someplace comparable to what their home had been like was probably out of the question. All of

which sounds an awful lot like a nuisance, and it sounds a lot like a damaging. But the court said none of that mattered. What mattered, it said, was that when you buy property in a city, you accept the risk that the city might allow a railroad to be built nearby.[2]

Molly Brady: It's remarkable to me the process of constitutional forgetting. So even though these decisions are in some cases within 20 years of a constitutional change. The context for why this was happening is forgotten.

John: One possible explanation for that, although it's not entirely satisfactory, is that until relatively recently, judges, and lawyers, and litigants didn't really have easy access to transcripts from state constitutional conventions.

Molly Brady: It's easy to forget just how little access to the delegates' remarks these judges might have had. I have done some other work on state constitutional convention records. There's certainly at least one jurisdiction where they say that that book is out there somewhere but it was too hard for us to find of the constitutional debates. And you're like: Oh, no! But now it's much easier for people, litigants to bring in this evidence that I just think wasn't available.

John: Overall, state damagings jurisprudence is underdeveloped and often forgotten. When people have brought claims, courts have not taken them or the clauses seriously. But there is one notable exception. Not everywhere, and different states have come down different ways, but property owners whose homes have been destroyed by law enforcement have won a few rounds. In 1991, for instance, after a SWAT team destroyed an innocent's property owner's house in Minneapolis, the Minnesota Supreme Court ruled that that was compensable under the state's damagings clause. There was intentional damage. It was for public use. Case closed.

[2] De Kay v. North Yakima & V. Ry. Co., 71 Wash. 648 (1913)

And as we noted earlier, that ruling has not resulted in an explosion of litigation or flood of liability. Nor has a similar ruling from 1980, involving a group of inmates who escaped from prison and barricaded themselves in a house, which Houston police then burned to the ground. That ruling came from the Texas Supreme Court. Texas has a damagings clause. Which means that our client Vicki Baker is going to win her case against the City of McKinney, though she won't get to make the nationwide precedent that she was fighting for. Of course, our argument is that if a state has a damagings clause, that's just icing on the cake. Property owners should be winning these cases under the federal constitution and under state constitutions even in states that don't have a damagings clause. That's what Supreme Court precedent requires. And that's what history and tradition requires. And speaking of history, before we wrap up this episode, you might be wondering, what did James Madison and the Founders think of all this? Sadly, the answer is, they didn't say.

Jeffrey Redfern: We don't actually know what the Framers themselves thought about the Fifth Amendment, it didn't generate any contemporaneous commentary. As far as we can tell, it's just something that James Madison threw in there. But it was a very old principle.

John: As we talked about on previous episodes about eminent domain, one notable early Supreme Court decision said it would be "a monster in legislation" that would "shock all mankind" if the government took property without paying for it, which is a concept that dates back to Magna Carta. But as to whether the Founders had any specific, contemporaneous incident in mind when they put the takings clause in the Bill of Rights, the answer to that is: probably. According to Henry St. George Tucker, who fought in the Revolutionary War and was wounded at Yorktown and then went on to become a law professor and later a judge.

Jeffrey Redfern: The earliest commentary that we have comes from St. George Tucker a few decades later. And he thought that it was probably included because during the Revolutionary War troops were seizing horses and supplies for use against the British, and sometimes colonists were not being paid promptly, or they weren't being paid at all.

John: Which is to say that during the war for independence on our own soil, as great a public emergency as one can imagine, the Founders thought that burdens of supplying the Army should in all fairness and justice should be shared by everyone. I'm John Ross, and that's our episode. And I ask you, since you've made it this far, if you wouldn't mind leaving a review on Apple Podcasts if that's where you listen or telling a friend about our show. That'd be super cool of you. In any event, we'll return soon and when we do, we'll return to the Fourth Amendment. Specifically, to a gigantic and ahistorical exception to the usual rule that government officials need a warrant based on probable cause to force themselves inside the home.

> **Lawyer for Baltimore**: Individual freedom must yield in some cases to the enforcement of reasonable regulations for public welfare. The right of privacy should not give the right to refuse entry to a health inspector anymore than the right to free speech gives the right to falsely shout fire in a theater … It would give the right to offer a human sacrifice.

John: When we return: the Fourth Amendment and the right to offer a human sacrifice.

Credits:

Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Kais Ali and Charles Lipper at Volubility Podcasting. The theme music is by Patrick Jaicomo. Clips from oral argument at the Supreme Court come from Oyez. With

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