

Today's War on Property

by R. W. Bradford

Most people assume that property rights and individual rights are entirely separate issues, and the loss of one has no bearing on the other. However, as you'll begin to see in this and the following two articles, property rights may be the foundation for our individual rights and constitutionally guaranteed freedoms.

Although I am skeptical of this author's explanation for property seizures ("deodands"), I fully agree with his overall assessment of the growing national problem of unconstitutional seizures by government.

What is the status of property rights in the United States today? Consider the following true story.

When Hurricane Hugo devastated the Carolina coast in 1992, it wasn't long before local lumberyards began to run out of building supplies. So Selena Washington decided to drive to Florida to buy the construction materials she needed to repair her home. She took \$10,000 cash with her, since she believed the lumberyards in Florida would not accept her South Carolina

check. In Volusia County, Florida, a sheriff's deputy stopped Mrs. Washington's car and searched her handbag, in which he found her money. He took the cash and drove away without taking down her name, refusing to give her a receipt or an explanation.

The indignant Mrs. Washington followed the officer to the police station, where she protested what had happened. The police refused to give her back any of her money, so she hired an attorney. He negotiated an agreement: the sheriff could keep \$4,000, the attorney would get \$1,200, and Mrs. Washington could have the remainder of her money back. She took the deal. What else could she do? In 1990s America, this trampling of private property rights is perfectly legal.¹

Private property is the foundation of a free society. The collectivist left, intent on destroying free-market economies, has long recognized this fact. A century and a half ago, Karl Marx and Friedrich Engels announced, "The theory of the communists may be summed up in a single sentence: Abolition of private property," and counseled that "the first step in the revolution . . . cannot be effected except by means of despotic inroads on the rights of property." Under relentless attack from the

left, property rights have been in retreat ever since.

But it is a measure of property's precarious status that in recent years property rights have been assailed as much by political conservatives as by leftists. Selena Washington's property rights were taken by laws proposed by conservative Republican presidents, enacted by conservatives in Congress, and validated by conservatives on the Supreme Court.

Of course, those on the political right do not proclaim themselves opposed to private property. Instead, they subvert property rights by means of their war on drugs.

The war on drugs was declared by Richard Nixon in 1969, and expanded during the Ford, Reagan, and Bush administrations. By virtually any measurement but one, it is a failure. Since it began, the number of people who use drugs has risen dramatically, as has the number of people killed in drug-related violence. The war on drugs is a success only for its soldiers, who are allowed to take the property of those it suspects of violating drug laws. Consider the following cases:

- In 1987, when Frances Lopes of Maui, Hawaii, discovered that her

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adult son, who had a history of mental illness, was growing marijuana in her backyard, she asked him to stop. He responded by threatening to commit suicide. So when police arrested her son and removed the plants, she was relieved: as a first offender, her son was sentenced to probation and given psychiatric help. Four years later, when a detective in Maui was reviewing old files, he noted that Mrs. Lopes had admitted she had known about the marijuana plants. Mrs. Lopes was in her carport when the police arrived. "We're taking the house," they said. And they did.²

• On April 9, 1989, Customs officials searched a new boat, just purchased by Craig Klein, a university professor. The 17-hour search was conducted with axes, power drills and crowbars, and involved dismantling the engine, rupturing the fuel tank, and drilling over 30

holes in the boat's hull. The effort turned up no evidence of illegal drugs. It did, however, destroy the boat. When Mr. Klein asked for compensation, Customs refused.³

• On February 2, 1991, forty police officers gathered outside Randy Brown's metal shop in Sacramento. Not bothering to knock, they shattered the locks on his front door with a hail of bullets, then rushed in, handcuffed the bewildered Brown, and began tagging items of his personal property for their own use. They found a coffee can with \$4,600 in cash, which they claimed as evidence, along with \$313 that Brown had in his wallet.

The police had obtained a search warrant on the grounds that Brown had legally purchased chemicals that *could* be employed in manufacturing amphetamines. But they found no evidence that Brown possessed any of the other chemicals needed for the process, or that he had ever engaged in the manufacture of illegal drugs.

Indeed, Brown had no criminal record. Prosecutors dropped the case. But they refused to return his money, insisting that Brown prove it was legitimately acquired. When Brown produced records accounting for the cash, they agreed to return \$2,000, provided he would sign an agreement that their seizure had been justified.⁴

• In 1984, Rosa Montoya was grabbed by Customs as she attempted to enter the United States. When a thorough search failed to turn up any evidence of smuggling, Customs locked her in a room with instructions to defecate into a wastebasket. When she had failed to do so after nearly 24 hours, Customs handcuffed her and took her to a hospital, where she was forcibly given a rectal examination.⁵

• In 1990, a 12-member police SWAT team broke into the home of Robert Brewer of Irwin, Idaho, and discovered a half-pound of marijuana, and eight marijuana plants growing in his basement. Brewer was dying of prostate cancer, he explained, and used the marijuana to relieve the pain and nausea. The police seized Brewer's home and van, which he used for transport to his cancer treatment center, some 270 miles away.⁶

While I chose these cases for their dramatic effect, they are not entirely atypical: in four out of five cases of civil forfeiture (summary government confiscation of property without legal process) the person whose property is taken is not charged with any crime.

And all these actions were legal.

The law authorizing civil forfeiture was sponsored by Senator Strom Thurmond of South Carolina and enacted by Congress without debate. The law that authorizes Customs officials to search individuals and vehicles on waterways that connect to international bodies of water (i.e., all lakes, rivers, and coastal waters of the United States except a few bodies of water in the basins of the West) was drafted by the Reagan White House.

The Sixth Amendment to the Constitution guarantees an individual accused of offenses punishable by fine or imprisonment the right "to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defense."

Each and every one of these guarantees is routinely and legally violated by police engaged in the war on drugs. People are routinely fined and imprisoned with no trial at all, with no jury except an arresting policeman (who is sometimes allowed to keep a portion of the fine he imposes on the spot), without being informed of the charges against them, without being allowed to obtain witnesses, without being allowed the assistance of counsel. In order to justify the absolute destruction of these property rights, conservative legal scholars came up with a legal theory hoary with age and bereft of logic.

The legal doctrine on which these laws are based is the ancient concept of "deodands," derived from the Latin phrase *deo dandum*,

meaning “given to God.” In ancient and medieval times, when a piece of property caused an accidental death, it was deemed to be possessed by demons and was forfeited to the state for destruction. Not surprisingly, deodand theory fell into disuse as belief in demonic possession declined, and as people began to realize that it was absurd to hold an object guilty of a crime and manifestly unjust to punish the object’s owner for an accidental death.

Britain abolished deodands in 1846, but they lived on in America to form the basis of the legal theory of civil forfeiture. Robert Brewer was not being punished when police confiscated his house—his house was punished, and his house, unlike his person, has no legal rights and thus is not entitled to a jury trial or any other constitutional protection. It can simply be confiscated. Nor was Selena Washington punished when a sheriff’s deputy took all her money; it was her money that was punished.

This rationale, I believe, is as specious as the legal theories propounded by the left when it advances confiscatory taxes, land use control, and other restrictions on economic freedom. And it is just as subversive of the institution of private property.

When proponents of the drug war argue that entire businesses should be forfeited after a single legal infraction, they not only endorse the socialist view of capital goods, but also extend their willingness to subvert property into areas unimagined by the most ardent socialist.

In Rosa Montoya’s case, Justice William Rehnquist, a conservative appointed to the Supreme Court by Nixon and elevated to chief justice by Reagan, argued that her treatment was justified because of “the veritable national crisis in law enforcement caused by the smuggling of illegal narcotics.”⁷ This is as clear a restatement of the argument that “the ends justify the means” as any collectivist ever made in defense of any communist dictatorship.

Sadly, only a few prominent conservatives, notably William F. Buckley and Henry Hyde, have spoken out against these violations of property rights. Most politicians who call them-

selves conservative appear willing to subvert private property on a grand scale to pursue their notion of protecting people from the harm they may cause themselves. It’s time for defenders of private property to stand up and be counted.

¹ Henry J. Hyde, *Forfeiting Our Property Rights: Is Your Property Safe from Seizure?* (Washington, D.C.: Cato Institute, 1995), pp. 39-40. Also, Leonard W. Levy, *A License to Steal: The Forfeiture of Property* (University of North Carolina Press, 1996), pp.2-3. Hyde says the attorney received \$1,000; Levy says \$1,200.

² Dan Baum, *Smoke and Mirrors* (Little, Brown and Co., 1996), pp. 313-314. Also Hyde, pp.34-35.

³ Hyde, pp. 11-12.

⁴ Baum, pp. 311-312.

⁵ Baum, p. 215.

⁶ Levy, pp. 5-6.

⁷ *U.S. v. Montoya de Hernandez*, 473 U.S. 531, 105 S.Ct. 3304, 87 L.Ed. 2nd 381(1985).

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