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Due process and vehicle impound

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APRIL 13, 2021

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees that no one shall be deprived "of life, liberty or property, without due process of law." U.S. Const. amend. XIV § 1. The contours of this constitutional right have been well-settled for decades as it relates to property — *i.e.* your stuff, as opposed to your freedom or your life.

The Supreme Court established the current framework in cases that many attorneys may recognize from their first-year constitutional law class, like *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Connecticut v. Doehr*, 501 U.S. 1 (1991), and others. Following these decisions, numerous United States District and Circuit Courts across the country applied the Supreme Court's framework to government seizures of motor vehicles.

The impounding of cars is commonplace and oftentimes the only interaction someone may ever have with government authority. Yet, decades after the cases establishing due process rights for impounded vehicles, many municipalities (and even some States) continue to get the issue fundamentally wrong.

Across the country, statutes and ordinances remain on the books that do not provide for any notice of impound, or provide notice to only some of the people to whom notice is required, or provide notice only that the municipality has a list of demands (as opposed to providing notice of a procedure for recovering a vehicle).

Also common is a requirement to pay towing and storage fees before the town or city will give the car back, even though no hearing has occurred on whether these demands are proper.

Some municipalities also try to do indirectly what cannot be constitutionally accomplished directly, by giving seized vehicles to their towing contractors instead of holding the cars themselves. The contractors then withhold the cars until being paid (oftentimes compensating the municipality for the privilege of taking and holding these vehicles).

These ordinances and towing arrangements are common but not constitutional. Towns and cities everywhere should heed the warning the D.C. Circuit issued 30 years ago: "Every court which has considered the issue has held that the owners of towed vehicles — whether illegally parked, abandoned or junk — are entitled, at minimum, to post-deprivation notice and a hearing." *Propert v. D.C.*, 948 F.2d 1327, 1332 (D.C. Cir. 1991) (collecting cases).[1]

When the police take a vehicle, they must provide prompt[2] notice to all interested parties that there will be a hearing — arranged by the government — to determine the propriety of the seizure, the propriety of continued detention, and the propriety of any conditions placed on the vehicle's release.

As one court colorfully described the requirements of due process: "the government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking." *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008).

Decades after the cases establishing due process rights for impounded vehicles, many municipalities (and even some States) continue to get the issue fundamentally wrong.

Many cases have outlined each of these requirements in detail.[3]

The constitutional inquiry starts with notice, because "[t]he right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

The notice must be reasonably calculated under the circumstances to apprise interested parties and give them the opportunity to present objections.[4]

The notice should be by mail to a last known address of any person whose rights may be affected where the "name and address are reasonably ascertainable" from public records. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 791 (1983) (notice by mail required to mortgagee of real property); Dutch Point, 36 Conn. App. 123, 132 (1994) (noting that a lienholder's address is readily determinable from motor vehicle records); *DCFS USA, LLC v. D.C.*, 803 F. Supp. 2d 29, 40 (D.D.C. 2011) (notice by mail required).

While notice by mail to a last-known address typically suffices, notice should not be blindly mailed to an address when it is known that the notice will not be received at that address. For example, when the police seize a car and jail the owner, mailed notice to that

owner's home cannot be said to be "reasonably calculated" to provide notice. In that case, the police know with certitude the owner is not home and will not be checking the mail. *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972).

The impounding city or town should also take care to identify each person with an interest in an impounded vehicle, and must provide separate notice to each.

Notice cannot merely be sent to one of several interested parties (*i.e.* the driver of the vehicle) on the assumption that person will notify other interested parties (like lessors and lienholders); rather, each separate party with a property interest in a vehicle must be notified.[5]

At a minimum, the people who should receive notice include — as applicable to a given car — the person driving the car when it is impounded, the registered owner, the titled owner and any lienholders.[6]

A constitutionally adequate notice must be notice *of a hearing*, not a letter saying, in effect, "we have your car and you owe us money."

Municipal police should be cognizant that motor vehicle ownership and lien interests are recorded at the state level, meaning a search of only the police's home jurisdiction may not be sufficient when a car has an obvious relationship to some other state.[7] A prudent policy would include a search of state records in the municipality's home-state, *and* surrounding states or certain national databases.[8]

Notice also does *not* mean a letter informing interested parties of a list of demands.[9] A constitutionally adequate notice must be notice *of a hearing*, not a letter saying, in effect, "we have your car and you owe us money."

Courts have repeatedly invalidated ordinances where the "notice" merely insisted that "a party. . . pay towing and storage costs within fifteen days of the mailing of a notice or forfeit all claim to [the] car." *Seals v. Nicholl*, 378 F. Supp. 172, 177 (N.D. Ill. 1973).[10]

As one District Court put it in 1978, where the "notice" is merely a letter informing a party that they owe towing and storage charges which *must* be paid, "the notice is merely a fait accompli," and not constitutionally adequate. *Craig v. Carson*, 449 F. Supp. 385, 395 (M.D. Fla. 1978).

Such notice "confront the owner of a car that has been towed and stored with the proverbial Hobson's choice: [the owner] must pay the charges. . . or forfeit [the] car. Under either alternative, the owner is compelled to relinquish. . . personal property, whether [the] car or [the] money, without an opportunity to dispute the loss."[11] Notice complying with due process is notice of a hearing, not notice of a demand for payment.

Once a constitutionally sound procedure provides notice to interested parties of the right to be heard, the remaining question is whether the hearing is constitutionally adequate. To begin with, an ordinance will *not* be constitutionally sound where it requires the person whose rights are affected to "opt in" or request that there be a hearing.

The government bears the burden of starting and conducting a hearing.[12]

Moreover, there must be a hearing even if the result seems obvious.[13] This result is sensible. Even though most officers are well intended, due process ensures there are no mistakes, and ensures that an officer's well-intended decision complies with the meaning of ordinances and statutes that officer is trying to enforce. For example, where a car has been determined to be "abandoned" or "junk," a neutral decisionmaker must review the often subjective police determination that a given car was actually "abandoned" or "junk."[14]

Propert involved a particularly vivid example, where the police officer candidly described his test for determining whether a car was "junk" by asking "whether you would take your mother to church in it."[15]

These officers may have been correct, but due process provides the proverbial "second set of eyes" to ensure government action is proper.

Whether a particular hearing procedure is constitutionally adequate depends on a weighing of several factors:

(1) the private interest involved,

(2) the risk of an erroneous deprivation of that interest,

(3) the probable value, if any, of additional procedural safeguards, and

(4) the government's interest, including the government function involved and the fiscal and administrative burdens of additional procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The *Mathews* balancing test provides flexibility in outlining the conduct of a hearing on a given vehicle's impoundment.

While the hearing can be less formal than a trial, there must be *some* hearing even if the government believes its costs outweigh the interests involved.[16]

The person's whose rights are affected must be given some meaningful opportunity to present arguments before a neutral decisionmaker.[17] The hearing must *at least* involve a test of the validity of continued detention of the vehicle and the validity of the municipality's seizure of that vehicle in the first place.[18] *Krimstock v. Kelly*, 306 F.3d 40, 69 (2d Cir. 2002).

Finally, municipalities cannot abdicate constitutional responsibilities through the use of private towing companies.[19]

The government cannot determine that a vehicle should be impounded and then wash its hands of the consequences by turning a car over to a contractor, because "all authorities agree that [due process] inhibits the taking of one man's property and giving it to another . . . without notice or an opportunity for a hearing." *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 161 (1913).[20]

Whether the police tow seize a vehicle themselves or call a towing contractor to retrieve a vehicle they believe should be impounded, courts will find state action and require compliance with the Constitution. The question is "whether the State provided a mantle of authority that enhanced the power of the. . . individual actor." *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988).

The *Mathews* balancing test provides flexibility in outlining the conduct of a hearing on a given vehicle's impoundment.

Towing contractors would not lawfully possess impounded vehicles but-for the police determination they be towed in the first place, and therefore both parties must comply with due process.[21]

Municipalities should be especially weary of arrangements with private towing contractors who are only compensated by extracting payment from persons with interests in impounded vehicles.[22] These issues have been widely litigated against many of the country's largest cities, and the case law provides detailed guidance on constitutionally acceptable impound ordinances and procedures.

Municipalities can and should consult this precedent and adopt appropriate policies, which should include:

(1) a search for parties with interest in vehicles, inside and outside the municipalities' home state;

(2) mailed notice to all interested parties located by that search;

(3) a timely hearing before a neutral decisionmaker, which

(4) adjudicates, at least, the propriety of the impound and any other actions the municipality intends to take, such as continued detention or imposition of towing and storage fees.

Notes

[1] 27 years later, the Eastern District of New York replicated *Propert*'s review of cases on the subject, supplementing *Propert*'s already extensive list of cases and echoing that the "[m]any courts that have considered the issue have held that the owners of towed vehicles — whether illegally parked, abandoned or junk — are entitled to no less than post-deprivation notice and a hearing." *HVT, Inc. v. Port Auth. of New York & New Jersey*, No. 15-CV-5867 (MKB) (VMS), 2018 WL 3134414, at *9 (E.D.N.Y. Feb. 15, 2018), rpt. and rec. adopted, 2018 WL 1409821 (E.D.N.Y. Mar. 21, 2018).

[2] Readers should be aware that there is an entire area of law regarding whether due process requires a pre-deprivation hearing, or whether a prompt post-deprivation hearing is adequate. *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). There are many circumstances where the government may tow a vehicle without pre-deprivation process — such as when it is blocking traffic — and this article focuses on the basic requirements for notice and a hearing of some kind, as opposed to the timing of an otherwise adequate hearing.

[3] *See e.g. Stypmann v. City & Cty. of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977); *Krimstock v. Kelly*, 306 F.3d 40, 68 (2d Cir. 2002).

[4] *Mullane*, 339 U.S. at 314.

[5] *See, e.g. Mennonite*, 462 U.S. at 799; DCFS USA, LLC, 803 F. Supp. 2d at 41; *Am. Honda Fin. Corp. v. City of Revere*, 471 F. Supp. 3d 399, 409 (D. Mass. 2020) (finding a Massachusetts statute unconstitutional where it failed to require separate notice to a lienholder). The author of this article served as counsel pro hac vice for American Honda Finance in the *Revere* litigation.

[6] Notice most obviously must be given to owners. *See, e.g.*, *Henry v. City of Middletown, Ohio*, 655 F. App'x 451, 462 (6th Cir. 2016) ("private interests in owning and utilizing their vehicles are substantial"); *Propert v. D.C.*, 948 F.2d 1327, 1331 (D.C. Cir. 1991) ("Propert's economic interest in his car was certainly more than de minimis."); *Price v. City of Junction, Texas*, 711 F.2d 582, 589 (5th Cir.1983) ("Whether a junk car has little or great value, it is constitutionally protected property."). Courts have recognized that the registered owner (i.e. a lessee), a titled owner (i.e. a leasing company), and the person driving the vehicle at the time of seizure may be three different people, and notice must be provided to all of them. *See, e.g. Ferrari v. Cty. Of Suffolk*, 845 F.3d 46, 56 (2d Cir. 2016) (titled owner has protectible interest); *Krimstock v. Kelly*, 306 F.3d 40, 69 n.31 (2d Cir. 2002) (noting that "the arrestee and the vehicle owner are not the same person" in all cases, and notice must be separately sent to each); *Alexandre v. Cortes*, 140 F.3d 406, 410 (2d Cir. 1998) (persons with possessory interests who are not titled owners entitled to due process); *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 54 (1993) (finding protectible interest in home even though it was rented to tenants). Lienholders are also entitled to notice and a hearing. *See, e.g. Ford Motor Credit Co. v. NYC Police Dep't*, 503 F.3d 186, 194 (2d Cir. 2007) (finding a lienholder's "interest in the present value of a seized vehicle" to be "considerable."); *Am. Honda Fin. Corp. v. City of Revere*, 471 F. Supp. 3d 399, 406 (D. Mass. 2020) ("[W]hile courts have acknowledged that the owner of a seized vehicle is most negatively affected by its loss, lienholders . . . have an equally valid interest . . . ."); *DCFS USA, LLC v. D.C.*, 803 F. Supp. 2d 29, 38 (D.D.C. 2011) (finding the lienholder "had a protected property interest in the Vehicle. . . .").

[7] *DCFS USA*, 803 F. Supp. 2d 41 (faulting the District of Columbia for failing to search Virginia motor vehicle records when the vehicle in question bore a Virginia plate at the time of seizure).

[8] There is a federal database containing title information and some, but not all, lien information. 49 U.S.C.A. § 30502 (a). Many states also have reasonably easy-to-use online databases. Relevant precedent requires a prudent municipality to check this information. *Mennonite*, 462 U.S. at 798, n.4 (Noting that mortgage on file only identified the mortgagee by name, but assuming "that the mortgagee's address could have been ascertained by reasonably diligent efforts.")

[9] Municipalities would also do well to avoid seizing cars at all merely because the cars' owners are accused of owing that municipality money — such as prior parking tickets — because that practice has been repeatedly invalided on Fourth Amendment search and seizure grounds, in addition to the due process concerns these practices raise. *United States v VERTOL*

H21C, Reg. No. N8540, 545 F.2d648, 651 (9th Cir. 1976) (holding the government may not "summarily take property as a security"); *Rosemont Taxicab Co. v. Philadelphia Parking Auth.*, 327 F. Supp. 3d 803, 822 (E.D. Pa. 2018) (finding that the city's seizure of "a taxicab solely as surety for the payment of fines that possibly may be assessed for a violation of [a municipality's] regulations" to be unconstitutional); *Harrell v. City of New York*, 138 F. Supp. 3d 479, 492 (S.D.N.Y. 2015) (finding a seizure of property to "hold . . . as leverage to ensure payment" violated the Fourth Amendment).

[10] There are many other examples. *See also, e.g.*, *Stypmann*, 557 F.2d at 1343 (invalidating ordinance where "[t]he vehicle may be recovered only by paying the towing and storage fees. . . ."); *Huemmer v. Mayor & City Council of Ocean City*, 632 F.2d 371, 372 (4th Cir. 1980) ("The ordinance was manifestly defective, in that recovery of a removed vehicle was absolutely conditioned on payment of towing and storage charges."); *Remm v. Landrieu*, 418 F. Supp. 542, 548 (E.D. La. 1976) (finding New Orleans ordinance unconstitutional where there was no opportunity for a hearing before the assessment of towing fees and storage charges); *HVT, Inc.*, 2018 WL 3134414, at *3 (invalidating procedure which provided notice only of a demand for towing and storage fees, and not notice of a hearing).

[11] *Craig*, 449 F. Supp. at 394.

[12] *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (finding unconstitutional a Pennsylvania statute that "allows a post seizure hearing if the aggrieved party shoulders the burden of initiating one."); *Mennonite Bd. of Missions*, 462 U.S. at 799 ("a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation."); *Krimstock v. Kelly*, 306 F.3d 40, 59 (2d Cir. 2002) (rejecting argument that party with interest in a seized vehicle should institute "a separate civil action in order to force the City to justify its seizure and retention of a vehicle.").

[13] *Fuentes*, 407 U.S. at 87 ("[t]he right to be heard does not depend on an advance showing that one will surely prevail at a hearing.").

[14] *Id*.

[15] *Id.*; *see also Tedeschi v. Blackwood*, 410 F. Supp. 34, 45 (D. Conn. 1976) (discussing how, where a car was deemed abandoned because it had a flat tire and had not moved for 24 hours, "[n]either of these facts seems particularly conclusive.").

[16] *Propert*, 948 F.2d at 1335 ("[W]hile cost to the government is a factor to be weighed in determining the amount of process due, it is doubtful that cost alone cane ever excuse the failure to provide adequate process.").

[17] *Id.* at 1333.

[18] In most instances, vehicles are seized pursuant to exceptions to the Fourth Amendment requirement of a warrant; of course, where a warrant has already been issued in compliance with the Fourth Amendment, there has also already been due process.

[19] *Cf. West v. Atkins*, 487 U.S. 42, 55-56 (1988) ("Contracting out prison medical care does not relieve the State of its constitutional duty. . . .").

[20] *See also Johnson v. Bradshaw*, 772 F. Supp. 501, 505 (D. Nev. 1991), aff'd, 5 F.3d 537 (9th Cir. 1993) ("Plaintiff clearly was deprived of his property when, without notice to him, it was given by the police department to a third party").

[21] *See, e.g.*, *Tadeschi*, 410 F. Supp. at 41 ("towing of a. . . vehicle. . . by either the police or a private garage constitutes state action. . . ."); *Stypman*, 557 at 1341 (applying due process protections where "[t]he towing company tows the vehicle only at the direction of the [police] officer. . . solely to accomplish the state's purpose of enforcing its traffic laws"); *Lee v. NNAMHS*, No. 03:06CV-0433-LRH-RAM, 2007 WL 2462616, at *3 (D. Nev. Aug. 28, 2007) (finding the constitution applicable where "plaintiff's car was towed at the direction of a state officer and pursuant to laws enacted to further the state's interest. . . .").

[22] *See, e.g.*, *Revere*, 471 F. Supp. 3d at 405 (determining the municipality was a proper defendant after its towing contractor sold an impounded vehicle without notice or a hearing where the "sale proceeds are the only source of compensation and reimbursement available to garage owners.").

This article was published on Westlaw Today on April 13, 2021.

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