

SOLICITUDE FOR PROPERTY IN THE FOURTH AMENDMENT: CORRECTING A HISTORY OF MISCONSTRUCTION

Abstract: On August 9, 2024, in *Asinor v. District of Columbia*, the U.S. Court of Appeals for the D.C. Circuit held that the Fourth Amendment requires that law enforcement’s retention of an arrestee’s property seized pursuant to a lawful arrest be reasonable. In doing so, the D.C. Circuit rejected the seizure-excludes-retention approach adopted by five sister circuits in favor of the seizure-includes-retention approach. Unlike the seizure-excludes-retention approach, the seizure-includes-retention approach treats a property seizure as a continuing event that requires the government’s retention to be reasonable beyond the initial act of dispossession. This Comment argues that the seizure-excludes-retention approach is unconstitutional. It urges the U.S. Supreme Court to resolve this circuit split by adopting *Asinor*’s seizure-includes-retention approach, which aligns with the Framers’ intent, the Court’s precedent, and the Fourth Amendment’s plain text. This Comment further argues that the *Asinor* approach could be strengthened by recognizing that retention falls within the Court’s definition of seizure.

INTRODUCTION

Sir William Blackstone, a preeminent legal scholar in the Anglo-American tradition, once stated, “[t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property.”¹ In 1791, guided by this principle, the First Congress of the United States ratified the Fourth Amendment, expressly prohibiting unreasonable seizures of personal property.²

¹ 2 WILLIAM BLACKSTONE, COMMENTARIES *1. Commentators have described Blackstone’s *Commentaries* as “the most influential law book in Anglo-American history.” Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996).

² U.S. CONST. amend. IV; see George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1454 (2005) (detailing James Madison’s original draft of the Fourth Amendment, which was even more expansive, and hypothesizing that Madison would be surprised by the Fourth Amendment’s failure to protect early common law’s “solicitude for property and privacy”). *Black’s Law Dictionary* defines “effects” as “[m]ovable property; goods.” *Effects*, BLACK’S LAW DICTIONARY (12th ed. 2024). Throughout Fourth Amendment jurisprudence, the phrase “personal property” is employed by courts interchangeably with “effects.” See, e.g., *Denault v. Ahern*, 857 F.3d 76, 84 (1st Cir. 2017) (using personal property and effects interchangeably); *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 181 (2d Cir. 2004) (same); *Lee v. City of Chicago*, 330 F.3d 456, 465 (7th Cir. 2003) (same).

Centuries later, on August 30, 2020, the D.C. Metropolitan Police Department (MPD) seized photojournalist Oyoma Asinor's phone, camera, and other personal belongings incident to his arrest at a racial justice protest.³ The MPD retained Asinor's property for over eleven months, despite releasing him without any criminal charges soon after his arrest.⁴ Undoubtedly, the Fourth Amendment speaks to law enforcement's initial seizure of Asinor's property.⁵ But what, if anything, does the Fourth Amendment say about their retention of it?⁶

Part I of this Comment examines the history and evolution of the Fourth Amendment's protection of property and recounts the factual and procedural history of *Asinor v. District of Columbia*, which was considered before the U.S. Court of Appeals for the D.C. Circuit in 2024.⁷ Part II discusses the competing judicial approaches to the government's retention of property seized pursuant to a lawful arrest.⁸ Part III argues that the Constitution mandates adopting the seizure-includes-retention approach, which aligns with the Framers' intent at codification, the U.S. Supreme Court's precedent, and the Fourth Amendment's plain text.⁹

³ *Asinor v. District of Columbia*, No. 21-cv-02158, 2022 WL 3715777, at *1 (D.D.C. Aug. 29, 2022), *vacated*, *Asinor v. District of Columbia*, 111 F.4th 1249, 1261 (D.C. Cir. 2024). Oyoma Asinor was participating in a Black Lives Matter (BLM) protest at the time of his arrest. *See* Jury Trial Demanded ¶¶ 21–24, *Asinor*, 2022 WL 3715777, at *1 (explaining that Asinor was covering the BLM protests condemning police brutality late into the night of August 29, 2020, and was arrested in the early morning hours of August 30, 2020). Estimates suggest between fifteen and twenty-six million individuals across the United States participated in BLM demonstrations in the summer of 2020. *See* Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [perma.cc/E4GD-EXPH] (estimating the number of protesters involved in the BLM movement).

⁴ *Asinor*, 2022 WL 3715777, at *1. In 2024, the New York Police Department (NYPD) possessed 75,770 cellphones that it had seized incident to arrest. *Local Law 131—Seized Property Data Report*, N.Y.C. POLICE DEP'T, www.nyc.gov/site/nypd/stats/reports-analysis/seized-property.page [perma.cc/FA8K-B7V8] (Click “Attachment D 2024”). The NYPD returned the vast majority of the 75,770 cellphones within six months. *Id.* Nevertheless, the NYPD retained possession of 279 cellphones for over two years after initial seizure. *Id.*

⁵ *See* *Riley v. Dorton*, 115 F.3d 1159, 1162 (4th Cir. 1997) (canvassing the Court's Fourth Amendment jurisprudence); *see also* *Fox v. Van Oosterum*, 176 F.3d 342, 354 (6th Cir. 1999) (Clay, J., concurring in part and dissenting in part) (recognizing that the Fourth Amendment protects a person's distinct possessory interest in retaining their property) (citing *Texas v. Brown*, 460 U.S. 730, 747 (1983) (Stevens, J., concurring)).

⁶ *See infra* notes 46–68 and accompanying text (detailing the circuit split on whether the Fourth Amendment applies to the government's retention of property).

⁷ *See infra* notes 10–45 and accompanying text.

⁸ *See infra* notes 46–68 and accompanying text.

⁹ *See infra* notes 69–94 and accompanying text.

I. THE LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND OF *ASINOR V. DISTRICT OF COLUMBIA*

In 2024, in *Asinor v. District of Columbia*, the U.S. Court of Appeals for the D.C. Circuit held that the Fourth Amendment mandates that law enforcement's retention of a lawfully arrested individual's property be reasonable.¹⁰ Section A of this Part traces the protection of private property enshrined in early common law and the Fourth Amendment.¹¹ Section B discusses the varied interpretations of two U.S. Supreme Court cases underlying a circuit split concerning the Fourth Amendment's protections—or lack thereof—of an arrestee's property.¹² Section C recounts the factual and procedural history of *Asinor*.¹³

A. The Fourth Amendment's Property Roots

Since the founding of the United States, the inviolable protection of personal property from government interference has been inextricably intertwined with the American Dream.¹⁴ Early common law recognized a cause of action for property owners after an individual unlawfully retained their personal property, even when the individual's initial seizure was lawful.¹⁵ The Virginia

¹⁰ See 111 F.4th 1249, 1251 (D.C. Cir. 2024) (recognizing that the Fourth Amendment's prohibition on unreasonable seizures imputes a reasonableness standard to the duration of the government's possession of a person's property).

¹¹ See *infra* notes 14–21 and accompanying text.

¹² See *infra* notes 22–39 and accompanying text.

¹³ See *infra* notes 40–45 and accompanying text.

¹⁴ See THE FEDERALIST NO. 54 (Alexander Hamilton) (postulating that government is suited “no less for protection of the property, than of the persons, of individuals”); see also Harvey M. Jacobs, *U.S. Private Property Rights in International Perspective* (discussing how Thomas Jefferson aimed to include the Lockean phrase “life, liberty[,] and property” in the Declaration of Independence), in PROPERTY RIGHTS AND LAND POLICIES 52, 55 (Gregory K. Ingram & Yu-Hung Hong eds., 2009), www.lincolnst.edu/app/uploads/2024/04/2077_1400_LP2008-ch03-U.S.-Private-Property-Rights-in-International-Perspective_0.pdf [perma.cc/EAX4-8282]; Paul J. Larkin, Jr., *The Original Understanding of Property in the Constitution*, 100 MARQ. L. REV. 1, 27 (2016) (recounting that the Framers' generation saw property protection as “vital to civil society”). John Locke described the preservation of property as the “great and chief end” of government. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 124, at 66 (C.B. Macpherson ed., Hackett Publ'g Co.1980) (1690); see Maryam Shariat & Hassan Hosseini, *Financialization of the American Dream in the 21st Century in the US as a World Leading Country*, 5 J. WORLD SOCIOLOGICAL STUD. 85, 92 (2021) (observing that the Founding Fathers' conception of the American Dream drew large inspiration from Locke's theory of the “natural rights of life, liberty, and property”) (citing CALVIN JILLSON, THE AMERICAN DREAM IN HISTORY, POLITICS, AND FICTION (2016)); Jeffrey C. Sindelar, Jr., *Of Form and Function: Lockean Political Philosophy and Mass Tort*, 90 NEB. L. REV. 887, 904 (2012) (same).

¹⁵ *Asinor*, 111 F.4th at 1253. William Blackstone suggested that conversion actions may be filed against anyone that unlawfully detains or converts personal property. See BLACKSTONE, *supra* note 1, at *359 n.95 (suggesting that the early common-law doctrine of conversion provided recourse for property owners where a third party unlawfully retained possession of their property). *Black's Law Dictionary* defines tortious conversion as “the wrongful possession or disposition of another's property as if it were one's own.” *Conversion*, BLACK'S LAW DICTIONARY, *supra* note 2.

Declaration of Rights of 1776, a foundational text that shaped the Fourth Amendment, identified property as a natural right indispensable to legitimate governance and rejected the English practice of general warrants.¹⁶ General warrants allowed law enforcement to seize property without specific justification, thereby facilitating the Crown's increasing number of prosecutions for seditious libel.¹⁷

The colonists' commitment to protecting personal property found expression in the codification of the Fourth Amendment, which guarantees the people's right to be secure in their property against unreasonable government seizures.¹⁸ The inclusion of the term "to be secure" was intended to safeguard individuals from the fear and danger posed by unwarranted government intrusions.¹⁹ The Fourth Amendment's protections are deeply intertwined with the First Amendment's guarantees of free speech, association, assembly, and religion, each tracing its origins to colonial resistance against the Crown's practice of general war-

¹⁶ See VIRGINIA DECLARATION OF RIGHTS OF 1776, § 1, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3812, 3813 (Francis Newton Thorpe ed., 1909) (describing the right to the "means of acquiring and possessing property" as an inherent right that cannot be deprived by a legitimate government); Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1265 (2016) (explaining that the Framers of the Bill of Rights in the U.S. Constitution drew from the Virginia Declaration of Rights of 1776 as a central persuasive source); David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581, 593 (2008) (reasoning that early Americans preferred specific warrants because they limited law enforcement's discretion and deterred illegitimate searches and seizures).

¹⁷ See Conor M. Reardon, *Cell Phones, Police Recording, and the Intersection of the First and Fourth Amendments*, 63 DUKE L.J. 735, 750 (2013) (describing the tumultuous history of conflict between the Crown and the press and explaining how the First and Fourth Amendments share a similar historical justification of protecting the people against seditious libel prosecution). *Black's Law Dictionary* defines seditious libel as "libel made with the intent of inciting sedition." *Libel*, BLACK'S LAW DICTIONARY, *supra* note 2. The First Amendment's protections extend to speech, journalism, and political activity. Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 114 (2007).

¹⁸ See U.S. CONST. amend. IV (guaranteeing the people's right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"); Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 990 (2016) (explaining that Anti-Federalists advocating a Bill of Rights relied upon *Ward's Case*, an English case from 1636, to underscore the need for protection against governmental intrusion upon personal property); see also *Asinor*, 111 F.4th at 1253 (describing the protection against unreasonable searches and seizures as a "pre-existing right" (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008))). The Fourth Amendment only affords protection against unreasonable searches and seizures effectuated by the government. See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (clarifying that a claim against a non-governmental actor for a purported seizure would not sound in the Fourth Amendment). In addition to its protections of possessory interests, the Fourth Amendment protects privacy interests. See Carol A. Chase, *Privacy Takes a Back Seat: Putting the Automobile Exception on Track After Several Wrong Turns*, 41 B.C. L. REV. 71, 82 (1999) (observing that the Court has implicitly placed more weight on the Fourth Amendment's protection of privacy interests than possessory interests).

¹⁹ See *Secure*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1773) (defining "secure" as "free from fear" and "free from danger").

rants.²⁰ Nevertheless, at codification, dictionaries defined seizure as both an initial act of taking a person's property and the continued act of retention.²¹

B. Seizure: U.S. Supreme Court Precedent and Federal Circuit Court Interpretations Prior to Asinor

The Fourth Amendment requires that any seizure of property by a government actor be reasonable.²² A government action constitutes a Fourth Amendment seizure of property where it effectuates a “meaningful interference with an individual’s possessory interests.”²³ Over the years, the Court developed a robust body of case law defining when an initial seizure is considered reasonable.²⁴ As a threshold matter, an initial seizure of an arrestee’s personal property collected incident to a lawful arrest is invariably considered reasonable.²⁵ A lawful arrest typically requires probable cause and a warrant, unless an exception to the warrant requirement applies.²⁶ State actors may also

²⁰ See *Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961) (describing the Fourth Amendment as entangled with First Amendment concerns); Reardon, *supra* note 17, at 750–51 (same).

²¹ See *Asinor*, 111 F.4th at 1252–53 (explaining that the competing definitions of seizure at codification as both the “act of seizing” and “gripe,” which was defined as “hold,” created ambiguity) (citing “Seizure,” JOHNSON, *supra* note 19). But see *Lee v. City of Chicago*, 330 F.3d 456, 462 (7th Cir. 2003) (holding that the definition of seizure at codification was not ambiguous, and only referred to the initial act of taking possession).

²² U.S. CONST. amend. IV; see *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (characterizing reasonableness as the “[t]he touchstone of the Fourth Amendment”) (citing *Katz v. United States*, 389 U.S. 347, 360 (1967)).

²³ See *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (confirming that the Fourth Amendment’s protection of possessory interests applies whenever the government meaningfully interferes with an individual’s property) (citing *Jacobsen*, 466 U.S. at 113); *Jacobsen*, 466 U.S. at 113 (establishing the definition of a Fourth Amendment seizure of property). *Black’s Law Dictionary* defines “possessory interest” as a “present or future right to the exclusive use and possession of property.” *Possessory Interest*, BLACK’S LAW DICTIONARY, *supra* note 2.

²⁴ See generally Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 UTAH L. REV. 977, 991–1022 (describing the five different tests for reasonableness that the Court has employed throughout Fourth Amendment jurisprudence).

²⁵ See *Asinor*, 111 F.4th at 1252 (affirming as settled law that officers may seize an arrestee’s property incident to a lawful arrest) (citing *Riley v. California*, 573 U.S. 373, 384 (2014)). Law enforcement is not required to obtain an arrest warrant to effectuate a lawful initial seizure. See *id.* (citing *Riley*, 573 U.S. at 384) (describing the principle that officers may seize an arrestee’s property during a warrantless arrest as “blackletter law”).

²⁶ See *United States v. Watson*, 423 U.S. 411, 417, 423 (1976) (concluding that a warrantless arrest supported by probable cause is lawful if made in a public place and if law enforcement has “reasonable grounds to believe that the person to be arrested has committed a felony”) (citing *Henry v. United States*, 361 U.S. 98, 100 (1959)); *District of Columbia v. Wesby*, 583 U.S. 48 (2018) (permitting a warrantless arrest if the officer gained probable cause that the “suspect committed a crime in the officer’s presence”) (citing *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001)). In 1975, in *Gerstein v. Pugh*, the Court defined probable cause as “facts and circumstances ‘sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense.’” 420 U.S. 103, 111 (1975) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). Law enforcement officials are generally entitled to qualified immunity in determining whether probable cause has been satisfied, provided that

seize the property of an individual detained based on reasonable suspicion—a lower legal standard than probable cause—although the Court has set strict limits on such seizures.²⁷

In 1983, in *United States v. Place*, the U.S. Supreme Court addressed whether law enforcement officials could seize a traveler's luggage for ninety minutes at New York's LaGuardia Airport based upon reasonable suspicion that the luggage contained narcotics.²⁸ The Court held that law enforcement's ninety-minute, warrantless seizure was sufficiently lengthy to offend the Fourth Amendment.²⁹

In 1984, shortly after *Place*, in *United States v. Jacobsen*, the Court considered whether the manner in which law enforcement officers executed the seizure of a package containing white powder from a private freight carrier violated the Fourth Amendment.³⁰ Unlike in *Place*, law enforcement's seizure in *Jacobsen* was supported by probable cause.³¹ Despite this critical difference, the Court in *Jacobsen* relied on *Place* to hold that a lawful initial seizure may violate the Fourth Amendment based on its "manner of execution."³² The Court suggested that officers may run afoul of the Fourth Amendment if the duration of their retention unreasonably interferes with an individual's posses-

the unlawfulness of their conduct was not "clearly established at the time." *Wesby*, 583 U.S. at 63 (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

²⁷ See *United States v. Place*, 462 U.S. 696, 702, 709 (1983) (permitting the application of *Terry v. Ohio* and its progeny to allow seizures supported by reasonable suspicion) (citing *Terry v. Ohio*, 392 U.S. 1, 88 (1968)).

²⁸ See *id.* at 698–99 (observing that law enforcement grew suspicious of the defendant after he acknowledged their identity as police officers and they discovered that the street addresses listed on his luggage were fictitious).

²⁹ See *id.* at 709–10 (holding that the Fourth Amendment permitted law enforcement to conduct a dog sniff test of the defendant's luggage but did not permit law enforcement's ninety-minute detention of the luggage). Nevertheless, the Court declined to set forth a permissible time limit for seizures supported by reasonable suspicion. *Id.* The Court noted that law enforcement's failure to tell the defendant where his luggage could be retrieved and failure to inform him of the anticipated time of dis-possession exacerbated the Fourth Amendment violation. *Id.* at 710.

³⁰ See *United States v. Jacobsen*, 466 U.S. 109, 109 (1984) (recounting how federal agents, after being notified by private freight-carrier employees who had discovered a white-powdered substance contained in a tube inside of a package, proceeded to examine and test the substance). After conducting a field test, Drug Enforcement Administration officers quickly concluded that the substance was cocaine and sought a warrant to search the address provided by the package, leading to the defendants' arrest. *Id.*

³¹ Compare *id.* at 121 n.20 (confirming that it is uncontroverted that the federal agents supported their seizure of the defendants' package with probable cause), with *Place*, 462 U.S. at 699 n.1 (observing that the district court found that the law enforcement agents supported their seizure of the defendant's luggage with reasonable suspicion).

³² See *Jacobsen*, 466 U.S. at 124 (relying upon the Court's holding in *United States v. Place* to hold that the government's manner of executing a seizure may violate the Fourth Amendment) (citing *Place*, 462 U.S. at 707–10).

sory interests.³³ Nevertheless, the Court concluded that the officers' conduct in *Jacobsen* did not violate the Fourth Amendment because they seized only an undetectable trace of suspected contraband—an amount so minimal that it went unnoticed by the dispossessed defendants.³⁴

In 2017, in *Manuel v. City of Joliet*, the Court considered whether the Fourth Amendment, which protects persons and property alike, requires the government's pretrial detention of an arrestee to be reasonable.³⁵ The Court concluded that an arrestee's pretrial detention must be reasonable because it constitutes an ongoing Fourth Amendment seizure of a person.³⁶

Following *Jacobsen* and *Place*, a divergence in interpreting the Fourth Amendment emerged: does it protect property seized pursuant to a lawful arrest from unreasonably lengthy government retention?³⁷ Under the majority seizure-excludes-retention approach, the Fourth Amendment is silent on the retention of property seized pursuant to a lawful arrest.³⁸ Conversely, under the minority seizure-includes-retention approach, the Fourth Amendment requires that law enforcement's retention of property seized incident to a lawful arrest be reasonable.³⁹

³³ See *id.* at 124 n.25 (suggesting that an initial lawful seizure supported by probable cause may become unreasonable if it is unduly lengthy).

³⁴ *Id.* at 125.

³⁵ See *Manuel v. City of Joliet*, 580 U.S. 357, 364, 368 (2017) (canvassing Fourth Amendment jurisprudence and concluding that the Fourth Amendment protects an arrestee whom officers detained for forty-eight days before trial based solely on false evidence rather than probable cause).

³⁶ See *id.* at 364 (suggesting that an arrestee's pretrial detention constitutes an ongoing Fourth Amendment seizure that requires reasonableness to pass scrutiny).

³⁷ See *Asinor v. District of Columbia*, 111 F.4th 1249, 1251, 1260 n.3 (D.C. Cir. 2024) (describing the circuit split regarding the extent to which the Fourth Amendment protects an individual's possessory interests in property).

³⁸ See *Fox v. Van Oosterum*, 176 F.3d 342, 351 (6th Cir. 1999) (concluding that the Fourth Amendment does not protect an individual's possessory property interest against unduly lengthy retention by the government). In holding that the Fourth Amendment does not protect a lawfully arrested individual's property from the government's unduly lengthy retention, the U.S. Court of Appeals for the Sixth Circuit announced the position that was subsequently followed by the U.S. Courts of Appeals for the First, Second, Seventh, and Eleventh Circuits. *Id.*; see *Denault v. Ahern*, 857 F.3d 76, 84 (1st Cir. 2017) (holding that the Fourth Amendment is silent beyond the initial act of dispossession); *Case v. Eslinger*, 555 F.3d 1317, 1330 (11th Cir. 2009) (same); *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 187 (2d Cir. 2004) (same); *Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003) (same).

³⁹ See *Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017) (concluding that the Fourth Amendment protects against unduly lengthy retention of property by the government). The Ninth Circuit became the pioneering circuit to adopt the minority seizure-includes-retention approach, relying upon *United States v. Jacobsen* to find that the Fourth Amendment's property protections are not quelled upon the completion of a proper initial seizure. See *id.* (citing *Jacobsen*, 466 U.S. at 124 & n.25, to announce that the "Fourth Amendment doesn't become irrelevant once an initial seizure has run its course"); see also *Asinor*, 111 F.4th at 1255 (adopting the seizure-includes-retention approach and reasoning that *Jacobsen* provided a general rule that seizures supported by probable cause may become unreasonable if unduly lengthy) (citing *Segura v. United States*, 468 U.S. 796, 812 (1984)).

C. Factual Background and Procedural History of *Asinor*

Asinor involves two consolidated appeals with similar factual and procedural histories.⁴⁰ In both *Cameron v. District of Columbia* and *Asinor v. District of Columbia*, decided by the U.S. District Court for the District of Columbia in 2022, the MPD lawfully arrested the plaintiffs at racial justice protests and seized their cell phones and other personal belongings.⁴¹ In each instance, the plaintiffs were released after federal prosecutors decided not to press charges.⁴² In *Cameron*, some of the plaintiffs did not regain possession of their belongings for over fourteen months after their arrest, whereas in *Asinor*, the MPD retained the plaintiff's property for eleven months.⁴³ In both matters, the plaintiffs filed suit alleging that the MPD violated the Fourth Amendment by

⁴⁰ *Asinor*, 111 F.4th at 1251; see *Cameron v. District of Columbia*, No. 21-cv-2908, 2022 WL 3715779, at *1 (D.D.C. Aug. 29, 2022) (involving the seizure of personal property incident to lawful arrests during racial justice protests without the government pursuing subsequent criminal charges), *vacated*, *Asinor*, 111 F.4th at 1261; *Asinor v. District of Columbia*, No. 21-cv-02158, 2022 WL 3715777, at *1 (D.D.C. Aug. 29, 2022) (same), *vacated*, *Asinor*, 111 F.4th at 1261.

⁴¹ See *Asinor*, 111 F.4th at 1252 (remarking that it is uncontroverted that the MPD's arrest was reasonable); *Cameron*, 2022 WL 3715779, at *1 (recounting that the MPD arrested five plaintiffs for felony rioting at a BLM protest); *Asinor*, 2022 WL 3715777, at *1 (noting that on August 30, 2020, MPD officers arrested the photojournalist Oyoma Asinor for his involvement in a BLM protest and seized his cellphone, eyewear, and camera). On May 25, 2020, George Floyd, a forty-six-year-old Black man, was murdered by Derek Chauvin, a Minneapolis police officer who fatally knelt on George Floyd's neck for over nine minutes. Tobi Raji, *Their Killings Sparked a Racial Reckoning. Here's What's Happened Since*, WASH. POST (July 22, 2025), www.washingtonpost.com/nation/2025/07/22/george-floyd-breonna-taylor-ahmaud-arbery-killings-racial-reckoning/ [perma.cc/9NC9-QSE5]. Chauvin received a sentence of twenty-two and one-half years in prison for second-degree murder in Minnesota, and a twenty-year federal sentence for depriving Floyd of his constitutional right to be free from unreasonable force. *Id.* The murder engendered widespread outrage and just days later, in June 2020, over ten thousand protesters took to the streets of the nation's capital to voice concerns about racial justice and police brutality. Samantha Schmidt et al., *Protesters Throng D.C., Vowing to Be Heard After George Floyd's Death*, WASH. POST (June 7, 2020), www.washingtonpost.com/local/protesters-gather-for-massive-day-of-rallies-in-dc/2020/06/06/92cd6838-a6cb-11ea-bb20-ebf0921f3bbd_story.html [perma.cc/H53K-SUCP]; see Buchanan et al., *supra* note 3 (estimating participation in racial justice protests across the United States during the summer of 2020).

⁴² *Cameron*, 2022 WL 3715779, at *1; *Asinor*, 2022 WL 3715777, at *1.

⁴³ See *Cameron*, 2022 WL 3715779, at *2 (noting that the MPD returned two of the plaintiffs' phones over nine months post-arrest upon invocation of D.C. Rule of Criminal Procedure 41(g) and explaining that in response to the plaintiffs' requests for the return of their phones, an MPD detective claimed that investigators were deciding whether to obtain search warrants); *Asinor*, 2022 WL 3715777, at *1, *2 n.1 (recounting that over the eleven months officials retained Asinor's property, he repeatedly requested its return without success and, unlike the *Cameron* plaintiffs, was not informed by officers of any potential investigatory purpose in the MPD's retention); see also Jennifer Earl, *Protest Arrests and Future Protest Participation: The 2004 Republican National Convention Arrestees and the Effects of Repression* (describing the contentious arrests at the 2004 Republican National Convention in New York City and characterizing the extended detention of arrested protesters released without charge as an "informal punishment" designed to repress protests), in 54 STUDIES IN LAW, POLITICS, AND SOCIETY 141, 151–52 (Austin Sarat ed., 2011). The D.C. Rules of Criminal Procedure create a cause of action for individuals seeking to regain possession of property unreasonably retained by the government. D.C. SUPER. CT. R. CRIM. P. 41(g).

retaining their property for an unreasonably lengthy duration.⁴⁴ The district court rejected the plaintiffs' Fourth Amendment claims in both cases, leading the parties to appeal, which the D.C. Circuit consolidated into the *Asinor* case.⁴⁵

II. THE CIRCUIT SPLIT ON DEFINING SEIZURE UNDER THE FOURTH AMENDMENT

In 2024, in *Asinor v. District of Columbia*, the U.S. Court of Appeals for the D.C. Circuit adopted the seizure-includes-retention approach, requiring that the length of the government's retention of an arrestee's property be reasonable.⁴⁶ In doing so, the D.C. Circuit rejected the majority seizure-excludes-retention approach.⁴⁷ Section A of this Part explores the various rationales underlying the majority approach that the Fourth Amendment does not protect a lawfully arrested individual's personal property from unduly lengthy retention.⁴⁸ Section B of this Part examines how the U.S. Court of Appeals for the Ninth Circuit and the D.C. Circuit reached the seizure-includes-retention approach.⁴⁹

⁴⁴ See *Cameron*, 2022 WL 3715779, at *1 (identifying that the plaintiffs sought Fourth and Fifth Amendment claims under 42 U.S.C. § 1983); *Asinor*, 2022 WL 3715777, at *1 (providing that in addition to his Fourth Amendment claim, Asinor pursued common-law assault and battery claims against two MPD officers). Both the plaintiffs in *Cameron* and the plaintiff in *Asinor* pursued a claim for common-law conversion. *Cameron*, 2022 WL 3715779, at *1; *Asinor*, 2022 WL 3715777, at *1. The five *Cameron* plaintiffs alleged that MPD customarily retains the cell phones that officers seize from arrestees for prolonged periods of time after the investigatory value of retaining the cellphones has entirely diminished. *Cameron*, 2022 WL 3715779, at *2. To support this claim, the five plaintiffs attempted to furnish examples of similar unduly retention of the cellphones of over two hundred individuals arrested incident to protests of President Donald Trump's first inauguration. *Id.*

⁴⁵ See *Asinor*, 111 F.4th at 1251 (consolidating the appeals from *Cameron* and *Asinor*); *Cameron*, 2022 WL 3715779, at *3 (aligning with the majority approach adopted by the First, Second, Sixth, Seventh, and Eleventh Circuits to conclude that the MPD's extended retention of property seized incident to lawful arrests did not violate the Fourth Amendment); *Asinor*, 2022 WL 3715777, at *1 (expressly incorporating the D.C. District Court's reasoning from *Cameron* to dismiss the plaintiff's Fourth Amendment claim) (citing *Cameron*, 2022 WL 3715779, at *1–12).

⁴⁶ See *Asinor*, 111 F.4th at 1251 (finding that law enforcement's retention of the consolidated plaintiffs' property constituted a seizure and invoked the Fourth Amendment).

⁴⁷ See *id.* at 1262 (Henderson, J., concurring in judgment) (disagreeing with the majority approach and characterizing the various underlying reasonings as unpersuasive). Under the seizure-excludes-retention approach, a seizure's temporal scope is limited to the instance when a state actor takes possession of an individual's property. See *Lee v. City of Chicago*, 330 F.3d 456, 463 (7th Cir. 2003) (concluding that the Seventh Circuit's precedent necessitates it to impose temporal restrictions on seizures under the Fourth Amendment). Under the majority approach, once the government has effectuated "some meaningful interference with an individual's possessory interests in [his] property," the seizure has concluded. See *id.* at 462 (quoting *Soldal v. Cook County*, 506 U.S. 56, 61 (1992)) (determining that once law enforcement has dispossessed a person of their property, that individual's possessory interest is no longer protected by the Fourth Amendment).

⁴⁸ See *infra* notes 50–60 and accompanying text.

⁴⁹ See *infra* notes 61–68 and accompanying text.

A. The Rationales Underlying the Seizure-Excludes-Retention Approach

In 1999, in *Fox v. Van Oosterum*, the U.S. Court of Appeals for the Sixth Circuit became the first circuit to adopt the seizure-excludes-retention approach.⁵⁰ In *Fox*, the Sixth Circuit rejected the plaintiff's claim that the county's failure to return his driver's license for over five months constituted an unreasonable seizure in violation of the Fourth Amendment.⁵¹ In doing so, the Sixth Circuit found that the U.S. Supreme Court had only considered cases where the claimants challenged the government's initial deprivation of property, not the government's retention.⁵² Notably, the Sixth Circuit interpreted *United States v. Place* to be confined to seizures pursuant to reasonable suspicion and therefore wholly inapplicable to seizures based on probable cause.⁵³

In 2003, in *Lee v. City of Chicago*, the U.S. Court of Appeals for the Seventh Circuit also adopted the seizure-excludes-retention approach to reject a plaintiff's claim that the city of Chicago's impoundment policy constituted an

⁵⁰ See 176 F.3d 342, 350 (6th Cir. 1999) (concluding that the Fourth Amendment does not protect arrestees against the government's unreasonably lengthy retention).

⁵¹ See *id.* (holding that law enforcement's retention of the plaintiff's driver's license did not amount to a new seizure or change the nature of the initial seizure, precluding the plaintiff from prevailing on a Fourth Amendment theory). In *Fox*, officers collected the plaintiff's driver's license incident to an inventory search of his truck based on probable cause. *Id.* at 345. After receiving an anonymous tip that the plaintiff was involved in multiple car thefts, officers conducted the inventory search of the plaintiff's truck. *Id.* In August 1993, following the inventory search which dispossessed the plaintiff of his driver's license, law enforcement conditionally released him on the understanding that he would not drive. *Id.* Prior to the end of the month, officers again arrested the plaintiff after law enforcement witnessed him operating a motor vehicle. *Id.* The plaintiff filed suit against the county and its officials after they declined to return the plaintiff's driver's license months after his release from jail on car theft crimes. See *id.* (recounting that after being released in December 1993, the plaintiff made repeated attempts to retrieve his license, but law enforcement consistently thwarted him, suggesting that his outstanding tickets for excessive noise undermined his driving privileges and precluded the return of his license). Eventually, over five months after the plaintiff's release, the Secretary of State provided him with a "duplicate license." *Id.* *Fox* filed suit pursuant to 42 U.S.C. § 1983 against the county and county officials under Fourth, Sixth, and Fourteenth Amendment theories, all of which were rejected. *Id.* at 347, 354.

⁵² See *id.* at 351 (reviewing the Court's precedent to find that the Court has solely applied its definition of seizure to challenges based on the government's initial dispossession of an individual's property). The Sixth Circuit concluded that the Fourth Amendment is silent after the government has completed its initial seizure. See *id.* at 350 (quoting *Texas v. Brown*, 460 U.S. 730, 747 (1983) (Stevens, J., concurring)) (relying upon Justice Stevens's characterization of the protections guaranteed by the Fourth Amendment in "retaining possession of property" to find that seizure does not afford an interest in retaining lawfully seized property).

⁵³ See *id.* at 351 n.6 (citing *United States v. Place*, 462 U.S. 696, 709–10 (1983)) (describing *Place* as establishing an analytical framework for determining the constitutional limits of law enforcement's retention of property based solely on reasonable suspicion). Critically, the Sixth Circuit did not analyze whether the Court's holding in *Jacobsen* extended its holding in *Place*. Compare *Fox*, 176 F.3d at 351 n.6 (failing to mention the Court's holding in *Jacobsen* when describing *Place*), with *Asinor v. District of Columbia*, 111 F.4th 1249, 1255 (D.C. Cir. 2024) (concluding that, in *Jacobsen*, the Court extended *Place* to full-fledged seizures based on probable cause) (citing *United States v. Jacobsen*, 466 U.S. 109, 124 (1984)).

unreasonable Fourth Amendment seizure.⁵⁴ In doing so, the Seventh Circuit expressly rejected the Sixth Circuit's reasoning in part, although it agreed with the Sixth Circuit's confinement of *Place* to seizures based on reasonable suspicion.⁵⁵ Unlike the Sixth Circuit, the Seventh Circuit employed a textualist interpretation of the Fourth Amendment, concluding that the scope of a seizure was limited temporally due to the meaning of the word at codification.⁵⁶ Through its textualist analysis, the Seventh Circuit focused on definitions at the time of codification and declined to consider early common-law norms.⁵⁷ The *Lee* court determined that "to be secure" affords no protection against the government's retention of lawfully seized property because the government's dispossession extinguishes a person's security in their property.⁵⁸

⁵⁴ See *Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003) (holding that a seizure is "limited to an individual's interest in retaining his property" and rejecting the plaintiff's Fourth Amendment claim). In *Lee v. City of Chicago*, the plaintiff, Mark Lee, was an innocent victim of a stray shooting in Chicago, leading law enforcement to impound his vehicle for evidentiary purposes in hopes of identifying the perpetrator. See *id.* at 458–59, 472 (observing that the record is devoid of any indication that the plaintiff was anything other than an innocent bystander). After ten days, law enforcement notified Lee that his car no longer served evidentiary value, but that he could not collect it until he paid all the impoundment fees or solicited a hearing. *Id.* at 459. Officers informed Lee that a failure to make the requested payment or pursue a hearing within thirty days of the initial impoundment would allow the City of Chicago to either sell or crush the car. *Id.* Lee was able to retain counsel to negotiate a reduction in the payment required for retrieval because he could not pay the amount initially solicited. *Id.*; see James Hill, *City's Noise Law Lowers Volume of Auto Stereos*, CHI. TRIB., Apr. 13, 1998, <http://www.chicagotribune.com/1998/04/13/citys-noise-law-lowers-volume-of-auto-stereos> (reporting that the city of Chicago customarily assessed a five hundred dollar fine in addition to storage and towing fees to retrieve impounded vehicles). Upon retrieval, Lee noticed that the city had painted six-digit inventory numbers in bright red on his vehicle. *Lee*, 330 F.3d at 459. The city made no attempt to account for the damage caused by the spray paint, either through a refund or a discount on the requested retrieval payment. *Id.* The plaintiff filed suit against the city, claiming that the city's impoundment policy violated the Fourth Amendment. *Id.*; see Gary Washburn, *Laws Turning Chicago into the City That Tows*, CHI. TRIB., July 23, 1999, at SW1 (dubbing Chicago the "towing capital of the universe"); Hill, *supra*, at C–A1 (detailing a Chicago noise ordinance restricting audio volume from vehicle stereos and permitting law enforcement to impound vehicles in violation led law enforcement to impound 5,286 vehicles in the ordinance's nascent twenty-one months).

⁵⁵ See *Lee*, 330 F.3d at 462 (describing the Sixth Circuit's reliance on Justice Stevens' characterization of the interests afforded by the Fourth Amendment's prohibition on unreasonable seizures in his *Texas v. Brown* concurrence as "problematic") (citing *Brown*, 460 U.S. at 744). Although the Seventh Circuit disagreed with the Sixth Circuit's reliance on Justice Stevens' concurrence in *Brown*, it nevertheless agreed with the Sixth Circuit's narrow construction of *Place*. See *id.* at 464 (opining that *Place* is applicable only to "the initial loss of that possessory interest") (citing *Place*, 462 U.S. at 696).

⁵⁶ See *id.* at 462 (explaining that early Americans understood seizure to be restricted to the confiscation or forcible taking of property).

⁵⁷ See *id.* (surveying myriad definitions of seizure at codification to find that the Framers defined seizure as a temporally limited act—not an expansive, continuous act).

⁵⁸ *Id.*; see *supra* note 19 and accompanying text (detailing the meaning of "to be secure" at the time the United States codified the Fourth Amendment).

The U.S. Courts of Appeals for the First, Second, and Eleventh Circuits also adopted the seizure-excludes-retention approach.⁵⁹ Nevertheless, in reaching their decisions, the First, Second, and Eleventh Circuits provided cursory analyses and avoided endorsing the rationales of either the Sixth or Seventh Circuit.⁶⁰

B. Reaching the Seizure-Includes-Retention Approach

In 2017, in *Brewster v. Beck*, the U.S. Court of Appeals for the Ninth Circuit became the first circuit to split from the seizure-excludes-retention approach in favor of a seizure-includes-retention approach.⁶¹ In *Brewster*, the Ninth Circuit adopted the seizure-includes-retention approach to hold that a Los Angeles Police Department's thirty-day impoundment policy was a Fourth Amendment seizure of property.⁶² In rejecting the seizure-excludes-retention approach, the Ninth Circuit found the Court's holding in *Place* instructive for seizures based on probable cause.⁶³

⁵⁹ See *Denault v. Ahern*, 857 F.3d 76, 84 (1st Cir. 2017) (finding "no reason to disagree" with its sister circuits that have embraced the seizure-excludes-retention approach); *Case v. Eslinger*, 555 F.3d 1317, 1330–31 (11th Cir. 2009) (concluding that the Fourth Amendment is irrelevant once law enforcement establishes probable cause); *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 187 (2d Cir. 2004) (rejecting the seizure-includes-retention approach as a theory that was too novel to gain Fourth Amendment protections).

⁶⁰ See *Asinor v. District of Columbia*, 111 F.4th 1249, 1262 (D.C. Cir. 2024) (Henderson, J., concurring in judgment) (describing the analysis undertaken by the First, Second, and Eleventh Circuits in reaching the majority approach as "short shrift"); *Denault*, 857 F.3d at 83–84 (sidestepping subscribing to a particular line of reasoning in reaching its adoption of the seizure-excludes-retention approach, despite recounting the various rationales provided by its sister circuits); *Case*, 555 F.3d at 1330–31 (declining to rely upon sister circuits in adopting the seizure-excludes-retention approach); *Shaul*, 363 F.3d at 187 (considering both the Sixth and Seventh Circuits' reasoning in adopting the seizure-excludes-retention approach).

⁶¹ See 859 F.3d 1194, 1197 (9th Cir. 2017) (establishing that the Fourth Amendment is not rendered irrelevant after an initial seizure has concluded).

⁶² *Id.* In *Brewster v. Beck*, the plaintiff, Lamy Brewster, commenced litigation against the Los Angeles Police Department (LAPD) on behalf of a class of individuals whose vehicles the LAPD seized under its thirty-day impound policy. See *id.* at 1195 (detailing that the policy at issue prevented aggrieved vehicle owners from recovering their impounded vehicles for thirty days, even when the vehicle owners offered to pay all applicable fees incurred by impoundment). The district court prior to *Brewster* found that the LAPD policy constituted an administrative penalty that avoided triggering the Fourth Amendment. See *id.* (observing that the district court granted the motion to dismiss in favor of LAPD). The Ninth Circuit did not hold that the LAPD policy violated the Fourth Amendment; instead, it found that the policy invoked the Fourth Amendment because the thirty-day impoundment constituted a seizure. See *id.* at 1197 (declining to decide as a matter of law whether the LAPD's thirty-day impoundment policy constituted an unreasonable seizure in violation of the Fourth Amendment).

⁶³ See *id.* (rebuking the Seventh Circuit's confinement of *Place* to seizures based on reasonable suspicion and suggesting that, on its own, *Place* established a rule applicable to seizures based on reasonable suspicion and probable cause) (first citing *United States v. Place*, 462 U.S. 696, 707, 710 (1983); and then citing *Lee v. City of Chicago*, 330 F.3d 456, 464 (7th Cir. 2003)).

In 2024, in *Asinor*, the U.S. Court of Appeals for the D.C. Circuit joined the Ninth Circuit in adopting the seizure-includes-retention approach.⁶⁴ In concluding that the scope of a Fourth Amendment seizure is not limited to the initial instance of dispossession, the D.C. Circuit relied upon a textualist interpretation buttressed with a detailed historical analysis that differed from the Seventh Circuit's.⁶⁵ Recognizing that competing definitions of seizure at codification rendered a purely textualist analysis insufficient, the D.C. Circuit looked to early common-law property protections and held that seizure includes retention.⁶⁶

The D.C. Circuit interpreted *United States v. Jacobsen* to extend *Place* to establish that a seemingly lawful initial seizure based on probable cause may violate the Fourth Amendment if the government's retention becomes unreasonably lengthy.⁶⁷ The D.C. Circuit concluded that *Place*'s prohibition on unreasonably lengthy government retention is not confined to seizures based on reasonable suspicion because the Court had extended *Place* to a seizure based upon probable cause in *Jacobsen*.⁶⁸

III. THE PATH FORWARD: ADOPTING AND STRENGTHENING THE CONSTITUTIONAL SEIZURE-INCLUDES-RETENTION APPROACH

The U.S. Supreme Court should resolve the federal circuit split by embracing the seizure-includes-retention approach adopted by the U.S. Court of Appeals for the D.C. Circuit in *Asinor v. District of Columbia* in 2024.⁶⁹ Section A of this Part describes how the Constitution mandates adopting the sei-

⁶⁴ See 111 F.4th at 1260 n.3 (finding the Ninth Circuit's approach the most persuasive).

⁶⁵ Compare *id.* at 1253 (relying upon a detailed discussion of early common-law protections of possessory interests to resolve the ambiguity engendered by the definition of seizure at codification), with *Lee*, 330 F.3d at 462 (focusing solely on the definition of seizure at codification and not relying upon early common-law traditions that granted claimants relief for unlawfully possessed property).

⁶⁶ See *Asinor*, 111 F.4th at 1252–53 (explaining that the meaning of seizure at the time of codification was ambiguous and could be construed to include or exclude continued retention of property). The D.C. Circuit resolved the tie created by a rigid textualist interpretation by focusing on early common-law causes of action that allowed individuals to recover property unlawfully retained by a tortfeasor, even if the initial dispossession was lawful. See *id.* at 1253–54 (recounting the early common-law mechanisms that granted claimants relief for property that a tortfeasor lawfully took, but unlawfully possessed, and concluding that these causes of action indicate an expansive construction of seizure at the time of the Fourth Amendment's codification).

⁶⁷ See *id.* at 1255 (majority opinion) (highlighting that the Court in *Jacobsen* cited *Place* to establish a rule concerning the “permissible duration of full-fledged seizures”). Judge Henderson criticized sister circuits that adopted the seizure-excludes-retention approach for relying on *Place* without acknowledging that the Court's subsequent decision in *Jacobsen* broadened *Place*'s scope. *Id.* at 1262 (Henderson, J., concurring in judgment).

⁶⁸ See *id.* at 1255 (majority opinion) (emphasizing that *Jacobsen* applied *Place* to a seizure based on probable cause, not reasonable suspicion).

⁶⁹ See *id.* at 1261–64 (Henderson, J., concurring in judgment) (canvassing the logic underlying the various positions taken by sister circuits and concluding that the D.C. Circuit “correctly” split from the majority approach).

zure-includes-retention approach, which aligns with the Framers' intent at codification, the Court's precedent, and the Fourth Amendment's plain text.⁷⁰ Section B of this Part contends that the seizure-includes-retention approach could be bolstered by recognizing that the Court's definition of seizure necessarily includes retention.⁷¹

A. History, Precedent, and the Plain Text Mandate That Seizure Includes Retention

Although the Framers were no strangers to spirited debate, they firmly aligned on the need to protect property from prolonged government intrusion.⁷² Unlike the majority approach, the seizure-includes-retention approach faithfully reflects the Framers' intent, guaranteeing robust protection of personal property from unduly lengthy government possession.⁷³ It achieves this by requiring the duration of law enforcement's retention of seized property to be reasonable.⁷⁴ Under the majority approach, property lawfully seized with probable cause could be arbitrarily held for decades without upsetting the Fourth

⁷⁰ See *infra* notes 72–86 and accompanying text.

⁷¹ See *infra* notes 87–94 and accompanying text.

⁷² See *Asinor*, 111 F.4th at 1253 (describing the pervasive Anti-Federalist concerns engendering the Fourth Amendment and expounding that many colonists regarded the Crown's confiscation of personal property as a key grievance that precipitated the Revolutionary War) (citing Brady, *supra* note 18, at 987–94, 991 & n.205); BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 7 (1977) (emphasizing that the Framers placed great importance on safeguarding property rights); *supra* notes 15–21 and accompanying text (describing how the Framers prioritized protecting property against government intrusion); see also *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021) (recognizing that the Founders believed that protecting private property was critical to promoting individual freedom); GianCarlo Canaparo & Paul J. Larkin, Jr., *The Twenty-Seventh Amendment: Meaning and Application*, HARV. J.L. & PUB. POL'Y 1, 10 (2021) (commenting that the Framers engaged in “fierce debate” concerning the potential funding mechanisms for members of Congress); Lyle D. Griffin, *A Glimmer of Hope for State Sovereignty: The Supreme Court Limits Federal Regulation of Radioactive Waste Disposal*, 23 CUMB. L. REV. 655, 674 (1993) (remarking that the Framers engaged in spirited discussions over whether Congress could employ state governments to administer federal law) (citing *New York v. United States*, 505 U.S. 144, 161 (1992)).

⁷³ See *Asinor*, 111 F.4th at 1253–54 (concluding that the protections of personal property against unduly detention at early common law suggest that the Framers intended the Fourth Amendment to embrace the seizure-includes-retention approach); see also *supra* note 15 and accompanying text (describing an early common-law right of action that provided recourse for property owners whose property was unlawfully retained by a third party).

⁷⁴ See *Asinor*, 111 F.4th at 1254 (suggesting that history provides that the MPD's continued retention of the plaintiff's property is governed by the Fourth Amendment). The seizure-includes-retention approach may dissuade law enforcement from retaining personal property for numerous months after any legitimate government interest in the property dissipates. See *id.* at 1255 (noting that the plaintiffs' harm accrued throughout the government's prolonged retention of their effects). But see *id.* at 1261 (cautioning that administrative burdens may prolong the government's eventual return of personal property after its legitimate interest dissipates and noting that the government need not return property instantaneously to avoid Fourth Amendment scrutiny).

Amendment—an outcome the Framers would have found intolerable.⁷⁵ Early common-law causes of action for improperly retained property outweigh codification-era definitional ambiguity, further confirming the Framers' intent that seizure includes retention.⁷⁶

The First and Fourth Amendments reflect early Americans' intent to curb the pervasive abuses of general warrants, particularly the Crown's suppression of seditious publications through seizure.⁷⁷ The seizure-includes-retention approach accords with the Framers' rejection of general warrants by requiring that law enforcement's continued retention of property be supported by a legitimate government interest.⁷⁸

The Court's precedent further supports the adoption of the seizure-includes-retention approach.⁷⁹ In *United States v. Jacobsen*, the Court established that a seemingly lawful initial seizure based on probable cause may upset the Fourth Amendment where its "manner of execution unreasonably infringes possessory interests."⁸⁰ The Court suggested that the government's manner of execution is

⁷⁵ See *Lee v. City of Chicago*, 330 F.3d 456, 470 (7th Cir. 2003) (highlighting that a dispossessed owner cannot invoke the Fourth Amendment to regain their property); Donohue, *supra* note 16, at 1319–20 (describing early Americans' concerns with the dangers of arbitrary seizures of property); see also U.S. CONST. amend. IV (guaranteeing the people's right to be secure in their effects against unreasonable seizures); *supra* notes 14–21 and accompanying text (surveying the solicitude for property rights that animated the Framers' drafting of the First and Fourth Amendments).

⁷⁶ See *Asinor*, 111 F.4th at 1253 (concluding that history resolves the tie created by the competing definitions of seizure at codification because the Fourth Amendment codified a "'pre-existing right'" at early common law (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008))).

⁷⁷ Reardon, *supra* note 17, at 750–51.

⁷⁸ See *Asinor*, 111 F.4th at 1261 (explaining that under the seizure-includes-retention approach, the government must return seized property once it no longer has a valid reason for retaining it, though the return need not occur immediately upon the dissipation of that reason); *supra* note 17 and accompanying text (recounting the history of seditious libel prosecutions that contributed to the adoption of the Fourth Amendment). The constitutional mandate of adopting the seizure-includes-retention approach is further reinforced when considering First Amendment concerns. See Earl, *supra* note 43, at 152 (theorizing that law enforcement's practice of arresting protesters for a prolonged period of time and rarely pursuing conviction is a form of "informal punishment" sought to repress future protests); *Appeals Court Rules D.C. Police Cannot Hold Personal Property for Unreasonable Amount of Time*, ACLU OF D.C. (Aug. 9, 2024), www.acludc.org/press-releases/appeals-court-rules-dc-police-cannot-hold-personal-property-unreasonable-amount-time [perma.cc/MH6W-MB2X] (opining that law enforcement's practice of retaining protesters' belongings for a lengthy period of time creates a "chilling effect" for protest involvement).

⁷⁹ See *Asinor*, 111 F.4th at 1252 (reaching the seizure-includes-retention approach in part due to the Court's precedent governing the permissible duration a seizure of property or persons).

⁸⁰ See 466 U.S. 109, 124 (1984) (determining that although law enforcement's initial seizure of suspicious white powder upon probable cause was reasonable, the Court still had to consider whether factors after the initial seizure rendered the seizure unreasonable). Notably, in *Jacobsen*, the Court rebuked interpreting the Fourth Amendment to be silent after a seizure's inception and lent support to the Fourth Amendment's applicability to law enforcement's retention of personal property. See *id.* (recognizing that the Fourth Amendment's temporal coverage extends beyond a seizure's inception).

affected by the duration it retains the seized property.⁸¹ In doing so, the Court indicated that the Fourth Amendment protects an arrestee's possessory property interest from unduly lengthy retention by state actors.⁸²

The seizure-includes-retention approach conforms to the Fourth Amendment's plain language by extending uniform temporal scopes to a seizure, regardless of what is being seized.⁸³ The Fourth Amendment promises to protect persons and effects equally.⁸⁴ The Court has consistently held that the government's retention of a seized arrestee constitutes an ongoing Fourth Amendment seizure that must be reasonable.⁸⁵ Thus, the seizure-includes-retention approach successfully effectuates the Fourth Amendment's promised uniform protection of persons and property by requiring that the government's retention of seized property also be reasonable.⁸⁶

⁸¹ See *id.* at 124 n.25 (declining to articulate an analytical framework for the "manner of execution," yet still indicating that the duration of a seizure is a critical consideration). In *Asinor*, the D.C. Circuit interpreted "manner of execution" to mean "any change in circumstances that makes unreasonable the government's ongoing interference with possessory property interests." 111 F.4th at 1256 (citing *Jacobsen*, 466 U.S. at 124 & n.25).

⁸² See *Jacobsen*, 466 U.S. at 124 & n.25 (recognizing that seizure based on probable cause that is seemingly lawful at its inception may violate the Fourth Amendment if it becomes unduly lengthy). In *Jacobsen*, the Court extended its holding in *United States v. Place* to apply to seizures supported by probable cause instead of mere reasonable suspicion. See *id.* (applying the rule from *Place* that a seizure initially lawfully conducted may be rendered unreasonable due to its duration) (citing *United States v. Place*, 462 U.S. 696, 707–10 (1983)). By observing that "as *Place* also holds," the Court signaled in *Jacobsen* its intent to extend *Place* to seizures incident to lawful arrest, demonstrating that *Jacobsen* was meant to extend, not merely reaffirm, *Place*'s holding. See *id.* at 124 (suggesting that the Court's holding in *Jacobsen* stands on its own).

⁸³ See *Asinor*, 111 F.4th at 1256 (concluding that nothing in the text, history, or other sources support treating seizures of persons and property differently under the Fourth Amendment). The Court has never lent explicit support to the proposition that the scope of the Fourth Amendment's protection against unreasonable seizures hinges upon whether the government is seizing a person or an effect. See *id.* (suggesting that the Court's precedent and the text of the Fourth Amendment protect persons and effects uniformly beyond the government's initial seizure).

⁸⁴ See U.S. CONST. amend. IV (guaranteeing the same protection—a protection from unreasonable searches and seizures—to persons and effects alike).

⁸⁵ See *Manuel v. City of Joliet*, 580 U.S. 357, 364 (2017) (concluding that the Fourth Amendment requires the government's detention of a person to be reasonable from the moment of inception); *Asinor*, 111 F.4th at 1256 (concluding that Fourth Amendment case law requires the length of a government's seizure of a person to be reasonable); *Denault v. Ahern*, 857 F.3d 76, 83 n.2 (1st Cir. 2017) (recognizing that in *Manuel v. City of Joliet*, the Court lent support to the theory of a continuing seizure) (citing *Manuel*, 580 U.S. at 368). In *Manuel*, the Court supported the seizure-includes-retention approach where a person is seized. See 580 U.S. at 364 (finding that the Fourth Amendment is not silent after law enforcement detains a person); *Asinor*, 111 F.4th at 1256 (suggesting that the logic of the seizure-includes-retention approach where persons are seized also applies to property seizures).

⁸⁶ See *Asinor*, 111 F.4th at 1256 (concluding that "[n]either text, grammar, nor history" support applying a different temporal scope to seizures of persons and seizures of effects).

B. Bolstering the Seizure-Includes-Retention Approach with Explicit Reliance Upon the Supreme Court's Definition of Seizure

Nevertheless, neither the D.C. Circuit nor the Ninth Circuit explicitly relies upon the Court's definition of a property seizure in reaching the seizure-includes-retention approach.⁸⁷ Instead, the D.C. Circuit and the Ninth Circuit rely upon other grounds, including the Court's holdings in *United States v. Place* and *United States v. Jacobsen*, to conclude that seizure includes retention.⁸⁸ Although the Court's holdings in *Jacobsen* and *Place* are instructive, the Court's definition of a property seizure announced in *Jacobsen* is especially illuminating in indicating that the Court has endorsed the seizure-includes-retention approach.⁸⁹

In *Jacobsen*, the Court established that a property seizure occurs when the government effectuates "some meaningful interference with an individual's possessory interests."⁹⁰ A dispossessed property owner maintains a cognizable possessory interest in their seized property throughout the duration of the government's continued retention, well beyond the initial act of dispossession.⁹¹ The government continues to effectuate a meaningful interference with that interest throughout its period of retention by preventing the dispossessed owner from using their property.⁹² Accordingly, through its definition of seizure, the Court has indicated that a Fourth Amendment seizure of property necessarily includes

⁸⁷ See *id.* at 1252, 1254 (incorporating the Court's seizure definition by contending that the MPD's "ongoing meaningful interference is self-evident," but failing to employ the Court's definition of seizure in its rationale for adopting the seizure-includes-retention approach); *Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017) (failing to expressly recognize that the definition of seizure established by the Court in *Jacobsen* further necessitates adopting the seizure-includes-retention approach) (citing *Place*, 462 U.S. at 710). But see *Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003) (limiting the Court's definition of seizure to "an individual's interest in retaining" their property).

⁸⁸ See *Asinor*, 111 F.4th at 1252 (reaching the seizure-includes-retention approach in part due to the Court's modern precedents); *Brewster*, 859 F.3d at 1197 (relying on the Court's precedent and Ninth Circuit precedent to conclude that seizure includes retention) (first citing *Jacobsen*, 466 U.S. at 124 n.25; then citing *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012); and then citing *Manuel*, 580 U.S. at 357, 360, 369).

⁸⁹ See *Jacobsen*, 466 U.S. at 113 (announcing that a Fourth Amendment seizure of property occurs where the government meaningfully interferes with a person's possessory property interest); *Lee*, 330 F.3d at 470 (reversing the district court's erroneous legal conclusion that a person is deprived of their possessory interest upon a lawful initial seizure).

⁹⁰ *Jacobsen*, 466 U.S. at 113.

⁹¹ See *Lee*, 330 F.3d at 470 (acknowledging that an individual properly dispossessed based on probable cause is not deprived of their possessory interest at the moment of dispossession); see also *Brewster*, 859 F.3d at 1197 (disagreeing with the Seventh Circuit's rejection of the appellant's argument that the government's continued possession of his vehicle "'became a meaningful interference with his possessory interest'" (quoting *Lee*, 330 F.3d at 460)).

⁹² See *Asinor*, 111 F.4th at 1257 (observing that the government is "prepared to use force to prolong an ongoing deprivation" of an arrestee's property if the arrestee attempts to retrieve their property). Possession is binary: either the arrestee has it, or the government does. See *id.* (suggesting that shared possession is impracticable).

retention and requires the government's continued retention of property to be reasonable.⁹³ Incorporating the Court's definition of seizure into the rationale for the seizure-includes-retention approach would strengthen the D.C. and Ninth Circuits' interpretation and improve the prospects of the Court adopting it.⁹⁴

CONCLUSION

In 2024, in *Asinor v. District of Columbia*, the U.S. Court of Appeals for the D.C. Circuit adopted the seizure-includes-retention approach, holding that the government's retention of property seized during a lawful arrest must also be reasonable under the Fourth Amendment. In doing so, the D.C. Circuit aligned itself solely with the U.S. Court of Appeals for the Ninth Circuit, diverging from five sister circuits that have embraced the seizure-excludes-retention approach. The U.S. Supreme Court should resolve the circuit split by rejecting the unconstitutional seizure-excludes-retention approach and adopting *Asinor's* seizure-includes-retention framework. The seizure-includes-retention approach harmonizes the Framers' intent to guard against prolonged governmental interference in possessory interests with both the Court's precedent and the Fourth Amendment's plain text. Furthermore, the Court should strengthen the seizure-includes-retention approach by making explicit that its definition of seizure necessarily encompasses an arrestee's continuing Fourth Amendment right against unreasonable retention of property.

JONATHON STRANG

⁹³ See *id.* at 1260 (concluding that the Fourth Amendment's protection of an individual's possessory property interest against unreasonable seizures extends to consideration of the length the government maintains possession); see also U.S. CONST. amend. IV (establishing the constitutional baseline against which the government's seizure and retention of effects must be measured).

⁹⁴ See *Asinor*, 111 F.4th at 1252 (failing to incorporate expressly the Court's definition of a property seizure in concluding that the seizure-includes-retention approach is sanctioned by the Constitution); *Brewster*, 859 F.3d at 1197 (same).