

# Paying for Police Damage



By Paul Engel

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- When police damage your home, who should pay?
- Police officers of the City of McKinney, TX damaged the home of Vicki Baker while apprehending a fleeing felon.
- Neither her homeowner's insurance or the city would pay for the damages, so she sued.

When the government, in the form of the police, damages your property, who pays for it? In the case of Vicki Baker v. City of McKinney, TX the police had to damage her property to apprehend a fleeing felon. However, when the city refused to pay for the damages, Ms. Baker sued. The District Court found for her, but the Circuit Court overturned. When she asked the Supreme Court to review, they declined certiorari. Two justices expressed concern about the prospect of the government damaging homes without paying compensation.

Imagine the police have to enter your home, and in doing so, they damage your property. Who pays for those damages? Your insurance? The police? That was the controversy brought to the District Court. Before we dig into that though, let's look at the background.

## Background

On July 25, 2020, Wesley Little kidnapped a 15-year-old girl. After a high-speed car chase, Mr. Little entered the home of Vicki Baker. (Mr. Little had worked there previously as a handyman.) Ms. Baker's daughter was there, and after letting Mr. Little into the house, she called police. When McKinney

police arrived, they set up a perimeter around Ms. Baker's home. Eventually, Mr. Little released the girl, who exited the house, and told the police that Mr. Little was armed, high on methamphetamine, and hiding in the attic. Little told the police that he was not going back to prison, that he knew he was going to die, and planned to shoot it out with the cops.

Police tried to drive Mr. Little out of the house with tear gas. When that didn't work, officers detonated explosives to break down doors and used a "tank-like" vehicle to bulldoze the back yard fence. However, by the time police gained entry, Mr. Little had taken his own life. While the actions taken by the police were necessary and proper, they did leave approximately \$50,000 in damage.

“The explosions left Baker's dog permanently blind and deaf. The toxic gas that permeated the House required the services of a HAZMAT remediation team. Appliances and fabrics were irreparable. Ceiling fans, plumbing, floors (hard surfaces as well as carpet), and bricks needed to be replaced—in addition to the windows, blinds, fence, front door, and garage door. Essentially all of the personal property in the House was destroyed, including an antique doll collection left to Baker by her mother.”

### [Baker v. City of McKinney – Sotomayor Statement](#)

You may think that this damage would be covered by homeowners insurance, but it's not. Moreover, it appears that homeowner's insurance policies generally do not cover damages caused by government.

Baker, who bore no responsibility for what had occurred at her home, then filed a claim for property damage with the city. The city denied the claim in its entirety. Baker thereafter sued the city, alleging a violation of the Takings Clause. At the summary judgment stage, the District Court held that the City's destruction of Baker's property was a compensable

taking under the Fifth Amendment. Baker v. McKinney, 601 F. Supp. 3d 124, 144 (E. D. Tex. 2022). Following trial, a jury awarded Baker nearly \$60,000 in damages.

### [Baker v. City of McKinney – Sotomayor Statement](#)

So far, things seem OK for Ms. Baker, but that was about to change. When the city appealed the District Court's decision, the Fifth Circuit reversed, but why?

On appeal, the Fifth Circuit reversed. The court declined to adopt the city's broad assertion that the Takings Clause never requires compensation when a government agent destroys property pursuant to its police power. Such a broad categorical rule, the Fifth Circuit reasoned, was at odds with its own precedent and this Court's Takings Clause jurisprudence.

### [Baker v. City of McKinney – Sotomayor Statement](#)

The Circuit Court didn't completely agree with the city's position that the Takings Clause never requires the government to compensate property owners for damage done while exercising their police powers. The Fifth Circuit thought that position was at odds with their precedent on the Takings Clause.

Instead, the Fifth Circuit adopted a narrower rule that it understood to be compelled by history and precedent: The Takings Clause does not require compensation for damaged property when it was "objectively necessary" for officers to damage the property in an active emergency to prevent imminent harm to persons.

### [Baker v. City of McKinney – Sotomayor Statement](#)

Interesting. The Fifth Circuit did not come to this decision because of the Constitution, but because it's what they had decided before. So let's look at the Takings Clause and see if the Fifth Circuit's precedent is constitutionally sound.

## **Takings Clause**

We find the Takings Clause in the Fifth Amendment to the Constitution:

nor shall private property be taken for public use, without just compensation.

### [U.S. Constitution, Amendment V – Takings Clause](#)

From this language, we find two criteria for the Takings Clause to be invoked. Private property must be taken, and it must be for public use.

Was Ms. Baker's property taken? Not exactly. Her home wasn't taken, neither was anything inside taken. Her home was damaged by police. Was her home acquired for public use? Again, not exactly. The damage done to her home was done while the police were exercising their legitimate powers, but that isn't a taking for public use.

An argument could be made that the police took control of her home temporarily for the purpose of exercising their public duty to apprehend a fleeing felon, but that does not meet the history or language of the Takings Clause. However, there is another clause in the Fifth Amendment that may apply: The Due Process Clause.

No person shall ... be deprived of life, liberty, or property, without due process of law;

### [U.S. Constitution, Amendment V – Due Process Clause](#)

Ms. Baker has been deprived of her property, by having it damaged and therefore devalued without due process of law. Furthermore, under the Texas Penal Code, Title 7, Chapter 28, the actions of the police were criminal mischief.

Sec. 28.03. CRIMINAL MISCHIEF. (a) A person commits an offense if, without the effective consent of the owner:

(1) he intentionally or knowingly damages or destroys the tangible property of the owner;

[Texas Penal Code, Title 7, Chapter 28, §28.03](#)

In fact, the crime in this case is a third-degree felony.

(b) Except as provided by Subsections (f) and (h), an offense under this section is: ...

(5) a felony of the third degree if:

(A) the amount of the pecuniary loss is \$30,000 or more but less than \$150,000;

[Texas Penal Code, Title 7, Chapter 28, §28.03](#)

Does this mean that the officers should be charged with criminal mischief? No. It is obvious that the police were acting within the city's police powers.

Because the parties agreed that the McKinney police's actions were objectively necessary, the Fifth Circuit concluded that Baker was not entitled to compensation. ... Baker now petitions for certiorari and asks this Court to reverse the Fifth Circuit's judgment.

[Baker v. City of McKinney – Sotomayor Statement](#)

While I agree with the Fifth Circuit's decision that this is not a compensatable action under the Fifth Amendment's Takings Clause, that doesn't mean the City of McKinney should be off the hook. Ms. Baker, however, asked the Supreme Court to hear the case, known as a petition for certiorari.

### **Sotomayor Statement**

While the court denied this petition without comment, Justice Sotomayor wrote a statement, joined by Justice Gorsuch, with her position on the case.

The Court's denial of certiorari expresses no view on the

merits of the decision below. I write separately to emphasize that petitioner raises a serious question: whether the Takings Clause permits the government to destroy private property without paying just compensation, as long as the government had no choice but to do so.

### [Baker v. City of McKinney – Sotomayor Statement](#)

Justice Sotomayor makes a key point regarding government employees destroying private property without just compensation.

Had McKinney razed Baker's home to build a public park, Baker undoubtedly would be entitled to compensation. Here, the McKinney police destroyed Baker's home for a different public benefit: to protect local residents and themselves from an armed and dangerous individual. Under the Fifth Circuit's decision, Baker alone must bear the cost of that public benefit.

### [Baker v. City of McKinney – Sotomayor Statement](#)

Justice Sotomayor is correct in her statement, but appears not to realize that she just shot down her position regarding the Takings Clause. If McKinney had taken Ms. Baker's home to build a park, that would meet the takings clause: Property was taken for public use. However, what happened to Ms. Baker, as the justice points out, the police destroyed (damaged) Baker's home for a public benefit, not public use. In support of her position, Justice Sotomayor points to the case *Armstrong v. United States*, where she finds:

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

### [Armstrong v. United States, 364 U.S. 40 \(1960\)](#)

However, both Justices Black (from Armstrong), and Sotomayor (from Baker), are rewriting the Constitution to get it to say what they want it to say: “takings” includes “damage” and “public use” includes “public benefit”.

## **A Just Resolution**

All parties agree that the actions of the McKinney police were objectively necessary, and therefore justified. And while the Supreme Court did not explain why they refused to hear the case, I do think there is a just solution to this case.

The city of McKinney has deprived Ms. Baker of her property. That is not disputed. Ms. Baker bore no responsibility for what happened to her home. That, too, is plainly obvious. The city denied Ms. Baker’s claim, though the reasoning behind that decision was not included in Justice Sotomayor’s statement. But did Ms. Baker receive due process when the city of McKinney destroyed her property?

due process:

An established course for judicial proceedings or other governmental activities designed to safeguard the legal rights of the individual.

[due process – The Free Legal Dictionary](#)

I would say the answer is no. The City of McKinney deprived her of her property using government activities that were designed to safeguard the legal rights of the public at large, but not of the individual. Therefore, the only just decision I can think of would have been to find for Ms. Baker and have the City of McKinney pay for the damages to her home. Not on the grounds of the Takings Clause, but the Due Process Clause.

## **Conclusion**

This was another example of why it’s important that both the attorneys and judges in a case be familiar with the text of

the Constitution rather than just the commentary about it, often referred to as “constitutional law.” Would the judges in any of these courts have looked at the case differently if it had been presented as a “deprivation of property without due process” rather than a “takings”? Remember, the judges in these cases are deciding based on the facts of the case, and bad facts make bad decisions.

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