SAN FRANCISCO
Daily Journal
www.dailyjournal.com
THURSDAY, JUNE 25, 2015

PERSPECTIVE

Ruling a win for property rights, limited government

By Christopher M. Kieser and Brian T. Hodges

In a decision issued this week, the U.S. Supreme Court ruled in favor of Fresno-area raisin farmers Marvin and Laura Horne, concluding that a program requiring raisin growers to hand over up to half of their annual crop to the government violated the takings clause of the Fifth Amendment.

The dispute in *Horne v. Department of Agriculture* arose from some questionable New Deal-era regulations designed to prop up the price of crops by preventing farmers from bringing their entire harvest to market. The Hornes balked at government demands that they forfeit up to 47 percent of their raisins without compensation, and in response the Department of Agriculture slapped them with almost $700,000 in fines and penalties. After over a decade of litigation, including an initial trip to the Supreme Court in 2013, the Hornes finally prevailed on Monday. In the process, they struck a blow for property rights and limited government.

The Supreme Court agreed with the Hornes on each question presented for review, entirely reversing a 9th U.S. Circuit Court of Appeals decision that had upheld the government program. First, Chief Justice John Roberts, writing for an eight-justice majority, held that the takings clause protects personal property, like raisins, to the same extent as real property. The principle that "property" refers equally to real and personal property "goes back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings." The government must, therefore, pay just compensation if it appropriates your raisins, just as much as if it physically seizes your home. Because the Hornes were required to hand over their raisins, the court concluded that the government's demand was a "clear physical taking."

The court then rejected the government's argument that it could avoid a taking by offering to pay the Hornes something in the future based on the government's eventual use of the seized raisins. Again, eight justices agreed that because the raisin reserve requirement operated by taking the Hornes' property in the first instance, the fact that the owners could later receive some money (or not) for the seized property was irrelevant to the question of whether a taking had occurred. In any case, the court noted that oftentimes raisin farmers received nothing in return for "contributing" to the government's raisin reserve. Thus, the court held that any residual value given to the Hornes could offset, at most, its obligation to compensate the Hornes — it could not change the fact that there was a taking.

It shows that, at least in some circumstances, property owners may successfully challenge an unconstitutional taking before submitting to it.

The court next rejected the 9th Circuit's conclusion that the raisin reserve requirement was a permissible condition on the right to sell raisins in the stream of commerce, analogous to the type of land-use exaction held unconstitutional by the Supreme Court two years ago in *Koontz v. St. Johns River Water Management District*. The chief justice roundly criticized the government's assertion that the Hornes could have avoided the taking by simply not selling raisins, saying that "'[l]et them sell wine' is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history." As the court recognized, the right to sell a product on the open market is not a government benefit subject to government controls — it is a constitutionally protected right. Otherwise, nothing would prevent a government agency from requiring a car manufacturer to give the government every fifth car that comes off its assembly line in exchange for the privilege of selling cars at all.

The justices divided 5-3-1 over the question of remedy. Five justices, led by the chief justice, concluded that the case could be finally decided on the record because the government had already determined the value of the raisins when it assessed penalties against the Hornes. Thus, there was no need to send this decade-old case back for further litigation — the court invalidated the fines and penalties, making the Hornes whole again.

In a separate opinion written by Justice Stephen Breyer, three justices agreed with the majority's takings analysis, but would have remanded this case to the lower courts for a calculation of compensation. In Breyer's view, the Hornes should have had to comply with the reserve requirement and then seek just compensation afterward. If it turned out that the reserve requirement was more beneficial to the Hornes than the value of the raisins they had to surrender, they may not be entitled to any compensation. But, as the majority wrote, there is no authority for the proposition that "general regulatory activity such as enforcement of quality standards can constitute just compensation for a specific physical taking."

Importantly, the chief justice noted that the Constitution is "concerned with means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be consistent with the letter and spirit of the constitution." Thus, the Hornes were entitled to prevent the taking from occurring in the first instance — they did not have to subject themselves to an unconstitutional demand only to find out later if the regulatory program provided them with any benefits that could offset the government's liability.

The chief justice's opinion is great news for advocates of limited government and private property. It ensures that governments must treat your personal property with the same respect as real property and soundly rejects the idea that selling crops on the open market is a privilege for which the government can force you to pay. And it shows that, at least in some circumstances, property owners may successfully challenge an unconstitutional taking before submitting to it. The Hornes' persistence in challenging this Depression-era law has finally paid off.

Christopher M. Kieser *is a fellow in the College of Public Interest Law at the Pacific Legal Foundation.*

Brian T. Hodges *is a principal attorney at the Pacific Legal Foundation.*

CHRISTOPHER KIESER
Pacific Legal Foundation

BRIAN T. HODGES
Pacific Legal Foundation