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*Horne v. Department of Agriculture*, No. 14-275 (previously described in the [January 20, 2015, Docket Report](#))

Today, the Supreme Court issued a decision in *Horne v. Department of Agriculture*, No. 14-275, holding that the Department of Agriculture's program for stabilizing raisin prices resulted in a *per se* taking of the petitioner raisin handlers' property. Under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601 *et seq*, the Department created a program that requires raisin handlers to surrender a portion of their raisin crop each year to the federal government. The government then "disposes" of the surrendered raisins in a variety of ways that do not affect the market price for domestic raisins. For example, the government may sell the raisins to foreign governments, give them to schools, or even physically destroy them. The government uses proceeds from this raisin disposal to cover the expense of administering the program. If any additional funds remain, they are distributed to the raisin handlers on a pro-rata basis.

Petitioners were raisin farmers who argued that the raisin program was an uncompensated taking of their private property, in violation of the Fifth Amendment. In the decision below, the Ninth Circuit disagreed, holding that although the government has a "categorical" duty to pay just compensation when it takes physical possession of privately owned real property, this categorical duty did not apply to personal property such as crops. Additionally, the Ninth Circuit held that the categorical duty to pay compensation did not apply because the raisin handlers retained one contingent property interest in the surrendered raisins: The right to a possible share in any proceeds from the government's raisin disposal.

In an opinion by Chief Justice Roberts, the Supreme Court reversed. Tracing the history of the protection of agricultural crops and other personal property from government seizure back to the Magna Carta, the Court rejected the notion that the Fifth Amendment provides less protection to real property than to personal property. The Court also held that the government could not avoid the categorical duty to pay just compensation by providing a contingent future interest in the proceeds from the raisin disposal. The Court emphasized that the value of that contingent interest was doubtful, as it was entirely dependent on the government's discretion.

The Court also rejected the government's argument that participation in the raisin-marketing program was a reasonable condition that raisin handlers must satisfy to receive permission to engage in interstate commerce in raisins. In reaching that conclusion, the Court limited an earlier case that had held that the EPA could require pesticide producers to disclose trade secrets in exchange for a permit to sell their products. The Court explained that "[s]elling produce in interstate commerce, although certainly subject to reasonable regulation, is . . . not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection. Raisins are not dangerous pesticides; they are a healthy snack."

Finally, the Court held that the government could not deduct the "asserted regulatory benefits" of the raisin-marketing program from any compensation owed. Avoiding "complicated" inquiry into the possible benefits of the raisin program, the Court explained that "just compensation" has always been interpreted to mean fair market value at the time of the taking.

Justice Thomas filed a concurring opinion to express his continuing opposition to *Kelo v. New London*, 545 U.S. 469 (2005), which had established that the Fifth Amendment imposes little or no restraint on the uses for which government may seize private property.

Justice Breyer, joined by Justices Ginsburg and Kagan, concurred in part and dissented in part. Justice Breyer's opinion agreed that a taking had occurred but objected to the Court's deciding whether the benefits of the raisin program should be deducted from the just compensation that was owed to raisin handlers. He argued that the case should be remanded to the Ninth Circuit for full briefing and consideration of that issue.

Justice Sotomayor dissented in full, arguing that no categorical taking had occurred because the raisin handlers retained the right to the proceeds from the raisin disposal.

This case is important for businesses operating in highly regulated industries. It confirms the vitality of the distinction that the Supreme Court has drawn between physical seizures of property, which are subject to a *per se* takings rule, and regulatory restrictions on the use of property, which are subject to a balancing test. It also clarifies that although reasonable regulation may be constitutional, the right to engage in commerce or to make use of personal property is not merely a governmental benefit subject to the plenary authority of regulators.

Any questions about this case should be directed to [Tim Bishop](#) (+1 312 701 7829) in our Chicago office or [Jeff Redfern](#) (+1 202 263 3246) in our Washington office.