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Erosion of ownership rights

Quin Hillyer

Property rights are under assault on at least six different fronts, from all branches and levels of government. The only encouraging news is that a seventh front - the beachfront property of Supreme Court Justice John Paul Stevens - may keep property rights from being entirely routed.

The unfortunate erosion of property rights has occurred despite a huge public backlash in the past several years against the Kelo v. New London decision in 2005. That was the Supreme Court case in which a Connecticut town successfully seized private property not just for public use, but also for private development surrounding new offices for the Pfizer Inc. drug corporation. (The destruction of that Connecticut neighborhood became all the more painful when Pfizer announced Nov. 9 that it would leave New London anyway, taking away the 1,400 jobs that were supposed to be the project's main benefit.)

Yet the Obama administration and other big-government avatars seem defiantly unconcerned about public support for property rights.

First, consider the moves in Congress to extend federal regulatory jurisdiction from "navigable" waters to "all interstate and intrastate waters of the United States." Suddenly, if the so-called Clean Water Restoration Act passes, your backyard fish pond could be subject to the dictates of commissars from the Environmental Protection Agency. (See editorial on facing page.)

Enactment of the CWRA would surely spur massive court fights. The CWRA's regulatory overreach would, by all logic, run afoul of the Constitution's "interstate commerce clause." How an "*intra*state" water of the sort affected by this bill would qualify as "*inter*state" commerce is beyond normal reasoning.

Indeed, both Justice Anthony M. Kennedy and Justice Antonin Scalia agreed in their controlling decisions in the 2006 Rapanos and Carabell cases (the most recent ones dealing

with the existing Clean Water Act) that one of the key factors keeping the existing law constitutional was its reference to "navigable" waters. (Or to what Justice Kennedy described as a "significant nexus" thereto.)

The second erosion of property rights is more indirect, but stems from an even more sweeping expansion of EPA authority. At issue is the EPA's decision this week that carbon dioxide presents an "endangerment" to human health such that EPA can now regulate it without new legislative authority. The EPA's targets supposedly are manufacturers that emit large amounts of carbon dioxide. But the agency easily could extend its regulatory reach to the collective emissions from home appliances and the like.

As the Heritage Foundation's Ben Lieberman has written, "even the kitchen in a restaurant, [or] the heating system in an apartment or office building ... could cause these and other entities [to be regulated] - potentially more than a million buildings, 200,000 manufacturing operations, and 20,000 farms." The ensuing devaluation of noncomplying small businesses is a back-door diminution of property rights.

The third assault on property rights occurred earlier this year, when the Obama administration shredded the key property right of contracts as part of its takeover of General Motors Corp. By unilaterally stripping the ownership protections of preferred stakeholders while bumping union pension funds up to a 55 percent ownership stake, the administration wiped out property/contract rights the way tanks flattened Tiananmen Square protesters in 1989.

The fourth bad omen occurred Nov. 24, when New York state's highest court ruled the state could use eminent domain to seize large numbers of homes and businesses in Brooklyn to make room for a new arena for New Jersey Nets basketball. As in the Kelo case, this seizure of private land for other private development, rather than for explicitly public use, is an affront to ideals of a limited government that protects private property.

The last two potential outrages involve Florida court cases. The U.S. Supreme Court has not yet decided whether to hear the first case, called 480.00 Acres of Land and Gilbert A. Fornatora vs. United States. But as the Cato Institute nicely sums up the basic issue in a friend-of-the-court brief, "The federal government pressured local authorities to enact significantly more onerous land-use regulations in anticipation of taking the property as part of an expansion of a national park. These increased regulations had the natural result of sharply limiting the profitable uses of the property and thus depressing its value." Result: "The government ended up paying Fornatora less compensation for the taking." Nice work, that: Kill a property's value via regulation, and then seize it for less cash.

Finally, the U.S. Supreme Court heard oral arguments Dec. 2 on Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection. For a beach-restoration project on the state's Panhandle, Florida's highest court decided that the newly added sand would not belong to homeowners whose land rights previously had extended to the water's edge.

In effect, Florida turned private beachfront into public beach, thus greatly reducing property values (and rights) for owners. Close observers of the U.S. Supreme Court seem to agree this case might have gone 5-to-4 against the property owners because the high court may be reluctant to second-guess the Florida Supreme Court on an interpretation of Florida law.

But here's where the tiniest ray of hope for property rights enters the picture: Cato Institute Scholar Ilya Shapiro unearthed documents showing that Justice Stevens owns property in Fort Lauderdale within a renourishment area similar to the one in this case. Justice Stevens thus recused himself at the last minute - which, if the court observers are correct, could lead to a 4-to-4 decision that, in the words of veteran court journalist Lyle Denniston, "would uphold the state court ruling, without an opinion and without setting a precedent."

Especially in today's bad climate for property rights, a bad decision that sets *no* precedent is better than a bad decision that *does* set precedent. That property-rights advocates must be thankful for such small favors is a sad indicator indeed.

Quin Hillyer is a senior editorial writer for The Washington Times.