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Oversight Hearing Based on the Report of the General Accounting Office
on the Implementation of Executive Order 12630

Before the
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives

October 16, 2003
My name is John D. Echeverria. I am the Executive Director of the Georgetown Environmental Law & Policy Institute. I appreciate the opportunity to testify today in this oversight hearing based on the General Accounting Office’s recent report, “Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use.”

The GAO report does a thorough and competent job of addressing the questions which the Committee posed relating to the steps taken by the U.S. Department of Justice and several federal agencies to carry out Executive Order 12630. Unfortunately, however, the GAO investigation did not address a more fundamental and more important question: whether the Executive Order was fundamentally flawed from its inception. Numerous academic and other commentators have severely criticized the Executive Order. In my judgment, those criticisms remain completely valid today; indeed they may have even greater force today. I submit that the Committee, rather than asking whether the guidelines implementing the Executive Order should be revised, should be asking whether Executive Order 12630 should simply be scrapped.

Federal officials, of course, have an obligation to consider the constitutional implications of their actions. This obligation extends to the Takings Clause, which mandates the payment of compensation, as well as to other provisions of the Constitution, starting with the First Amendment and proceeding through the Bill of Rights. The Executive Order, however, makes the mistake of singling out the Takings Clause for consideration through a type of elaborate bureaucratic process that, so far as I can determine, applies to no other provision of the Constitution, and which is essentially unworkable. Beyond that, for the reasons I discuss below, it does so according to standards that seriously distort the original understanding of the Takings Clause as well as settled Supreme Court precedent.

First, the Executive Order asks executive branch officials to conduct an analysis which, in many instances, is extremely difficult if not impossible to perform in any meaningful or useful fashion. The U.S. Supreme Court has largely rejected the use of clear, bright-line rules in deciding takings cases in favor of a relatively flexible, ad hoc approach. Thus, in one of its latest decisions, Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), the Supreme Court said that “we have ‘generally eschewed’ any set formula for determining how far is too far, choosing instead to engage in ‘essentially ad hoc, factual inquiries,’” Id. at 326, quoting Lucas v. South Carolina Coastal Council, 505 U.S.1003, 1015 (1992).
Applying this ad hoc approach, even the most knowledgeable and conscientious agency staff has great difficulty determining whether proposed “policies that have takings implications,” in the terminology of the Executive Order, actually create a risk of takings liability and what the magnitude of the potential liability might be. Whether a specific government action might result in a taking in any particular circumstance will depend upon a number of factors, such as the nature of the regulatory regime in place when a specific owner purchased a specific property, the actual market values of the property with and without the restriction, and the magnitude of the owner’s parcel as a whole. Because these and other relevant inquiries are so site- and owner-specific, it is very difficult, in the abstract, to reach any reliable determinations about whether new rules or policies might generate takings liabilities. Significantly, a primary focus of the Executive Order is broad government policies reflected, for example, in “federal regulations, proposed federal regulations, proposed federal legislation” and so on, in addition to site-specific regulatory decisions.

Importantly, Roger Marzulla of Defenders of Property Rights, reportedly one of the authors of the Executive Order, agrees with this point. In a book he wrote on the property rights issue, Mr. Marzulla (along with co-author Nancie Marzulla) criticized so-called “planning bills,” which have been introduced in Congress over the years to codify the Executive Order, or institute other types of takings impact assessment procedures, on the ground that they are unworkable. Mr. Marzulla wrote:

Planning bills do have a serious weakness, however. As Maryland [Deputy] Attorney General Ralph S. Tyler points out, ‘no meaningful analysis can be done’ of the liability at stake when so much depends not just ‘upon the particular circumstances’ of the case, but on the philosophy of the particular judge hearing the case.... When judges take this ad hoc approach to takings law, liability planning becomes a shot in the dark.

Nancie G. Marzulla and Roger J. Marzulla, Property Rights: Understanding Government Takings and Environmental Regulation 174 (1997). If the Executive Order supports “no meaningful analysis,” and calls for making “shots in the dark,” then it logically follows that the Executive Order fails to deploy limited federal agency resources in a useful or effective fashion.

Given the fact that takings impact assessments under the Executive Order are predecisional documents, and therefore not available for public inspection, it is difficult to assess how the Executive Order has worked in practice. Nonetheless, I find some significance in the fact that, of the ten agency rules which GAO identified in which agencies found significant takings implications, nine were issued under the current Bush administration. Unless the Bush administration is imposing new regulatory constraints which go very far beyond anything issued under the Clinton administration, a possibility which I think we can safely discount, then these data probably reflect the greater ideological predisposition on the part of the Bush administration to identify potential takings in agency rule makings. The fact that the standards in the Executive Order, at least as applied to general agency rules and other policy statements, are apparently so malleable underscores the fact that, in many instances, a reliable, objective estimate of takings
liability is virtually impossible under the Executive Order.

This is related to a second primary criticism of the Executive Order, which is that its true purpose was to undermine public health and environmental regulations through the back door by promoting an exaggerated and inaccurate version of regulatory takings doctrine. The most damning testimony on this point comes from Professor Charles Fried of Harvard Law School, who served as Solicitor General of the United States under President Ronald Reagan from 1985 to 1989, during the period when Executive Order 12630 was being developed and promulgated. In his memoirs recounting his professional experiences at the Department of Justice, Professor Fried described the deep interest in the property issue within the department during this period. He wrote:

[A]torney General Meese and his young advisors – many drawn from the ranks of the then fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein – had a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay compensation as for a taking of property every time its regulations impinged too severely on a property right – limiting the possible uses for a parcel of land or restricting or tying up a business in regulatory red tape. If the government labored under so severe an obligation, there would be, to say the least, much less regulation.

Charles, Fried, Order and Law 183.

Consistent with this description of the extreme constitutional theories held by some takings advocates within the Department of the Justice at the time, other scholars and other commentators have criticized the Executive Order specifically as an effort, not to state constitutional law, but affirmatively to misstate it. Thus, an exhaustive report issued by the Congressional Research Service issued on December 19, 1988, concluded that “the majority of taking principles stated or implied in Executive Order 12630 overestimate the likelihood of a taking, and that the Order does not list most of the factors that cut against the occurrence of a taking.” Another commentator observed that the Executive Order “has little to do with judicial realities in defending governmental actions against private claims,” (James M. McElfish, Jr., “The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?, 18 ELR 10474 (1988)), and two other commentators stated that “the document seeks to impose on federal agencies a view of takings law that is well beyond the point reached by the Supreme Court in inverse condemnation.” Jerry Jackson and Lyle D. Albaugh, “ A Critique of the Takings Executive Order in the Context of Environmental Regulation,”18 ELR 10464 (1988).

Because the Executive Order so severely misstated the law, it was difficult to avoid the conclusion that the true purpose of the Executive Order was not to enforce the Constitution, but rather to attack regulatory protections. On April 2, 1993, a number of prominent law scholars
wrote to President Clinton urging him to rescind executive Order 12630. (Copy attached.) They wrote:

The Executive Order... represents a misguided effort to use the specter of government liability under the Fifth Amendment in order to frustrate regulatory activity that certain members of the Reagan administration opposed as a matter of policy. Fair minded people can – and certainly do - disagree on the kinds of regulatory programs this nation should adopt to protect public health and safety, environmental quality, and other aspects of the public welfare. But the Order and guidelines [issued by the U.S. Department of Justice] seriously overestimate the likelihood that such regulatory programs would result in a taking based on existing precedent. They therefore inappropriately translate important questions of policy into alleged questions of constitutionality.

See also Jerry Jackson and Lyle D. Albaugh, supra (“the Executive Order’s true purposes are unstated: to expand the circumstances in which a taking will be considered to have occurred and to ‘chill’ the agencies from making regulatory decisions that may be construed as takings under existing inverse condemnation law as well as the expanded view of the law reflected in the Executive Order”).

It is understandable, of course, that some may disagree with the U.S. Supreme Court’s reading of the Takings Clause. But it is also important to emphasize that the Founding Fathers intended for the Takings Clause to have a narrow scope and that the Supreme Court’s current takings jurisprudence, if anything, goes beyond the original intent of the drafters of the Bill of Rights. No less an advocate of property rights than Justice Scalia has acknowledged that the Takings Clause was originally understood to apply only to direct expropriations of private property, and not to apply to regulations at all. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003,1028 n.15 (1992) (“early constitutional theorists did not believe the Takings Clause embraced regulations of property at all”). See also Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 321 (2002) (“The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.’”) The current Supreme Court does not question the existence of the regulatory takings doctrine nor am I questioning the existence of that doctrine. The point is simply that the regulatory takings doctrine has no foundation in the text and original understanding of the Takings Clause, and efforts to exaggerate the meaning of the Takings Clause, such as that reflected in Executive Order 12630, seek to take the law further afield from the Founders’ original intentions.

Against this backdrop the question of whether Executive Order 12630 should be updated is troubling. The question seems to assume that if the Executive Order has any problem, it is that the order is out of date. As I have explained, the fundamental problem is that the Executive
Order simply misstates the law. The order does not need to be fixed; it needs to be scrapped.

A final problem with the Executive Order is that it appears to impose a significant bureaucratic burden on federal agencies to address a relatively modest fiscal issue. The GAO reports that in the three years it examined, the United States incurred liabilities of approximately $32,000,000, as a result of takings judgments and settlements of takings cases. Over 50% of these liabilities were the result of the settlement of one major case. Most of these liabilities arose from cases that were not subject to the Executive Order process, in part because they predated it. While $32,000,000 over three years is hardly a trivial amount, it is a very small amount compared to the much larger voluntary and involuntary liabilities the United States assumes on a routine basis in the context of a $1 trillion-plus annual budget. It is also a small amount to pay to ensure that important environmental and other programs can go forward consistent with the requirement of the Fifth Amendment. In this connection, it is important to emphasize that the Takings Clause does not prohibit takings, but only requires that the government pay compensation for a taking. When public takings liabilities are compensated, both Congress’ policy objectives and the Fifth Amendment are vindicated. So long as the public’s liabilities under the Takings Clause are limited, as they plainly are, one can logically ask, where’s the beef?

It bears emphasis that a large number of regulatory reforms have been adopted in the administration of the federal endangered species act, wetlands, and other regulatory programs since Executive Order 12630 was instituted. Many of these reforms were initiated by the Clinton administration and many have been carried forward and expanded under the Bush administration. In the view of some, these administrative reforms have severely weakened our nation’s environmental protections. Others disagree. What would be difficult for anyone to dispute, however, is that these reforms have made the nation’s environmental laws far less burdensome for regulated property owners. As a result, the loudly voiced concerns that were part of the context in which Executive Order 12630 was developed have largely abated. Whatever property-rights protection agenda the Executive Order was intended to serve, it is, at a minimum, less useful and important for serving that purpose today.

Finally, I want to address specifically one of the questions discussed in the GAO report: assuming the Executive Order is worthwhile at all, has the Supreme Court made such “fundamental” changes in the law of takings that the U.S. Department of Justice is under an obligation, under the terms of the Executive Order, to update its guidelines under the Executive Order. In my judgment, the answer to this question is no. In certain minor respects the Court can be viewed as having tinkered with takings law since the Executive Order was issued. If anything, the general trend of the decisions has been to narrow the scope of regulatory takings doctrine. For example, the Court since 1988 has reaffirmed the “parcel as a whole” rule, reaffirmed that a legitimate government action is a precondition for a valid taking claim (demonstrating that the so-called “substantially advance” takings test is not a takings test at all), and reaffirmed that the Nollan “essential nexus” test applicable to physical actions is limited to exaction cases. On the other hand, the Court’s 1992 decision in Lucas v. South Carolina Coastal Council, could have been viewed, at least at one point, as having established a significant new
per se rule governing certain regulatory takings claims. Subsequent Supreme Court decisions, however, have reduced Lucas to insignificance, if they have not effectively overruled it. In sum, there have been no “fundamental changes” in takings law mandating revision of the Attorney General guidelines under the Executive Order. I note that, according to the GAO report, the U.S. Department of Justice agrees with this assessment.

Thank you for the opportunity to testify.
April 2, 1993

Dear Mr. President:

Congratulations on your election as President. We wish you great success in carrying out your important new responsibilities.

We are writing today to respectfully recommend that you make it one of your early priorities to rescind Executive Order 12630. This Order, promulgated in 1988 during the Reagan Administration, requires all Federal agencies to conduct detailed reviews of all actions that "may affect the use or value of private property" for the ostensible purpose of avoiding actions that might result in a taking of private property under the Fifth Amendment to the Constitution. Under the Order, the Attorney General prepared guidelines that purported to interpret the law of takings for all agencies to follow in implementing the Order. We believe that an objective review of the Order and guidelines supports the conclusion that they are based on an erroneous, biased view of the law.

The Executive Order also represents a misguided effort to use the specter of government liability under the Fifth Amendment in order to frustrate regulatory activity that certain members of the Reagan Administration opposed as a matter of policy. Fair minded people can -- and certainly do -- disagree on the kinds of regulatory programs this nation should adopt to protect public health and safety, environmental quality, and other aspects of the public welfare. But the Order and guidelines seriously overestimate the likelihood that such regulatory programs would result in a taking based on existing precedent. They therefore inappropriately translate important questions of policy into alleged questions of constitutionality.

Both the Order and the guidelines erroneously suggest that, regardless of a regulation's actual impact, the taking inquiry entails an intense examination of the need and appropriateness of governmental regulations. For example, the guidelines state that regulations that affect property will constitute a taking if they only "rationally advance" a legitimate government purpose, but do not do so "substantially." This rule, gleaned from Nollan v. California Coastal Commission, 483 U.S. 825 (1987), is inconsistent with a number of court decisions which have interpreted Nollan to impose stricter scrutiny only when government conditions the use of land on the granting of permission for a physical invasion that would otherwise be a taking. The guidelines similarly suggest that health and safety regulation must be "no more restrictive than necessary." As applied to the enormous range of government actions that "may affect the use or value of private
property," this language does not accurately reflect the current level of judicial scrutiny.

Other specific directives in the Order and guidelines also lack support in the case law. For example, the guidelines state broadly that regulations designed to prevent harms that are less "direct, immediate and demonstrable" are more constitutionally suspect than other types of regulations. This language inappropriately casts doubt on many regulations that confront distant and indirect harms but that are nonetheless of great public concern; these include, for example, regulations regarding unsafe drugs, buildings, or chemicals. The Order also asserts that the focus of the economic impact analysis should be on any "separate and distinct interests" in a piece of private property (which the guidelines equate to "each property interest recognized by the applicable law"). This language is somewhat ambiguous, but appears to be inconsistent with the courts' traditional practice in evaluating a regulation's economic impact to consider the regulation's effect on the property as a whole.

Because the Order and guidelines overstate the risk that regulatory action will result in a taking, and because the law of takings is itself so uncertain, the Order and guidelines allow takings concerns to exert an excessive and unreasonable influence on a broad range of government actions. Whatever principles should guide regulation as a matter of policy, the fact is that courts find takings in only a fleetingly small fraction of government actions that "affect the use or value of private property."

For all of the foregoing reasons, we urge you to rescind Executive Order 12630. In its place, we urge you to adopt a balanced policy on property rights that respects the mandate of the Constitution and at the same time recognizes that government regulatory activity serves to protect property and other individual rights as well as the interests of the community as a whole.

Sincerely,

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