

NLWJC- Kagan

Counsel - Box 013 - Folder 002

Takings (95) [1]

THE WHITE HOUSE
WASHINGTON

MEMORANDUM TO: Jack Quinn
Greg Simon
Linda Lance
Sally Katzen
Peter Yu
Steve Warnath
Joe Stiglitz
Paul Weinstein
Marvin Krislov
Bob Watson
Craig Crutchfield
Rosina Bierbaum
Marcia Hale
Tom Epstein
Tracey Thornton

FR: Katie McGinty *LS for Kur*

RE: Access to Justice for Small Landowners

DATE: 11 May 1994

Attached is a proposed Presidential Directive to the Attorney General requesting her to examine whether there are problems of fair access to the claims process for small landowners. Also attached is a draft Memorandum to the President recommending that he issue the directive along with the proposed Executive Order if indeed he decides to issue the Executive Order.

I would like your comments and suggestions, if any, on this proposal before sending it to the Staff Secretary. Please let me have your comments by Friday, May 13th COB. If you believe a meeting is needed, I am happy to schedule one, but I thought it best to proceed with a review of the paper in the hopes of avoiding yet another meeting.

cc. Todd Stern

MEMORANDUM TO THE PRESIDENT

FR: Katie McGinty

RE: Directive to the Attorney General Regarding Fair Access
to the U.S. Court of Federal Claims

DATE:

In conjunction with the proposed issuance of a new Executive Order on Protecting Private Property (which was recommended to you by memorandum from Jack Quinn), I am also recommending that you issue a simple directive to the Attorney General asking her to undertake a review of the ability of small landowners to gain access to the U.S. Court of Federal Claims for purposes of pursuing takings claims against the government. The draft directive is attached for your review, and has been approved by the Department of Justice.

The two principal arguments made by those advocating these takings/private property legislative proposals is that (1) the Federal government frequently takes people's property without justification; and (2) the existing remedies for securing compensation where takings occur are not adequate, particularly for people of limited means who cannot afford the time or money to hire lawyers and experts to press their claims effectively.

The proposed E.O. is intended to address the first argument by encouraging Federal agencies to avoid takings situations whenever possible.

This Directive to the Attorney General is intended to address the second. It does so by requiring the Attorney General to examine if there are significant impediments to access for purposes of securing compensation, and if so, to make recommendations on how to minimize or eliminate those impediments.

In discussions with Members and staff on the Hill we have discerned strong support for this additional initiative and no opposition. The attractiveness of it is that it will enable Members to argue that you are sensitive to the practical fairness issues associated with the claims process and are doing something about it. It will also help serve as a rebuttal to those who are pressing for completely new compensation schemes (Rep. Tauzin and Hayes) that are very draconian and expensive.

MEMORANDUM TO THE ATTORNEY GENERAL

SUBJECT: Small Landowners Access to Justice

Today I have issued Executive Order _____ on the protection of private property from unwarranted governmental restrictions. E.O. _____ seeks to minimize the impact of governmental actions on private property from Federal regulations while still fulfilling the legitimate governmental functions of protecting the general health, safety, and welfare. It is also intended to ensure that Federal agencies assess the potential for takings that might result from their proposed regulations and evaluate alternatives that would minimize or eliminate that potential.

One objective of my action today is to encourage Federal agencies to avoid takings if and where possible. A second objective, however, is to ensure that when a taking may have occurred, people of limited means have the practical ability to seek and secure compensation from the courts.

Over the last several years, there has been increasing debate about whether existing procedures for pursuing claims are accessible to property owners of limited means who may have neither the time nor the money to participate in protracted proceedings.

The question of fair and affordable access to constitutionally protected remedies is important and it deserves our serious attention.

I am therefore today directing that you undertake a review of the facts relating to the availability of affordable access to justice for purposes of securing compensation for regulatory takings, paying particular regard to the issue of access from the practical perspective of small landowners and people of limited means. You may include this review as a part of your investigation into access to justice in other legal contexts.

If your review reveals that there are practical impediments to affordable access to pursue legitimate claims, I am also directing you to develop recommendations to me on how to remove or minimize those impediments. The objective of these recommendations is to ensure that every effort is made to provide fair and affordable access to justice and a prompt resolution of claims.

* * *

This memorandum is intended only to improve the internal management of the Executive Branch and is not intended to, nor does it create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.

§4: Exec depts & agencies

(a) when an exec dept/agency requires a private party to obtain a permit for a specific use of private property, any conditions on granting the permit shall:

(1) serve the same purpose that would have been advanced by a prohibition of the use

(2) substantially advance that purpose

(b) when gov't action places a restriction on use of private prop,

J&F
p. 469
McE
p. 479

restriction must be proport. to the extent to which the use contributes to the overall problem addressed by the restrict

(c) if gov't permitting process or dec. making process interferes

contra
to
First
Amendment
J&F p. 467

w/ the use of private land pending completion, the process shall be kept to a minimum duration nec.

(d) before action, regulating private prop. use or to prot. health & saf, Exec dept must internally & to OMB:

(1) identify pub h's risk

(2) estab that action sub. advances the purpose of h's

(3) estab that restrictions are not disprop. to contrib to overall risk

(4) estimate cost to gov't if it constitutes a taking

if immed. threat to health & saf, may take action first, then to this

§5 Exec dept & agency implementation

- a) design official w/in agency to be resp.
- b) agencies should identify takings implications of proposed reg. actions in submissions to OMB & notices of proposed rule making & msgs transmitting proposed legis - to Congress
- c) agencies shall identify each rule/reg. against which a takings award has been made or a claim is pending
- d) annual list of awards made to AG & Dir of OMB
- e) Dir OMB & AG should carry out exec order
AG should issue guidelines

First Lutheran Church (1987) (Rehnquist)

- regulation interfering w/ land use can be a taking
- landowner may recover for damages for the time before the final determination that the reg constitutes a taking
- holding limited to facts: ordinance denied owner all use of his property (p. 321)
- doesn't deal w/ normal delays in obtaining bldg permits; changes in zoning; variances & the like

Nollan v. California Coastal Comm'n (1987) (Scalia)

- if a permanent physical occupation: taking to the extent of the occupation (Loretto) (p. 831) regardless of whether the action achieves an imp't govt interest OR has only a minimal econ impact on the owner
- if land-use regs substantially advance legit state interests and do not deny an owner econ. viable use of his land \Rightarrow not a taking (Penn Central, Agins) (p. 834)
- a permit condition that serves the same legit police power purpose as refusal to issue a permit is not a taking if refusal is not a taking (p. 856)
- there must be a "nexus" between the condition & purpose that is lacking in Nollan \therefore taking (p. 837)

Lucas (1992) (Scalia)

· 2 discrete categories of regulatory action are compensable w/out case specific inquiry into the public interest advanced in support of the restraint.

① physical invasions (no matter how small the intrusion or how weighty the public purpose)

② when reg. denies all econ. beneficial or productive use of land.

[112 S.Ct. ~~2886~~, 2893

but only if the State prohibits uses that would not be permitted under "background principles of nuisance & property law." ^{at} 2901

Reagan
12360
Exec Order

OLC thinks it's flawed

update on caselaw since the time of the EO.

SCT

Nolan - cases Nolan cites

3/4/94 8:00 am

Mtg Chris Schrader, Chris Yates, Peter Yu, Martin, Lisa

What does OLC think are the legal flaws

3(b) - Contrary to Lucas, Keystone, must be complete use or value overstatement

- counter to non-divisibility principle - Penn Central Concrete Pipe reaffirms

(but pre-existing state law may establish diff't estates)

essentially
overruled
by Keystone
subsequent

Nollan, Mahon have been interpreted that way (plus takings)
but wrong re: regulatory takings etc taken ^{partial} use
and non-divisibility shouldn't apply

3(c) Before Lucas, etc overstated

now it is obsolete - ^{wrong} no safe harbor for h/safety - doctrinal matter

(Lucas cut back safe harbor to only common law nuisance)

(doesn't matter substantially vs. significantly)

Ct of Claims - Kobzinski - Florida Rock - land like Lucas has mkt value

3(d) Prob technically correct - subst. overstates the risk

no decision that holds that delay constitutes a taking

Dolan will clarify

between Nolan & Riverside Bayview

see 4: if it only articulates policy not law - not inaccurate

4(a) Conclusions.

plainly incorrect - Nolan applies only when gov't extracts property right as a quid pro quo from the landowner to get the

reference under Riverside Bayview

↓
you can have

all)

pre development rights

pre dev. rights ← quid pro quo easement →

Exactions - unfunded state mandates

not just a req for h/s purpose vs fire escape reqmt
extracting \$ for its use (b/c by building you create the need)
sewerment

Dolan - city saying - need to put in sewer & take path in order to expand your hardware store

more of a nexus between sewer

argued 3/23/94

will either limit Nolan to actual extracts of prop.

or expand Nolan to all kinds of permits

4(a)(1) : 4(a)(2) - both req'd if you have phys. exaction

4(b) Proportionality - strict prop. is inaccurate

not supported in cases

contra to Penn Central

Holmes suggested burden concept but it hasn't done anything

rough principle: can't single out one house in a

Overstates the risk
4(c): Doesn't nec. lead to a taking

BOTTOM LINE - is § 3 in line w/ current takings law's practice

Schaefer - can't revise guidelines w/out revising § 4
bc they ^{Guidelines} must be consistent w/ § 4

Key constraints 4(a) - any conditions
4(b) - proportionality

How much does this really constrain us?

Key flashpoint

4(c) dredge & fill permits

if req. is an impact study on ecosystem
(not a quid pro quo).

Empirically - this TIA hasn't stopped agencies from
doing the things they want to do.
only @ 24 TIA's in Fed Reg.

Clean Air Act should have to meet 4(a) - but now
probably doesn't

Other problem - bills that will write the EO into law

Prop: soln: define the overall problem in a way

that lets us keep prop (make it tautological)
ie: Clean Air
define problem as air pollution

Bottom line (option to Δ guidelines)

The Guidelines are allowed to be amended

- could issue guidelines saying change b/c change in takings law
- then read the Guidelines as overruling the mandate in §4 ("shall")

- clarify non-divis.

- clarify Lucas impact on (c) \leftarrow changed to detriment of gov't
(no more special w/s)

- could create categorical exemption to TTA for ~~60~~ h/s regs

Timney?

to rewrite guidelines - autumn? faster? must be post Dolan
Lois Schiffman - Env. Div. of Justice drafts - OLC reviews

Suppose this were codified, created a private right of action:

could we argue these are unconstitutional?

not on policy points

Aliens can demand just
compensation under the 5th A
takings clause - EO. should
read "property-owners".

Amend. 5

Note 445

445. — Congress

Congress may not directly or through any legislative agency finally determine amount safeguarded to owner of private property taken for public use by this clause. *Baltimore & O.R. Co. v. U.S.*, Va.1936, 56 S.Ct. 797, 298 U.S. 349, 80 L.Ed. 1209.

It does not rest with Congress to say what compensation shall be paid in eminent domain, or even what shall be the rule of compensation. *Miller v. U.S.*, 1980, 620 F.2d 812, 223 Ct.Cl. 352.

Congress, although not compelled to do so, can at its option decide to pay more than the constitutional minimum of just compensation for private property taken for public use. *Confederated Salish and Kootenai Tribes of Flathead Reservation, Mont. v. U.S.*, 1967, 181 Ct.Cl. 739.

446. — Municipal legislators

Congress may delegate to state tribunals the power to fix and determine the amount of compensation to be paid by the United States for private property taken by them for public purposes, or adopt the rules of law prescribed by the state for that purpose. *High Bridge Lumber Co. v. U.S.*, C.C.A.Ky.1895, 69 F. 320, 325.

City charter provisions, authorizing city council to fix damages for taking land, with right of appeal to court, did not deprive owner of right to judicial hearing. In re *Improvement of Third St.*, St. Paul, 1929, 225 N.W. 86, 177 Minn. 146.

447. — Jury

By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be intrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury. *Bauman v. Ross*, D.C.1897, 17 S.Ct. 966, 167 U.S. 593, 42 L.Ed. 270.

When a person has availed himself of the right to proceed against the United States in the Court of Claims, under a statute prescribing a particular mode for ascertaining the compensation which he is entitled to receive, he has waived the right, if such he had, to demand that the amount of compensation be determined by a jury. *Great Falls Mfg. Co. v. Atty.*

CONSTITUTION

Gen., Md.1888, 8 S.Ct. 631, 124 U.S. 599, 31 L.Ed. 527.

Just compensation under this clause is not required to be determined by a "jury" as commonly understood, and in the District of Columbia has been referred to Commissioners, arbitrators, or an inquest larger or smaller than ordinary jury. In re *Condemnation of Lots Nos. 2, 27, 803*, etc., in Square 3960, D.C.D.C.1945, 58 F.Supp. 832.

448. — Judges

Except for single issue of just compensation, trial judge is to decide all issues, legal and factual, that may be presented in federal condemnation proceedings, and jury is to perform single function of determining compensation award within ground rules established by trial judge. *U.S. v. Reynolds*, Ky.1970, 90 S.Ct. 803, 397 U.S. 14, 25 L.Ed.2d 12.

The question as to what is the measure of just compensation is judicial and not legislative; the legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. *Monongahela Nav. Co. v. U.S.*, Pa.1893, 13 S.Ct. 622, 148 U.S. 327, 37 L.Ed. 463. See, also, *U.S. v. New River Collieries Co.*, N.J.1923, 43 S.Ct. 565, 262 U.S. 341, 67 L.Ed. 1014; *National City Bank v. U.S.*, D.C.N.Y.1921, 275 F. 855, affirmed 281 F. 754, error dismissed 44 S.Ct. 32, 263 U.S. 726, 68 L.Ed. 527; *Norfolk & W. Ry. Co. v. Nottingham & Wrenn*, 1924, 124 S.E. 398, 139 Va. 748.

Just compensation for property taken by government is matter for judicial determination. *Campbell v. Chase Nat. Bank of City of New York*, D.C.N.Y.1933, 5 F.Supp. 156, affirmed 71 F.2d 669, appeal dismissed 54 S.Ct. 455, 291 U.S. 686, 78 L.Ed. 1073, motion denied 54 S.Ct. 459, 291 U.S. 648, 78 L.Ed. 1043, certiorari denied 55 S.Ct. 108, 293 U.S. 592, 79 L.Ed. 686. See, also, *Miller v. U.S.*, 1980, 620 F.2d 812, 223 Ct.Cl. 352; *Sudametal Sociedad Anonima Sud Americana De Metales Y Minerales v. U.S.*, 1950, 88 F.Supp. 293, motion denied 90 F.Supp. 551, 116 Ct.Cl. 789, certiorari denied 71 S.Ct. 196, 340 U.S. 883, 95 L.Ed. 641; *Walker v. U.S.*, 1946, 64 F.Supp. 135, 105 Ct.Cl. 553.

449. — Presidents

Urgent Deficiency Act, Act Oct. 6, 1917, c. 79, 40 Stat. 352, which delegated

JUST COMPENSATION

to President the power of eminent domain, provided for United States to make just compensation therefor and established procedure under which President could make initial determination of amount of compensation satisfied requirements of this amendment. *U.S. v. Holmes*, D.C.Md.1976, 414 F.Supp. 831.

450. — Miscellaneous persons or entities

The value of land taken for public use may be fixed by viewers without a hearing, after entry upon the land, without depriving owner of due process of law, if viewers' award is subject to a review in which a trial upon evidence may be had. *Bailey v. Anderson*, Va.1945, 66 S.Ct. 66, 326 U.S. 203, 90 L.Ed. 3, rehearing denied 66 S.Ct. 228, 326 U.S. 691, 90 L.Ed. 407.

451. Persons or entities entitled to compensation—Generally

Since compensation in condemnation proceeding is due at time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment. *U.S. v. Dow*, Tex.1958, 78 S.Ct. 1039, 357 U.S. 17, 2 L.Ed.2d 1109. See, also, *Haldeman v. Freeman*, D.C.D.C. 1983, 558 F.Supp. 514.

Government was not liable to plaintiff for property taken by government which plaintiff had sold prior to earliest date alleged by any party to be date of governmental taking, in that plaintiff had no standing to claim payment for such property since compensation can be paid only to the person who owns or has an interest in the property at the time it is taken. *Yaist v. U.S.*, 1981, 656 F.2d 616, 228 Ct.Cl. 281, on remand 2 Cl.Ct. 349.

The person entitled to compensation for a taking of property by the government is the owner of the property at the time of taking. *Lacey v. U.S.*, 1979, 595 F.2d 614, 219 Ct.Cl. 551. See, also, *U.S. v. Douglas*, C.A.Wash.1953, 207 F.2d 381, certiorari denied 74 S.Ct. 520, 347 U.S. 920, 98 L.Ed. 1074; *U.S. v. Honolulu Plantation Co.*, C.A.Hawaii 1950, 182 F.2d 172, certiorari denied 71 S.Ct. 51, 340 U.S. 820, 95 L.Ed. 602; *Redman v. U.S.*, C.C.A.Md.1943, 136 F.2d 203; *U.S. v. 71.29 Acres of Land, More or Less*, in *Catahoula Et Al. Parishes*, D.C.La.1974, 376 F.Supp. 1221; *U.S. ex rel. Tennessee Val. Authority v. 544 Acres of Land, More or Less*, in *Franklin County, Tenn.*, D.C.Tenn.1969, 309 F.Supp. 46; *U.S. v. 52.67 Acres of Land, More or Less*, in *St.*

Amend. 5

Note 454

Clair County, Ill., D.C.Ill.1957, 150 F.Supp. 347.

452. — Aliens

Aliens are entitled to a large measure of equal economic opportunity, they may invoke writ of habeas corpus, are accorded protection of this amendment and Amend. 6 in criminal proceedings and, unless enemy aliens, their property cannot be taken without just compensation. *Harisiades v. Shaughnessy*, N.Y. 1952, 72 S.Ct. 512, 342 U.S. 580, 96 L.Ed. 586, rehearing denied 72 S.Ct. 767, 2 mems., 343 U.S. 936, 96 L.Ed. 1344.

Friendly aliens are protected against confiscation of their property by this clause. *Guessefeldt v. McGrath*, App.D. C.1952, 72 S.Ct. 338, 342 U.S. 308, 96 L.Ed. 342.

Government taking property of alien friend by eminent domain must pay equivalent of full value contemporaneously with taking. *Russian Volunteer Fleet Co. v. U.S.*, 1931, 51 S.Ct. 229, 282 U.S. 481, 75 L.Ed. 473.

Although an alien's property may not be taken without just compensation, absent a state of war existing between alien's country and the United States, such does not mean that an alien who has violated United States immigration laws is entitled to a hearing before government may deprive him of an item of his personal property that would assist him in avoiding detection as an alien. *Lopez v. U.S.* I.N.S., C.A.10 (Colo.) 1985, 758 F.2d 1390.

453. — Bondholders

Holders of municipal bonds issued by city to finance intrastate bridge project were not entitled to recover against United States on an inverse condemnation claim for loss of revenues and consequent default by city on bonds when United States helped build and finance a new bridge where United States acquired no property interest from bondholders either directly or indirectly. *Jackson Sawmill Co. v. U.S.*, C.A.Mo.1978, 580 F.2d 302, certiorari denied 99 S.Ct. 839, 439 U.S. 1070, 59 L.Ed.2d 35.

454. — Corporations

Where the government in the exercise of its power of eminent domain condemns for public use the property of a person, including a corporation, the property owner is constitutionally entitled to just compensation. *U.S. v. 91.90 Acres of Land, Situate in Monroe County, Mo.*, C.A.Mo.1978, 586 F.2d 79, certio-

and they are not entitled to compensation for taking of timber on occupied land under authority granted by United States. *Tee-Hit-Ton Indians v United States* (1955) 348 US 272, 99 L Ed 314, 75 S Ct 313, reh den 348 US 965, 99 L Ed 753, 75 S Ct 521.

Act of March 1, 1933 (47 Stat 1418), withdrawing certain lands in Utah from public domain and adding them to Navajo Reservation, and providing that if oil or gas is produced in commercial quantities on lands, 37½ percent of net royalties accruing therefrom derived from tribal leases shall be paid to State of Utah, and shall be expended by state for education of Indian children and for building and maintaining reservation does not create constitutionally protected property rights in residents of lands, since lands are added to tribal reservation, and leases giving rise to mineral royalties are tribal leases; consequently, Act of May 17, 1968 (PL 90-306, 82 Stat 121), allowing expanded use of royalties, for health, education, and general welfare of Navajo Indians residing in San Juan County" does not violate Fifth Amendment guaranty against taking of property without just compensation. *United States v Jim* (1972) 409 US 80, 34 L Ed 2d 282, 93 S Ct 261, 43 OGR 574, reh den 409 US 1118, 34 L Ed 2d 702, 93 S Ct 893 and reh den 409 US 1118, 34 L Ed 2d 703, 93 S Ct 894.

Indian allottees of surface lands under Northern Cheyenne Allotment Act of 1926 do not have vested rights in underlying mineral deposits, so that Congress could validly terminate allottees' interests without rendering United States constitutionally liable to pay allottees just compensation under Fifth Amendment. *Northern Cheyenne Tribe v Hollowbreast* (1976) 425 US 649, 48 L Ed 2d 274, 96 S Ct 1793, 56 OGR 65.

Although taking of unrecognized or aboriginal Indian title is not compensable under Fifth Amendment, once government has declared, by treaty or other agreement, that Indians are to hold lands permanently, compensation must be paid for subsequent takings; Act of February 28, 1877 (19 Stat. 254) constituted taking of Indian land for purposes of Fifth Amendment, since evidence indicates that government did not act in good faith in its dealings with Indians to give Sioux tribe full value for taking of Black Hills. *United States v Sioux Nation of Indians* (1980) 448 US 371, 65 L Ed 2d 844, 100 S Ct 2716.

Extinguishment of aboriginal title by United States does not give rise to right of compensation under Fifth Amendment. *United States v Dann* (1983, CA9 Nev) 706 F2d 919.

Congress can exercise guardianship over Indian property, derived from its plenary power

recognized in Constitution to control tribal Indian affairs, or it may exercise its fundamental power of eminent domain and take Indian property, for which it must pay just compensation; if acquisition of certain lands from Indians by United States constituted taking for purposes of Fifth Amendment right of just compensation, government would be liable not only for value of property taken but also for interest from date of taking. *Sioux Nation of Indians v United States* (1979) 220 Ct Cl 442, 601 F2d 1157, affd 448 US 371, 65 L Ed 2d 844, 100 S Ct 2716 and later proceeding 225 Ct Cl 771.

472. Application to aliens

Russian corporation was entitled to maintain suit against United States in Court of Claims to recover compensation for property requisitioned whether or not government of Russia had been recognized by United States. *Russian Volunteer Fleet v United States* (1931) 282 US 481, 75 L Ed 473, 51 S Ct 229.

Non-enemy owner of property erroneously seized by alien property custodian has remedy which must be constitutionally sufficient to satisfy guaranty of Fifth Amendment that compensation shall be awarded for property taken for public use. *Becker Steel Co. v Cummings* (1935) 296 US 74, 80 L Ed 54, 56 S Ct 15.

Claim of national of enemy country domiciled in United States that he is protected by Fifth Amendment requirement of just compensation for taking his property is not frivolous. *Guessefeldt v McGrath* (1952) 342 US 308, 96 L Ed 342, 72 S Ct 338.

473. Application to taking by foreign state

Fifth Amendment is not restriction on acts of foreign governments. *United States v Belmont* (1937) 301 US 324, 81 L Ed 1134, 57 S Ct 758.

Constitutional guarantees against confiscation of property do not necessarily prevent federal courts from giving effect to confiscatory act of foreign state, but they do show what public policy of United States is. *Republic of Iraq v First Nat. City Bank* (1965, CA2 NY) 353 F2d 47, cert den 382 US 1027, 15 L Ed 2d 540, 86 S Ct 648.

474. Right to hearing

Landowners, alleging that proceedings by government to acquire their lands for flood control were arbitrary, capricious and in bad faith, who were ordered to vacate possession of their lands, were entitled to hearing on their objections to taking prior to their being required to vacate their homesteads, and such hearing should not have been deferred until determination of just compensation. *United States v 58.16 Acres of*

and on January 29 he approved a schedule of overassessments which embraced the overpayment for the year 1918. The schedule was transmitted to the Collector of the appropriate district with the usual instructions and authority to check the overassessment against the taxpayer's account and determine whether the amounts in which the tax liability had been reduced should be abated in whole or in part, and if any part of the overassessment was found to be an overpayment to apply the same against taxes due, if any, making the appropriate entry in his accounts.

After this had occurred, petitioner inquired in writing of the Collector as to the status of its account. He replied by letter dated February 23, 1926, stating that he had applied the overassessment to close out the accounts of 1916 and 1917, thus extinguishing the taxpayer's liability as shown by his books. On February 27, 1926, he returned the schedule of overassessments to the Commissioner together with the usual subsidiary schedule of credits and refunds showing how he had credited the overassessment and that there remained a balance of 1918 taxes refundable to the taxpayer amounting to \$21,152.12. On April 15, 1926, the Commissioner approved the schedule, thus authorizing the issuance of checks covering the amount to be refunded.

The question is whether interest should be allowed the petitioner under § 1019 of the Revenue Act of 1924 (43 Stat. 346) or under § 1116 of the Revenue Act of 1926 (44 Stat. 119). The latter act took effect February 26, 1926. The Court of Claims held that the act of the Commissioner in approving the schedule of refunds and credits and authorizing the issuance of checks on April 15, 1926, constituted the allowance of the claim for credit, and that interest on credits for 1916 and 1917 taxes should be calculated under the Act of 1926, which had then become effective. The petitioner argues that credit was allowed

or taken when the Collector, prior to February 26, 1926, made the entries upon his books, and that consequently interest on the credits should be calculated under the provisions of the Act of 1924. We hold, in conformity with our decision in *United States v. Swift & Co., supra*, that the allowance occurred April 15, 1926, when the Commissioner finally acted on the schedule of refunds and credits. The judgment is

Affirmed.

RUSSIAN VOLUNTEER FLEET *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 39. Argued December 12, 1930.—Decided February 24, 1931.

1. When the United States expropriates the property of an alien friend, the Fifth Amendment requires that it pay just compensation equivalent to the full value of the property contemporaneously with the taking. P. 489.
2. This constitutional right of the alien does not depend upon whether the government of his country renders compensation to our citizens in like cases or upon whether that government is recognized as such by our own. P. 491.
3. The Act of June 15, 1917, which provided for war-time expropriation of ships, etc., and for payment of just compensation, expressly entitling the property owner, if dissatisfied with the amount fixed by the President, to accept 75% thereof and to sue the United States in the Court of Claims under Jud. Code § 145, for such further sum as will make up just compensation, should not be construed as limited, with respect to alien suitors, by Jud. Code § 155, which provides that "Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction."

So held in the case of a Russian corporation, where the property was taken under the 1917 Act after the recognition by the United States of the Provisional Government of Russia, successor to the

Imperial Government of that country, and where the suit was brought after the overthrow of the Provisional Government, which has no recognized successor. P. 491.

4. Where a statute presents no difficulty if read according to its terms, a condition that would raise a grave question of its constitutionality should not be implied. P. 492.
68 Ct. Cls. 32, reversed.

CERTIORARI, 281 U. S. 711, to review a judgment of the Court of Claims rejecting a claim for want of jurisdiction.

Mr. William L. Rawls, with whom Messrs. Charles Recht, Horace S. Whitman, William L. Marbury, Jr., and Osmond K. Fraenkel were on the brief, for petitioner.

The petitioner is a juristic person with capacity to sue. The United States dealt with it as a legal entity and as owner of the property. Just compensation to it was fixed under the order of August 31, 1917. Since that time the United States Government has had numerous dealings with the Russian Volunteer Fleet as such and has even brought suit against the corporation. See *United States v. Russian Volunteer Fleet*, 22 F. (2d) 187.

The Department of State still recognizes the representative of the Provisional Russian Government as the accredited representative of the State of Russia.

But the overthrow of a Government does not carry with it the extinction of private rights, *Vilas v. Manila*, 220 U. S. 345, nor destroy the State. The continued existence of the State of Russia has been clearly recognized in *Russian Government v. Lehigh Valley R. Co.*, 293 Fed. 133; *id.*, 135; writ of prohibition denied, 265 U. S. 573; *Lehigh Valley R. Co. v. Russia*, 21 F. (2d) 396, certiorari denied, 275 U. S. 571.

Petitioner has alleged its continued existence as a corporation under the laws of the Soviet Government, but even were the fact otherwise, as in those cases where the Soviet Government has attempted to destroy the corporate entity, the continued existence of the corporation for the

purpose of bringing suit to collect its assets would be presumed by the courts here, in the absence of recognition by our Government of the validity of the decrees of the Soviet Government. *Petrogradsky W. K. Bank v. National City Bank*, 253 N. Y. 23; *Russian C. & I. Bank v. Comptoir d'Escompte de Mulhouse*, (1925) A. C. 112, (1923) 2 K. B. 630; *Banque v. Goukassow*, (1925) A. C. 150, (1923) 2 K. B. 682.

Even though no payment has been made to petitioner, the Act of June 15, 1917, is broad enough to cover this case. Similar suits have been entertained. *United States v. Carver*, 278 U. S. 294; *Seaboard Air Line v. United States*, 261 U. S. 299; *Houston Coal Co. v. United States*, 262 U. S. 361; *United States v. McNeil & Sons*, 267 U. S. 302.

The Act of 1917 must be so construed as to harmonize with the Fifth Amendment. If so construed as to deny just compensation to persons whose property is taken under it, it would be unconstitutional. *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106; *Seaboard Air Line v. United States*, 261 U. S. 299; *Phelps v. United States*, 274 U. S. 341. An alien is entitled to the protection of the Fifth Amendment. *Wong Wing v. United States*, 163 U. S. 228, 242; *Truax v. Raich*, 239 U. S. 33, 39.

The case is governed by *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331.

Limitations expressing broad purposes contained in general Acts enacted many years ago, should not be read into special war legislation in such a manner as to limit its remedial character. *United States v. Pfitsch*, 256 U. S. 547; *Nassau Smelting Works v. United States*, 266 U. S. 101; *United States v. Skinner & Eddy Corp.*, 35 F. (2d) 889.

Section 155 of the Judicial Code, like § 3477 of the Revised Statutes discussed in the *Richmond Company Case*, *supra*, is a limiting Act, taking away rights thereto-

fore conferred upon aliens, and is not an enabling Act as the Court of Claims seems to have supposed. Section 155 does not limit the right to sue the United States to citizens of recognized governments. Its history makes clear that the Act did not confer special privileges on aliens, but took away from certain classes privileges which had theretofore been conferred upon them.

The decisions of this Court have condemned the practice of importing into an Act of Congress seriously affecting international relations, words which it does not contain. *The Three Friends*, 166 U. S. 1.

If petitioner's right is dependent upon § 155 of the Judicial Code, petitioner should be permitted to establish as a matter of fact that the present Russian Government allows suits to be brought against it by citizens of the United States.

A judicial determination that there was in fact a Government in Russia known as the Union of Soviet Socialist Republics, and that such government as a matter of fact carried on the ordinary functions of any civilized government, is not in the least an infringement upon the prerogatives of the Department of State. *United States v. Palmer*, 3 Wheat. 610; *Consul of Spain v. La Conception*, Fed. Cas. No. 3137; *Yrissari v. Clement*, 3 Bing. 432. See also, *Texas v. White*, 7 Wall. 700; *Thorington v. Smith*, 8 Wall. 1; *United States v. Insurance Companies*, 22 Wall. 99; *Williams v. Bruffy*, 96 U. S. 176; *Baldy v. Hunter*, 171 U. S. 388; *MacLeod v. United States*, 229 U. S. 416; *Wulfsohn v. Russian Soviet Republic*, 234 N. Y. 372; *Nankivel v. Omsk All Russian Government*, 237 N. Y. 150; *Sokoloff v. National City Bank*, 239 N. Y. 158; *Russian Reinsurance Co. v. Stoddard*, 240 N. Y. 149; *Joint Stock Co. v. National City Bank*, 240 N. Y. 368; *Petrogradsky Bank v. National City Bank*, 253 N. Y. 23; *Banque de France v. Equitable Trust Co.*, 33 F. (2d) 202; *Rossia Ins. Co. v. United States*, 58 Ct. Cls. 180. Practically all of the

writers who have had occasion to discuss this subject have come to the same conclusion: Hervey, *Legal Effects of Recognition in International Law*; Dickinson, *The Unrecognized Government or State in English and American Law*, 22 Mich. L. R. 29; Fraenkel, *The Juristic Status of Foreign States*, 25 Col. L. R. 544; Connick, *The Effect of Soviet Decrees in American Courts*, 34 Yale L. J. 499; Houghton, *The Validity of the Acts of Unrecognized Governments*, 13 Minn. L. R. 216; 35 Harv. L. R. 607, 768; 37 *id.* 606; 38 *id.* 816, 832; 39 *id.* 127; 41 *id.* 102; 35 Yale L. J. 98, 150, at 155; 30 Col. L. R. 225.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher*, *Assistant Attorney General Rugg* and *Messrs. Percy M. Cox*, *Erwin N. Griswold*, *H. Brian Holland*, *Green H. Hackworth*, *Solicitor*, Department of State, and *Francis M. Anderson*, Assistant Solicitor, were on the brief, for the United States.

The Government submits the case on the opinion of the Court of Claims. Although we do not confess error, we are of the opinion that § 155 of the Judicial Code is not applicable. The Act of June 15, 1917, does not mention § 155, and we think it doubtful whether Congress intended to make the right to sue dependent upon the conditions set forth in § 155. A case involving other statutes relating to suits in the Court of Claims supports the contention that § 155 is not applicable. *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331.

Moreover, there would seem to be grave doubt as to the constitutionality of the Act of June 15, 1917, as construed by the Court of Claims.

If § 155 of the Judicial Code is applicable, we submit that the decision of the Court of Claims was correct. This Government has not recognized any régime which has been functioning as a Government in Russia since 1917. It follows that if the petitioner is a citizen of Russia, it is not a citizen "of any Government" within the meaning of

§ 155, and that the courts in this country can not find that judicial remedies against the Russian Government exist in Russia.

A further question may be suggested, and that is whether a corporation which purports to be a citizen of "the Union of Soviet Socialist Republics" has such a legal existence as to bring suit in any court. But we are of the opinion that this question is not now before this Court. The petition filed in the Court of Claims describes the petitioner as a corporation "duly organized under, and by virtue of, the Laws of Russia." As the record avers facts showing that it was in existence under the régime of the Imperial Russian Government, it can not be assumed without proof that it now has no corporate existence. A recent well-considered case held that such a corporation may bring suits in the courts in this country. *Petrogradsky M. K. Bank v. National City Bank*, 253 N. Y. 23. The mere statement that the petitioner is a citizen of "the Union of Soviet Socialist Republics," in its brief, which is not a part of the record, would hardly seem to be sufficient ground for dismissing the case. Whether any corporation created by this so-called Republic can sue is a question which requires more information about the subject than can be obtained either from this record or judicial notice of political acts. Similarly, the question whether the suit is being prosecuted by persons having proper authority from the corporation, alleged to be entitled to compensation, is a matter which can not be determined at the present time.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The petitioner brought this suit against the United States in the Court of Claims to recover just compensation for the requisitioning by the United States Shipping Board Emergency Fleet Corporation, under authority

delegated to it by the President, of contracts for the construction of two vessels. The Court of Claims dismissed the petition for the want of jurisdiction. 68 Ct. Cls. 32. This Court granted a writ of certiorari. 281 U. S. 711.

The petition, filed in October, 1924, alleged that the petitioner "is a corporation duly organized under, and by virtue of, the Laws of Russia"; that in January, 1917, the petitioner became the assignee for value of certain contracts for the construction of two vessels by the Standard Shipbuilding Corporation of New York; that in August, 1917, the United States Shipping Board Emergency Fleet Corporation, acting under the authority conferred by the Act of June 15, 1917 (c. 29, 40 Stat. 183) and by the Executive Order of the President of the United States made on July 11, 1917, requisitioned these contracts, and the vessels being constructed thereunder, for the use of the United States; that the United States thereby became liable to the petitioner for the payment of just compensation; that in August, 1919, the petitioner submitted its affidavit of claim, and vouchers in support; that in March, 1920, the United States Shipping Board Emergency Fleet Corporation fixed the just compensation of the petitioner at a total amount of \$1,412,532.35; that the value of the contracts taken from the petitioner was \$4,000,000, to which the petitioner was entitled after allowing all proper credits and offsets; and that "citizens of the United States are and at the time of and since the commencement of this suit have been accorded the right to prosecute claims against the Russian Government in the Court of that Government."

In May, 1927, the petitioner filed motions to issue commissions to take testimony in Germany and France; the defendant objected, and the motions were overruled. The petitioner then gave notice of the taking of testimony in Washington, D. C., whereupon the defendant moved to quash the notice upon the ground that the

Court was without jurisdiction of the subject matter of the proceeding. On the submission of that motion, the petition was dismissed. The Court of Claims held that, as the United States Government had not recognized the Union of Soviet Socialist Republics in Russia, the petitioner was not entitled to maintain its suit in view of section 155 of the Judicial Code (U. S. C., Tit. 28, § 261). That section is as follows: "Sec. 155. Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction." The court said that the reference to citizens or subjects of "any government" meant such governments as were recognized by the proper authorities of the United States.

The Government in its argument here, while submitting the case on the opinion of the Court of Claims and not confessing error, presents the view that section 155 of the Judicial Code does not apply to this suit, which was brought under the provisions of the Act of June 15, 1917. With respect to the matter of recognition, the Government appends to its brief a letter of the Secretary of State of the United States, under date of December 5, 1930, stating that "the Provisional Government of Russia, the successor of the Imperial Government of Russia, was recognized by the Government of the United States on March 22, 1917"; that, "according to the Department's information, the Provisional Government of Russia was overthrown by an armed uprising which took place in the early part of November, 1917," and that "the Government of the United States has not extended recognition to any régime established in Russia subsequent to the overthrow of the Provisional Government."

As the facts alleged in the petition were admitted by the motion to dismiss, the allegation that the petitioner is a corporation duly organized under the laws of Russia stands unchallenged on the record. There was no legislation which prevented it from acquiring and holding the property in question. The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution. *Wong Wing v. United States*, 163 U. S. 228, 238; compare *Yick Wo v. Hopkins*, 118 U. S. 356, 369; *Santa Clara County v. Southern Pacific R. Co.*, 118 U. S. 394, 396; *Truax v. Raich*, 239 U. S. 33, 39; *Terrace v. Thompson*, 263 U. S. 197, 216; *Home Insurance Co. v. Dick*, 281 U. S. 397, 411. Exerting by its authorized agent the power of eminent domain in taking the petitioner's property, the United States became bound to pay just compensation. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 656; *United States v. North American Co.*, 253 U. S. 330, 333; *Campbell v. United States*, 266 U. S. 368, 370, 371; *Phelps v. United States*, 274 U. S. 341, 343, 344; *International Paper Co. v. United States*, ante, p. 399. And this obligation was to pay to the petitioner the equivalent of the full value of the property contemporaneously with the taking. *Phelps v. United States*, supra; *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 123.

The Congress recognized this duty in authorizing the expropriation. The Act of June 15, 1917, under which the requisition was made, provided for the payment of just compensation. The Congress did not attempt to give to any officer or administrative tribunal the final authority to determine the amount of such compensation¹, and recovery by suit against the United States was

¹ See *United States v. Jones*, 109 U. S. 513, 519; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 695; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 559; *United States v. Bab-*

made an integral part of the legislative plan of fulfilling the constitutional requirement. The Act provided as follows: "Whenever the United States shall . . . requisition any contract, . . . requisition, acquire or take over . . . any ship, . . . in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code." Section 24, paragraph 20, of the Judicial Code, U. S. C., Tit. 28, § 41, subd. (20), gives jurisdiction to the District Courts of the United States, concurrent with the Court of Claims, of claims against the United States not exceeding \$10,000, founded upon the Constitution, or any law of Congress, or upon any contract, express or implied, with the Government of the United States, when the claimant would be entitled to redress against the United States in a court of law, equity, or admiralty, if the United States were suable. The case of an alien friend is not excepted. Section 145 of the Judicial Code (U. S. C., Tit. 28, § 250) gives to the Court of Claims jurisdiction of suits on similar claims against the United States without limit of amount. The authority con-

cock, 250 U. S. 328, 331; *Bragg v. Weaver*, 251 U. S. 57, 59; *Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299, 304; *North Laramie Land Co. v. Hoffman*, 268 U. S. 276, 285, 286; *Great Northern Ry. Co. v. United States*, 277 U. S. 172, 182; *Dohany v. Rogers*, 281 U. S. 362, 369.

ferred upon the President by the Act of June 15, 1917, was exercised by him through the United States Shipping Board Emergency Fleet Corporation, and as the compensation fixed by that Corporation was not satisfactory to the petitioner, it became entitled under the express terms of the Act to bring suit against the United States to recover the amount justly payable by reason of the requisition.

The Act of June 15, 1917, makes no reference to section 155 of the Judicial Code with respect to alien suitors, and the question is whether that provision should be implied as establishing a condition precedent and the recovery thus be defeated. It is at once apparent that such an implication would lead to anomalous results. It would mean that, although the United States had actually taken possession of the property and was enjoying the advantages of its use, and the alien owner was unquestionably entitled to compensation at the time of the taking, it was the intention of the Congress that recovery should be denied, or at least be indefinitely postponed until the Congress made some other provision for the determination of the amount payable, if it appeared that citizens of the United States were not entitled to prosecute claims against the government of the alien's country in its courts, or that the United States did not recognize the régime which was functioning in that country.

We find no warrant for imputing to the Congress such an intention. "Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution." *Phelps v. United States*, *supra*. The Fifth Amendment gives to each owner of property his individual right. The constitutional right of owner A to compensation when his property is taken is irrespective of what may be done somewhere else with the property of owner B. As alien friends are embraced within

the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for public use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments. The Act of Congress should be interpreted in the light of its manifest purpose to give effect to the constitutional guaranty.

Nor do we regard it as an admissible construction of the Act of June 15, 1917, to hold that the Congress intended that the right of an alien friend to recover just compensation should be defeated or postponed because of the lack of recognition by the Government of the United States of the régime in his country. *A fortiori*, as the right to compensation for which the Act provided sprang into existence at the time of the taking, there is no ground for saying that the statute was not to apply, if at a later date, and before compensation was actually made, there should be a revolution in the country of the owner and the ensuing régime should not be recognized. The question as presented here is not one of a claim advanced by or on behalf of a foreign government or régime, but is simply one of compensating an owner of property taken by the United States.

The Act of June 15, 1917, if read according to its terms, presents no difficulty. A condition should not be implied which, to say the least, would raise a grave question as to the constitutional validity of the Act. *Federal Trade Comm. v. American Tobacco Co.*, 264 U. S. 298, 307; *Missouri Pacific R. Co. v. Boone*, 270 U. S. 466, 471, 472; *Blodgett v. Holden*, 275 U. S. 142, 148; *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331, 346; *Lucas v. Alexander*, 279 U. S. 573, 577.

Judgment reversed.

FURST AND THOMAS, PARTNERS, v. BREWSTER
ET AL.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 76. Argued January 27, 28, 1931.—Decided February 24, 1931.

A state statute denying to any foreign corporation the right to sue in the state courts unless it has filed in the State a copy of its articles and a financial statement and designated a local office and a local agent upon whom process may be served, is repugnant to the Commerce Clause if applied to an action to collect money due by a resident, whether as agent or as vendee, for goods shipped in to him, upon his order, from another State pursuant to his contract with the shipper, even though the latter acted as the agent of a foreign corporation which had not complied with the statute. P. 497.

180 Ark. 1167; 21 S. W. (2d) 863, reversed.

APPEAL from a judgment affirming a judgment against the appellants in their action for goods sold and delivered.

Mr. Frank F. Nesbit, with whom *Mr. M. Danaher* was on the brief, for appellants.

The transaction is not taken out of the field of interstate commerce by the mere designating of one party as the agent of the other. As between them, if the contract involves the interstate carriage of goods, interstate payment therefor and mercantile intercourse between citizens of different States, it is a transaction in interstate commerce, whether one is the vendee, agent, consignee or factor of the other. *Welton v. Missouri*, 91 U. S. 275, 280; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282; *International Text-Book Co. v. Pigg*, 217 U. S. 107; *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, certiorari denied, 212 U. S. 577; *Caldwell v. North Carolina*, 187 U. S. 622; *Adair v. United States*, 208 U. S. 161, 177.

The right to enforce and collect in the state courts debts arising out of such transactions is a necessary incident of interstate commerce, and the imposition of un-

We think the threatened injury to respondent is of too slight moment to justify a federal court of equity, in the exercise of its discretion, in according a remedy which would entail denial of a jury trial to the petitioners and withdraw from the jurisdiction of the state courts suits which could not otherwise be brought into the federal courts.

Reversed.

BECKER STEEL COMPANY OF AMERICA *v.* CUM-
MINGS, ATTORNEY GENERAL, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

No. 13. Argued October 17, 1935.—Decided November 11, 1935.

1. A suit in the District Court by a non-enemy claimant against the Alien Property Custodian and the Treasurer of the United States to recover the proceeds of property which was seized and disposed of under the Trading with the Enemy Act, is in substance a suit against the United States, authorized by § 9 (a) of that statute. P. 78.
2. The question whether such a suit may be maintained where the money demanded had been disbursed before suit begun, *held* not a question of the jurisdiction of the District Court, in the strict sense of its power or authority as a federal court to decide whether suit would lie, but a question of the proper construction of the statute, which that court had power to determine. P. 78.
3. Section 9 (a) of the Trading with the Enemy Act, which provides the only remedy allowed the non-enemy owner of property seized by the Alien Property Custodian upon an erroneous determination of enemy ownership, must be construed to avoid doubts of the constitutionality which would arise if the remedy were inadequate. P. 79.
4. The implication that by the appropriation of private property to public use the United States intends to make just compensation must enter into the construction of a statute giving to a non-enemy a remedy for the seizure of his property as a war measure. P. 79.
5. Only compelling language in a statute will be construed as withdrawing or curtailing the privilege of suit against the United

States in recognition of an obligation imposed by the Constitution. P. 80.

6. In a suit in the District Court under § 9 (a) of the Trading with the Enemy Act, a non-enemy, upon establishing his claim to property that was erroneously seized and sold by the Alien Property Custodian, is entitled to judgment upon the claim even though the proceeds are no longer "held" by the Custodian or Treasurer. *Escher v. Woods*, 281 U. S. 379. P. 80.
7. Section 7 (c) of the Act provides that, in the event of sale of the property by the Custodian, the claimant's remedy shall be limited to and enforced against the "net proceeds" received and "held" by the Custodian or the Treasurer. *Held* that "net proceeds" means no more than gross proceeds of the sale less charges which may rightly be deducted; and the limitation of the remedy to the net proceeds "held" by the Custodian or Treasurer refers, not to the net proceeds so held at the moment of entry of the decree, but to the proceeds so held at any time and not lawfully disbursed. P. 81.

75 F. (2d) 1005, reversed.

CERTIORARI, 295 U. S. 724, to review the affirmance of a decree of the District Court (10 F. Supp. 343) dismissing a suit against the Attorney General, as Alien Property Custodian, and the Treasurer of the United States.

Mr. E. Crosby Kindleberger for petitioner.

Assistant Attorney General Dickinson, with whom *Solicitor General Reed*, *Assistant Attorney General MacLean*, and *Messrs. Wendell Berge* and *Paul A. Sweeney* were on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

This is a suit against the Attorney General, as Alien Property Custodian, and the Treasurer of the United States, brought in the District Court for Southern New York under § 9 (a) of the Trading with the Enemy Act,

use the United States undertakes to make just compensation for it, see *United States v. Lynah*, 188 U. S. 445, 471; *Jacobs v. United States*, 290 U. S. 13; *Perry v. United States*, 294 U. S. 330; *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, must likewise enter into the construction of a statute giving to a non-enemy a remedy for the seizure of his property as a war measure. Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the government granted in recognition of an obligation imposed by the Constitution. See *Lynch v. United States*, 292 U. S. 571, 586, 587; *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 489. Hence § 9 (a) must be broadly construed to give effect to its remedial purpose, see *Miller v. Robertson*, 266 U. S. 243, 248; *Behn, Meyer & Co. v. Miller*, 266 U. S. 457, 471, 472.

In the present state of the record it is unnecessary to inquire whether the effect of the act is to sanction in every case the sale of the property of a non-enemy giving him recourse only to the proceeds of sale. See *Sielcken-Schwarz v. American Factors*, 60 F. (2d) 43, 44. That question was not raised or considered below. The issue now presented is much narrower, whether the failure of the Custodian to retain possession of the seized property or its proceeds precludes all inquiry as to the propriety of the disposition which he has made of them. Such, we think, is not the effect of the provisions in §§ 7 and 9, construed in the light of constitutional obligations which we must assume Congress did not intend to ignore. Section 9 (a) is specific in permitting the non-enemy claimant to institute a suit to establish the interest, right or title claimed. "If so established" the court in terms is directed to order the satisfaction of the claim from property "held" by the Custodian or Treasurer. But these words do not deny the right to establish the claim or to

enter judgment upon it when established, even though the property is no longer held by the Custodian. Directions that the money or property be retained and used for satisfying the decree in a pending suit are not the equivalent of a command that the suit be dismissed if the property is not so retained. If they were we should be forced to the conclusion, although the court below did not go so far, that the claim could be defeated by the waste or dissipation of the seized property by the Custodian at any time before judgment, after suit brought, as well as before.

Nor does the provision in § 7 that the remedy in the event of sale is to be limited to the net proceeds of sale "received therefrom and held" by the Custodian preclude inquiry whether amounts expended were lawfully charged against the gross proceeds. *Escher v. Woods*, 281 U. S. 379. "Net proceeds of sale" thus means no more than gross proceeds less charges which may be rightly deducted and we think that the direction that the remedy is to be limited to net proceeds "held" by the Custodian must be taken, not in the narrow and restricted sense as indicating only the proceeds retained by him at the precise moment of entering the decree, but as signifying proceeds held by him at any time and not lawfully disbursed. Such a construction does no violence to the language of the act and conforms to and is supported by its dominant purpose, often recognized by this Court, to give to citizens and alien friends an adequate remedy for invasions of their property rights in the exercise of the war powers of the Government. Any other construction by denying such a remedy would raise grave doubts of the constitutionality of the statute as applied to non-enemies.

In *Escher v. Woods*, *supra*, the Custodian had paid the proceeds of sale of non-enemy property into the treasury

of the United States after deducting 2% which he had paid into a fund to be used for paying the expenses of his office during the period of administration; expenses not shown to be rightly chargeable against the proceeds of sale. In allowing recovery of the amount improperly deducted the right to recover was not thought to turn on whether the expenses had or had not been in fact paid out by the Custodian. This Court placed its decision on the broad ground that under the statute the unlawfulness of the charges made by the custodian against the proceeds of sale of non-enemy owned property is open to judicial inquiry and that the limitation of recovery to net proceeds did not permit an unauthorized outlay to be deducted from the proceeds of sale.

We intimate no opinion as to the lawfulness of the deducted expenditures. We decide only that the right to challenge them is not lost because they have been made.

We do not pass upon the validity of the defense of the Statute of Limitations and others, the possibility of which is suggested by the allegations of the bill of complaint. Even if raised by the government's motion to dismiss for want of "jurisdiction of the persons of the defendants or of the subject matter of the action" they were not considered below or urged here. Whether, in a suit brought under the Trading with the Enemy Act against the Alien Property Custodian, these defenses go to the jurisdiction, as has been held in the case of the defense of the Statute of Limitations in a suit against the United States under the Tucker Act, see *Compagnie Generale v. United States*, 51 F. (2d) 1053, 1056; cf. *Finn v. United States*, 123 U. S. 227, or whether they go only to the merits, are questions which have never been decided. They have not been argued here. We think we should not undertake to decide them in the present posture of the case. *Scott v. Armstrong*, 146 U. S. 499, 512, 513.

Reversed.

MR. JUSTICE ROBERTS, dissenting.

Although I do not disagree with the opinion of the Court respecting the meaning of the word "held" as found in § 9 (a) of the Trading with the Enemy Act, I think we should not decide the point in this case. The order of the District Judge dismissing the action for want of jurisdiction was right notwithstanding he may have been in error as to the necessity of actual possession of the property or its proceeds by the Government's representatives at the date of suit.

The action is clearly one against the United States¹ and consent to be sued evidenced by Act of Congress is essential to jurisdiction. The question is whether such consent has been given. Whatever view may be taken of the nature of the action as disclosed by petitioner's pleading the answer must be in the negative.

The Government has consented to be sued as is evidenced by § 9 (a). It appears by petitioner's own declaration, however, that it availed itself of the privilege of suit thus granted and recovered a judgment for the full amount of the proceeds of the stock which had been seized by the Alien Property Custodian. The present action is a second suit to recover another judgment for a portion of the same money embraced in the former judgment. I fail to find any indication in the Act that Congress intended to afford a claimant two suits and two judgments for the same moneys.

Entirely apart from the provisions of the Trading with the Enemy Act, however, the District Court is without jurisdiction to permit a second action for a sum admittedly embraced in a judgment which is of record in that court.

¹ *Banco Mexicano v. Deutsche Bank*, 263 U. S. 591, 602; *Von Bruning v. Sutherland*, 58 App. D. C. 258; 29 F. (2d) 631; *Henkels v. Sutherland*, 271 U. S. 298, 301.

call on his loyalties which international law not only permits our Government to recognize but commands it to respect. In deference to it certain dispensations from conscription for any military service have been granted foreign nationals.⁶ They cannot, consistently with our international commitments, be compelled "to take part in the operations of war directed against their own country."⁷ In addition to such general immunities they may enjoy particular treaty privileges.⁸

Under our law, the alien in several respects stands on an equal footing with citizens,⁹ but in others has never been conceded legal parity with the citizen.¹⁰ Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and

⁶ § 2 of the Selective Draft Act of 1917, 40 Stat. 76, as amended, 50 U. S. C. App. § 202; § 3 of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U. S. C. App. § 303; § 4 (a) of the Selective Service Act of 1948, 62 Stat. 604, as amended, 50 U. S. C. App. § 454 (a). Cf. *Moser v. United States*, 341 U. S. 41.

⁷ Article 23, 1907 Hague Convention, Respecting the Laws and Customs of War on Land, 36 Stat. 2301-2302.

⁸ Borchard, *Diplomatic Protection of Citizens Abroad*, 64.

⁹ This Court has held that the Constitution assures him a large measure of equal economic opportunity, *Yick Wo v. Hopkins*, 118 U. S. 356; *Truax v. Raich*, 239 U. S. 33; he may invoke the writ of habeas corpus to protect his personal liberty, *Nishimura Ekiu v. United States*, 142 U. S. 651, 660; in criminal proceedings against him he must be accorded the protections of the Fifth and Sixth Amendments, *Wong Wing v. United States*, 163 U. S. 228; and, unless he is an enemy alien, his property cannot be taken without just compensation. *Russian Volunteer Fleet v. United States*, 282 U. S. 481.

¹⁰ He cannot stand for election to many public offices. For instance, Art. I, § 2, cl. 2, § 3, cl. 3, of the Constitution respectively require that candidates for election to the House of Representatives and Senate be citizens. See Borchard, *Diplomatic Protection of Citizens Abroad*, 63. The states, to whom is entrusted the authority to set qualifications of voters, for most purposes require citizenship as a condition precedent to the voting franchise. The alien's right to

tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.¹¹

War, of course, is the most usual occasion for extensive resort to the power. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment,¹² and his property becomes subject to seizure and perhaps confiscation.¹³ But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.

That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign

travel temporarily outside the United States is subject to restrictions not applicable to citizens. 43 Stat. 158, as amended, 8 U. S. C. § 210. If he is arrested on a charge of entering the country illegally, the burden is his to prove "his right to enter or remain"—no presumptions accrue in his favor by his presence here. 39 Stat. 889, as amended, 8 U. S. C. § 155 (a).

¹¹ *Fong Yue Ting v. United States*, 149 U. S. 698, 707, 711-714, 730; *Lem Moon Sing v. United States*, 158 U. S. 538, 545-546; *Li Sing v. United States*, 180 U. S. 486, 494-495; *Fok Yung Yo v. United States*, 185 U. S. 296, 302; *The Japanese Immigrant Case*, 189 U. S. 86, 97; *United States v. Ju Toy*, 198 U. S. 253, 261; *Zakonait v. Wolf*, 226 U. S. 272, 275; *Tiaco v. Forbes*, 228 U. S. 549, 556-557; *Bugajewitz v. Adams*, 228 U. S. 585, 591.

¹² 40 Stat. 531, 50 U. S. C. § 21.

¹³ 40 Stat. 411, 50 U. S. C. App. § 2 (c); 40 Stat. 415, 50 U. S. C. App. § 6; 62 Stat. 1246, 50 U. S. C. App. § 39; *Guessefeldt v. McGrath*, 342 U. S. 308.

Jose Refugio Pinon LOPEZ, a/k/a
Refugio Pinon, Plaintiff-Appellant,

v.

UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE; Robert
Godshall, Denver District Director, U.S.
Immigration and Naturalization Ser-
vice, in his official and individual ca-
pacities; Jack Holmes, Supervisory In-
vestigator, Denver District Office, U.S.
Immigration and Naturalization Ser-
vice, in his official and individual ca-
pacities; One Officer Hester, Field En-
forcement Officer, Denver District Of-
fice, U.S. Immigration and Naturaliza-
tion Service, in his official and individ-
ual capacities, Defendants-Appellees.

No. 83-2537.

United States Court of Appeals,
Tenth Circuit.

April 8, 1985.

Alien brought civil rights action seek-
ing damages, declaratory and injunctive re-
lief, based on seizure by INS of his driver's
license at time when he was technically in
violation of the immigration laws. The
United States District Court for the Dis-
trict of Colorado, John P. Moore, J., grant-
ed defendants' motion for summary judg-
ment, and alien appealed. The Court of
Appeals, Logan, Circuit Judge, held that:
(1) seizure by INS of state driver's license
did not violate the Tenth Amendment; (2)
even though seizure of driver's license was
not expressly authorized by federal statute
or regulation, seizure did not exceed scope
of authority of INS officials; and (3) INS
was not required to conduct a due process
hearing either before or after confiscating
driver's license, where license was not con-
fiscated until alien admitted to being an
alien and it was ascertained that he was
not carrying evidence of alien registration.

Affirmed.

1. Aliens ⇐39

Broad grant of legislative authority
over aliens is exclusive to Congress. U.S.
C.A. Const. Art. 1, § 9, cl. 1.

2. States ⇐4.16

Seizure of alien's state driver's license
by INS at a time when he was technically
in violation of immigration laws and return
of license to Colorado Department of Reve-
nue did not violate the Tenth Amendment,
on theory that federal government may not
act in areas that are exclusively within
province of states. U.S.C.A. Const.Amend.
10.

3. Aliens ⇐44

Confiscation by INS officials of alien's
state driver's license after they established
that he was not carrying evidence of alien
registration and transmittal of it to state
authorities was a lawful exercise of federal
authority, even though federal law does
not specifically authorize INS officials to
take state drivers' licenses away from al-
iens whom they may have reason to believe
are in violation of the immigration laws.
18 U.S.C.A. § 1015; Immigration and Na-
tionality Act, § 264(e), 8 U.S.C.A. § 1304(e).

4. Aliens ⇐3

Aliens, even those lawfully within the
country, do not have most of the constitu-
tional rights afforded to citizens; they may
be deported for considerations of race, poli-
tics, activities, or associations that govern-
ment could not punish them for if they
were citizens; they may be arrested by
administrative warrant issued without an
order of a magistrate, and held without
bail.

5. Constitutional Law ⇐252

Criminal Law ⇐641.2(2)

If accused of committing a crime
against the laws of the United States, a
resident alien is entitled to constitutional
protection of the Fifth and Sixth Amend-
ments. U.S.C.A. Const.Amend. 5, 6.

6. Aliens ⇐4

Although an alien's property may not
be taken without just compensation, absent
a state of war existing between alien's

country and the United States, such does not mean that an alien who has violated United States immigration laws is entitled to a hearing before government may deprive him of an item of his personal property that would assist him in avoiding detection as an alien.

7. Constitutional Law ⇐274.3

INS was not required to conduct a due process hearing either before or after confiscating alien's driver's license, where license was not confiscated until alien admitted to being an alien and it was determined that he was not carrying evidence of alien registration, as license could have assisted his avoiding detection as an alien. U.S. C.A. Const.Amend. 5.

Susan E. Perry, Denver, Colo., for plaintiff-appellant.

James W. Winchester, Asst. U.S. Atty., Denver, Colo. (Robert N. Miller, U.S. Atty., Denver, Colo., with him on brief), for defendants-appellees.

Before HOLLOWAY, Chief Judge, and BARRETT and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

Plaintiff Jose Refugio Pinon Lopez appeals from the district court's grant of defendants' motion for summary judgment. Plaintiff seeks damages, and declaratory and injunctive relief under 42 U.S.C. §§ 1981 and 1983 based on United States Immigration and Naturalization Service (INS) officials' seizure of his driver's license at a time when he was technically in violation of U.S. immigration laws. On appeal plaintiff argues that (1) the Tenth Amendment prohibits INS officials from enforcing Colo.Rev.Stat. § 42-2-103(3)(e), which forbids the issuance of a driver's license to persons whose presence in the United States is in violation of federal immigration laws; (2) the INS officials' ac-

tions were illegal because no express independent federal authorization existed for their actions; and (3) confiscating plaintiff's license violated Fifth and Fourteenth Amendment guarantees of procedural due process. In view of our resolution of these three issues, we need not consider plaintiff's argument concerning the individual defendants' qualified governmental immunity.

In October 1979, plaintiff was a passenger in a car that was stopped by officers of the INS. When he was unable to produce evidence of his lawful presence in the United States the officials took him into custody and transported him to the INS Detention Center in Aurora, Colorado. Plaintiff explained to the INS officials that his United States citizen wife had filed a petition seeking resident alien status for him.¹ The following day an INS investigator located a file containing such a petition. After contacting plaintiff's spouse INS authorities released him. Subsequently he was issued an immigrant visa and admitted to the United States for permanent residence.

Pursuant to their standard practice, the INS officials returned plaintiff's license, which they had taken at the detention center, to the Colorado Department of Revenue, which initiated proceedings to determine whether plaintiff's driver's license should be cancelled. The state authorities conducted a hearing in February 1980, at which plaintiff appeared with counsel. Following the hearing Colorado revoked plaintiff's license. Shortly thereafter, plaintiff initiated this civil rights action against the INS, its officials, and officials of the Colorado State Department of Revenue. The state officials settled with plaintiff and are no longer in the lawsuit.

I

Plaintiff contends that the Tenth Amendment to the United States Constitution pro-

ly completed this petition. Nevertheless, because plaintiff had moved without leaving a forwarding address, the petition was never formally processed.

1. A United States citizen may obtain permanent residence for an alien spouse by filing a Form I-130 petition on behalf of the alien. *Immigration Law and Defense* § 4.10(a) (National Lawyer's Guild 1979). Plaintiff's wife had previous-

scribes the actions of the INS. Relying on *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), and *United States v. Best*, 573 F.2d 1095 (9th Cir.1978), he reasons that the Tenth Amendment prohibits the federal government from acting in areas that are exclusively within the province of the states. Because the regulation of state drivers' licenses is an exclusive and traditional state function, he argues that the federal government may not interfere.

[1] At the outset we note that the United States Constitution confers on Congress the power to regulate matters relating to immigration. U.S. Const. art. 1, § 9, cl. 1. In addition, the Supreme Court has "repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 29 S.Ct. 671, 676, 53 L.Ed. 1013 (1909)). This broad grant of authority is exclusive to Congress. *Galvan v. Press*, 347 U.S. 522, 531-32, 74 S.Ct. 737, 742-43, 98 L.Ed. 911 (1954).

[2] Thus it is with this backdrop that we examine plaintiff's claim. *Garcia v. San Antonio Metropolitan Transit Authority*, — U.S. —, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), overruled *National League of Cities* and thereby rejected the argument that "traditional" state functions are insulated from federal authority. Nevertheless, another Supreme Court case more accurately addresses our issue. In *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), the Court examined whether the Tenth Amendment limited congressional power to pre-empt or displace the states' regulation of private activities affecting interstate commerce. *Id.* at 289-90, 101 S.Ct. at 2366-68. The Court, in finding no Tenth Amendment obstacle, "rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it

exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Id.* at 291, 101 S.Ct. at 2368. Although in the present case the INS acts pursuant to the immigration clause of Article I, § 9 rather than the Commerce Clause, congressional authority under both clauses is plenary. See *Kleindienst v. Mandel*, 408 U.S. 753, 766, 92 S.Ct. 2576, 2583, 33 L.Ed.2d 683 (1972) (Congress' plenary power over immigration). Because Congress may entirely pre-empt state authority in immigration matters, we dismiss plaintiff's claim that the INS actions violated the Tenth Amendment.

II

[3] Plaintiff argues that because the INS officials acted without any federal statute or regulation expressly authorizing their conduct, their confiscation of his state driver's license exceeded the scope of their authority.

Congress has conferred upon the INS broad authority to address the problem of illegal aliens. It is a felony to make false statements in matters relating to immigration or to use falsely procured documentary evidence of citizenship. 18 U.S.C. § 1015. The Immigration and Nationality Act authorizes the INS to interrogate any alien or person believed to be an alien. 8 U.S.C. § 1357(a)(1). The Act permits INS officials to arrest aliens whom the officials have reason to believe are in violation of the immigration laws. *Id.* at § 1357(a)(2). The Act empowers INS officials to detain illegal aliens and permits the Attorney General to arrange for their deportation. *Id.* at § 1252. These provisions collectively reveal Congress' strong interest in effective enforcement of our immigration laws. The Supreme Court has recognized the significant public interest in the enforcement of immigration policies. See *INS v. Miranda*, 459 U.S. 14, 19, 103 S.Ct. 281, 284, 74 L.Ed.2d 12 (1982) (per curiam); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79, 95 S.Ct. 2574, 2578-79, 45 L.Ed.2d 607 (1975).

Although federal law does not specifically authorize INS officials to take state drivers' licenses away from aliens whom they have reason to believe are in violation of the immigration laws, we find sufficient authority in the statutes listed above to infer such a power independent of Colorado state law. Cf. *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1219 (D.C. Cir.1981) (inferring authority to make searches of commercial establishments for illegal aliens), *cert. denied*, 455 U.S. 940, 102 S.Ct. 1432, 71 L.Ed.2d 651 (1982). The record indicates that illegal aliens, in an effort to escape detection by authorities, attempt to acquire any available indicia of legitimate status. This is the sort of action that 18 U.S.C. § 1015 was clearly meant to combat. A driver's license is one of the most useful single items of identification for creating an appearance of lawful presence. As we understand the record, INS officials did not take plaintiff's driver's license from him until they established that indeed he was an alien who was not carrying the evidence of alien registration required by 8 U.S.C. § 1304(e). The federal immigration authorities did not revoke plaintiff's right to drive on Colorado roads, they merely transmitted the license to the state authorities who could determine his right to drive, assuming that he was allowed to remain in the country. We hold that the actions of the INS officials in confiscating plaintiff's license and transmitting it to state authorities were a lawful exercise of federal authority.

III

[4-6] Plaintiff argues that the INS officials' taking of his driver's license from him without a hearing violated his constitutional right to procedural due process. In considering this contention, we note that

2. The INS appears to have significant safeguards to ensure that a license will be taken only from an alien who is violating federal law. INS regulations provide that after a suspected alien's warrantless arrest, an INS officer (other than the arresting officer if one is available) shall examine the suspected alien. If the second officer is satisfied that prima facie evidence of illegality exists, the case is referred to an immi-

gration judge. 8 C.F.R. § 287.3. Further, federal law requires a legal alien to carry "at all times" documents demonstrating his or her lawful alien status. Failure to do so is a federal misdemeanor. See 8 U.S.C. § 1304(e). Presumably only after establishing both that the suspect is an alien and in violation of the immigration law is the license confiscated.

aliens, even those lawfully within the country, do not have most of the constitutional rights afforded to citizens. They may be deported for considerations of race, politics, activities, or associations that the government could not punish them for if they were citizens. *Harsiades v. Shaughnessy*, 342 U.S. 580, 586-88, 72 S.Ct. 512, 517-19, 96 L.Ed. 586 (1952); *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905 (1893). They may be arrested by administrative warrant issued without an order of a magistrate, *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960), and held without bail, *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952). If accused of committing a crime against the laws of the United States, however, at least a resident alien is entitled to the constitutional protections of the Fifth and Sixth Amendments. *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). And an alien's property may not be taken without just compensation, absent a state of war existing between the alien's country and the United States. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 51 S.Ct. 229, 75 L.Ed. 473 (1931). But that does not mean that an alien who has violated United States immigration laws is entitled to a hearing before the government may deprive him of an item of his personal property that would assist him in avoiding detection as an alien.

[7] We do not have to decide whether license seizures from persons *believed to be* aliens violating immigration laws require a due process hearing.² As we understand the facts of this case, plaintiff's license was not confiscated until he had admitted to

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ADMINISTRATIVE MATERIALS

Attorney General's Guidelines for the Evaluation of Risk and
Avoidance of Unanticipated Takings
Authority: Executive Order No. 12630

18 ELR 35168

53 Fed. Reg. 8859

March 18, 1988

TEXT:

I. Explanatory Note

A. Policy, Purpose, and Mandate

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without payment of just compensation. Over the course of our nation's history, this constitutional requirement has had important legal and fiscal consequences in the development and implementation of government policies and actions at the local, state, and national levels.

During the past year, the Supreme Court of the United States again examined the protection of private property under the Fifth Amendment. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378 [17 ELR 20787] (1987) and *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 [17 ELR 20918] (1987), the Supreme Court addressed the fundamental protections afforded by the Fifth Amendment whenever a government policy or action is determined to result in a taking of private property for public use.

The President issued Executive Order No. 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," on March 15, 1988, pursuant to his authority as president and in service of his constitutional obligations to manage the executive branch and to ensure constitutionality of governmental actions. This Executive Order directs Executive Branch departments and agencies, as a part of their internal management process, to assess the takings implications of proposed policies and actions on private property interests protected by the Fifth Amendment. In this way, federal agency decisionmakers will be better informed about the potential effects of proposed agency activities and to the extent permitted by law, consistent with their statutory obligations, can minimize the impacts of such activities on constitutionally protected private property rights.

In Section 1(c) of Executive Order No. 12630, the President directed the Attorney General to promulgate, in consultation with the Executive Branch departments and agencies, Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings. In accordance with the direction provided in the Executive Order, these Guidelines establish a basic, uniform framework for federal agencies to use in their internal evaluations of the takings implications of administrative, regulatory, and legislative policies and actions. Neither the Executive Order nor these Guidelines prevents an agency

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from making an independent decision about proceeding with a specific policy or action which the decisionmaker determines is statutorily required. Rather, their purpose is to assure that governmental decisionmakers are fully informed of any potential takings implications of proposed policies and actions, thereby enhancing the cost-efficient administration of agency programs. In those instances in which a range of alternatives are available, each of which would meet the statutorily required objective, prudent management requires selection of the least risk alternative. In instances in which alternatives are not available, the takings implications are noted.

As detailed in Section VIII of the Guidelines, the evaluations conducted under the Executive Order, the Guidelines, and the accompanying Appendix to the Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings (incorporated by reference herein) are intended solely as internal and predecisional management aids for agency decisionmakers. Neither any part of the evaluation process nor any conclusions reached under that process are admissions of the existence -- possible, probable, or otherwise -- of takings or are otherwise subject to judicial review. Further, terms utilized in the process established in these Guidelines (for example, "takings implication" and "significant takings implications") are terms of art and their meanings are limited to the context of this evaluation process.

B. Overview of the Guidelines

The Guidelines first present, in Sections II and III, information regarding the scope of policies and actions subject to evaluation under Executive Order No. 12630 and the agencies that must conduct these evaluations. Generally, an agency's administrative, regulatory, and legislative policies and actions that affect, or may affect, the use or value of private property must be evaluated. The policies and actions specifically excluded from review, for example, agency plans and studies, and policies and actions initiated prior to issuance of the Executive Order, are also set forth. Even as to excluded matters, however, agency decisionmakers must take steps to ensure that their constitutional obligations are recognized and fulfilled.

Section V of the Guidelines then explains the Fifth Amendment principles and specific assessment factors to be used in evaluating the takings implications of policies and actions. This evaluation, called the takings implication assessment (TIA), will enable the agency to determine whether, and to what extent, a proposed policy or action poses risks of a taking of private property and to estimate the potential financial exposure of the proposal. The basic elements of the TIA appear in Section VI of the Guidelines. Once completed, the TIA, which will usually be based on a specific factual setting, will serve as an evaluative tool for the agency decisionmaker. This predecisional assessment should be incorporated by the agency, in a form and manner chosen by the agency, into existing planning processes and procedures.

Section VI of the Guidelines explains specific executive branch management responsibilities with regard to the Executive Order and details special reporting requirements. For instance, Sections VI(B) and VI(C) address agency reporting requirements under Section 5(b) of the Executive Order to the Office of Management and Budget.

In addition, Section VI(D) of the Guidelines establishes a supplementation process enabling agencies to adapt these implementation procedures and

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management requirements to their specific program responsibilities. Through supplementation, an agency has flexibility, with the approval of the Attorney General, to exempt specific policies and actions from analysis under the Executive Order whenever such policies and actions, as a class, have no takings implications. For example, under current case law, no takings implication arises solely because an otherwise lawful permit system is established with respect to subsequent uses of property. In addition, through supplementation, an agency may make specific modifications, as necessary, to the management process. Supplementation may be initiated by an agency at any time, subject to review and approval by the Attorney General.

Section VII sets forth the general responsibilities of the Attorney General and the Director of the Office of Management and Budget in implementation of the Executive Order. The Attorney General is responsible for taking action, to the extent permitted by law, to ensure that the policies of the agencies are consistent with the principles, criteria, and administrative requirements established in the Executive Order and these Guidelines, and for revising and reissuing these Guidelines, as necessary, to reflect fundamental changes in takings law that occur as a result of United States Supreme Court decisions. Finally, in Section VIII of the Guidelines, the non-reviewability of actions taken under the Executive Order, the Guidelines, and the accompanying Appendix to the Guidelines is explained.

An Appendix to the Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings has also been prepared and is incorporated by reference into these Guidelines. This Appendix provides further information for the use of departments and agencies regarding the case law surrounding considerations of whether a taking has occurred and the extent of any potential just compensation claim. As with the Guidelines themselves, this Appendix addresses only a general framework for the evaluation of takings implications of proposed agency policies and actions under the Executive Order and these Guidelines.

II. Scope of the Guidelines

A. Policies and Actions Subject to Evaluation

Except for the policies and actions specified in the exclusions in Subsections II(B) and (C) below, an agency must evaluate, for their takings implications, its administrative, regulatory, and legislative policies and actions that affect, or may affect, the use or value of private property in accordance with the framework established in these Guidelines. These will include, but are not limited to, the following.

1. Administrative and Regulatory Policies and Actions

An agency must evaluate its administrative and regulatory policies and actions that affect, or may affect, the use or value of private property. These policies and actions (as discussed in Sections 2(a) and 2(c) of Executive Order No. 12630) include, but are not limited to, federal regulations that propose or implement licensing or permitting requirements, conditions or restrictions otherwise imposed by an agency on private property use, and actions relating to or causing the physical occupancy or invasion of private property.

2. Legislative Policies and Actions

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An agency must evaluate its legislative policies and actions that affect, or may affect, the use or value of private property whenever such legislative policies and actions are subject to coordination and clearance by the Office of Management and Budget pursuant to Circular No. A-19, Revised, or succeeding management directives issued by the Office of Management and Budget for legislative coordination and clearance.

3. Recommendations to Other Federal Agencies

Written agency comments or recommendations by other than the lead agency on policies or actions within the Executive Order are subject to evaluation under these Guidelines whenever such comments or recommendations are required by law. In that circumstance, the commenting agency shall prepare a limited takings implication assessment consisting only of an assessment of the likelihood that the proposed action or policy may effect a taking for which compensation is due pursuant to Section VI(A)(2)(c)(i), *infra*.

B. Exclusions

The following federal policies and actions are excluded from evaluation under these Guidelines. Although these specific policies and actions are excluded from evaluation, they should be conducted or undertaken by federal agencies with due regard for the Fifth Amendment. Accordingly, even as to excluded matters, federal agency decisionmakers must take steps to ensure that their constitutional obligations are recognized and fulfilled.

Those policies and actions explicitly excluded from coverage under Executive Order No. 12630 and these Guidelines are as follows:

1. Programs or Regulations Reducing Federal Restrictions on Use of Private Property

Federal policies or actions involving amendments to regulations, deregulation, or discontinuance of federal programs in a manner that lessens interference with the use of private property are excluded from coverage under the Executive Order and these Guidelines.

2. Trust Property and Treaty Negotiations

Those policies or actions involving the property of person(s) or identified groups (for example, a federally recognized Indian tribe) for which the United States is serving as trustee and those actions taken while the United States is preparing to enter into or undertaking treaty negotiations with a foreign nation are excluded from coverage under the Executive Order and these Guidelines. For purposes of this exclusion, properties held in trust do not include trust territories of the United States (such as the Trust Territories of the Pacific) or other properties over which the United States is acting as a government, rather than serving in the capacity of a statutory trustee.

3. Seizures of Property

All policies or actions involving seizures of property, which will be used by federal civil or military law enforcement officers either as evidence in a criminal proceeding or for criminal or civil statutory forfeiture proceedings, are excluded from coverage under the Executive Order and these Guidelines.

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Property attached pursuant to law by court or administrative order in any proceeding initiated by the United States is also excluded.

4. Agency Plans and Studies

Preliminary data gathering and evaluation activities, which occur prior to the agency's decision to implement a policy or action and which neither (1) physically occupy or invade private property nor (2) purport to regulate or otherwise restrict the use of private property, are excluded from coverage under the Executive Order and these Guidelines. Such activities are preliminary aids in the decisionmaking process and are excluded even though disclosure of their mere existence may, in certain instances, result in a drop in property values.

Once a proposed policy or action has advanced beyond this preliminary stage, the agency's policy or action is subject to evaluation under the Executive Order.

5. Consultations Regarding Regulation of Private Property by State and Local Governments

Communications between federal agencies and state or local land-use planning agencies regarding planned or proposed state or local policies or actions regulating private property are excluded from coverage under the Executive Order and these Guidelines. This exclusion applies regardless of whether such communications are initiated by a federal agency or are undertaken by a federal agency in response to an invitation from the state or local authority. This exclusion does not apply to any policy or action for which a federal agency has decisionmaking authority, including authority to require or otherwise direct the state or local government to undertake or refrain from undertaking the activity in question.

6. Military Property

Policies or actions involving placement of military facilities, in the exercise of the power of eminent domain, are excluded from coverage under the Executive Order and these Guidelines. Military activities that are undertaken solely on federal property, for example, artillery practice and military maneuvers and exercises, are also excluded.

7. Exercise of the Power of Eminent Domain

The formal exercise of the power of eminent domain by federal agencies is excluded from coverage under the Executive Order and these Guidelines.

8. Military and Foreign Affairs Activities

Policies and actions involving military and foreign affairs functions of the United States, such as foreign sanctions programs, military exercises, procurement activities, and regulation of personnel, are excluded from coverage under the Executive Order and these Guidelines. This exemption does not apply to regulation by the military of the use by citizens of private property, including the United States Army Corps of Engineers' civil works program. Thus, for purposes of this subsection, military functions do not include those activities in which the military component or personnel are substituting for, or performing as, a civilian regulatory body or agency.

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9. Pending or Imminent Litigation; Enforcement Actions Seeking Statutorily Authorized Penalties, Debt Collection, or the Like

Policies and actions taken in furtherance of pending or imminent litigation, whether judicial or administrative, are excluded from coverage under these Guidelines. In addition, judicial and administrative adjudicatory actions brought pursuant to federal law seeking penalties, the collection of debts authorized by statute, or the like, are excluded from coverage under these Guidelines. Policies and actions of offices of the Inspector General under the Inspector General Act of 1978, as amended, are also excluded from coverage under these Guidelines.

C. Special Exclusion for Agency Policies and Actions Initiated Prior to Issuance of Executive Order No. 12630

Administrative, regulatory, or legislative policies and actions that were finally developed and implemented by an agency at the time of issuance of Executive Order No. 12630 are excluded from coverage under the Executive Order. Agency policies and actions proposed, but not initiated, prior to issuance of the Executive Order or these Guidelines are likewise excluded from coverage under the Executive Order. However, these categories of policies and actions should be evaluated in accordance with the Executive Order and these Guidelines to the maximum extent practicable in order to ensure that constitutional and managerial obligations are met.

III. Agency Applicability

Executive Order No. 12630 and these Guidelines apply, except as provided in Section 2 of the Executive Order and Section II(B) herein, to any executive department, agency, or military department of the United States Government, and to any United States Government corporation, United States Government controlled corporation, or other establishment in the Executive Branch of the United States Government other than those entities defined as "independent regulatory agencies" in 44 U.S.C. @ 3502(10).

The term "agency," when used in these Guidelines, shall refer to any of the departments, corporations, or other establishments identified in this section.

IV. Definitions

A. "Private Property"

"Private property" includes all property protected by the Fifth Amendment to the United States Constitution, including, but not limited to, real and personal property and tangible and intangible property.

B. "Takings Implication"

Any policy or action to which the Executive Order applies that, upon examination by the decisionmaker under Section V(D)(3), *infra*, appears to have an effect on private property sufficiently severe as to effectively deny economically viable use of any distinct legally protected property interest to its owner, or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation, shall be deemed to have a takings implication for purposes of the Executive Order and these Guidelines.

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C. "Significant Takings Implications"

For purposes of the Executive Order and these Guidelines, a "significant takings implication" exists when, on the basis of available information, the decisionmaker concludes as to any policy or action with a takings implication that:

1. The proposed policy or action poses a substantial risk that a taking of private property may result, or
2. Insufficient information as to facts or law exists to enable an accurate assessment of whether significant takings consequences may result from the proposed policy or action.

D. "Legislation"

For purposes of an agency's evaluation and reporting responsibilities under the executive order and these guidelines, "legislation" is limited to those agency legislative policies and actions that are subject to coordination and clearance by the Office of Management and Budget pursuant to Circular No. A-19, Revised, or succeeding management directives issued by the Office of Management and Budget on legislative coordination and clearance. Examples of the types of legislative submissions subject to review include an agency's proposed legislation and agency comments or testimony concerning pending legislation.

E. "Lead Agency"

This is the federal agency designated to supervise the preparation of the reviews and assessments directed by the Executive Order and these Guidelines.

1. Designation of a lead agency is necessary whenever more than one department or agency is involved in a group of policies or actions directly related to each other because of their functional interdependence or geographic proximity.
2. For purposes of all policies and actions subject to evaluation under the Executive Order and these Guidelines, the lead agency is the one which will have primary responsibility for implementing the proposed policy or action or whose program would otherwise be primarily affected by the proposed policy or action. Any other agency having interagency consultation and review responsibilities for the policy or action in question shall, to the maximum extent possible, work with the lead agency to identify any takings implications.
3. Potential lead agencies have the responsibility to coordinate and determine, in a timely manner, which agency will be lead agency and which will be cooperating agencies. If there is disagreement among the agencies, the following factors should be considered in resolving the lead agency question:
 - a. Magnitude of the agency's involvement in the policy or action;
 - b. The agency's approval/disapproval authority over the policy or action;
 - c. Duration of the agency's involvement in the policy or action; and

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d. Sequence of the agencies' involvement in the policy or action.

4. When agencies are unable to resolve the choice of the lead agency, an official, to be designated by the Office of the President, shall be responsible for selecting the lead agency.

V. General Principles and Assessment Factors

Section V of these Guidelines provides a discussion of the general principles and assessment factors which inform considerations of whether a takings implication (Section V(D)(3)) exists. Section V(A) surveys takings factors generally; Section V(B) addresses current takings law more specifically; and Section V(C) points to specific takings risks discussed in Executive Order No. 12630. The accompanying Attorney General's Appendix to these Guidelines further details case law considerations on the risk of a taking. Section V(D) describes the current legal criteria through which the factors identified in Section V are analyzed. And, Section V(D)(3) specifies the term of art risk assessment criteria -- "takings implication" used to assess risk. Section VI of the Guidelines, especially Section VI(A)(2), sets forth the general process for documentation of the agency's application of these factors and criteria.

A. Underlying Premises of the Fifth Amendment

1. The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." Ownership, use, and transfer of private property of all types are rights. They are not benefits or privileges bestowed by government. At the same time, government also has the obligation to lawfully govern. Thus, the rights of property owners are not absolute and government may, within limits, regulate the use of property. Where those regulations amount to a taking of private property, government must pay the owner just compensation for the property rights abridged. The fact that the government's actions are otherwise constitutionally authorized does not mean that those actions cannot effect a taking. On the other hand, government may not take property except for a public purpose within its constitutional authority, and only then, on the payment of just compensation.

2. Government has historically used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. However, government may become liable for the payment of just compensation to private property owners whose property permanently or temporarily has been either physically occupied or invaded by government or others with the assistance or approval of government, or so affected by governmental regulation as to have been effectively taken despite the fact that the government has neither physically invaded, confiscated, or occupied the property nor taken legal title to the property.

3. So long as an action having consequences sufficiently severe as to constitute a taking is within the constitutional authority of the government, and the action taken is expressly or impliedly authorized by Congress or other constitutional source of authority (for example, an action directed by the President that the President may constitutionally authorize), the just compensation obligation will attach regardless of whether government contemplated or intended the taking to result. In contrast to the formal exercise of eminent domain, the private property owner can obtain compensation by filing what is called an "inverse condemnation" suit.

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4. The Fifth Amendment's protection extends to all forms of property -- real and personal, tangible and intangible. Property is not defined by the Constitution, but by independent sources such as state, local, and federal law.

5. In planning and carrying out federal program policies and actions undertaken by statute and otherwise, government officials have the obligation to be fiscally responsible. In addition, they must respect the constitutional rights of individuals who are affected by those program policies and actions. Accordingly, officials must be aware of and avoid, to the extent possible and consistent with the obligations imposed by law, actions that may inadvertently result in takings. Where such taking risk cannot be wholly avoided, responsible government officials should, to the extent possible and consistent with the obligations imposed by law, minimize the potential financial impact of takings by appropriate planning and implementation. To do this, officials must make decisions informed by the general and specific principles of takings case law.

B. The Nature of a Taking

Takings may occur when permanent or temporary government actions result in the physical occupancy of property, the physical invasion of property, or the regulation of property.

1. Physical Occupancies

Permanent or temporary physical occupancy is the most traditional type of taking and is therefore the most familiar and most easily recognized as a taking. As a general rule, where a physical occupancy exists no balancing of the economic impact on the owner and the public benefit will occur in the taking analysis. Examples of physical occupancy takings include not only formal condemnation exercises, such as the taking of land to build a highway, but also utility easements and access easements. [See Appendix to Guidelines, Section III(E)(1).]

2. Physical Invasions

As a general rule, physical invasions of property, as distinguished from physical occupancies, may also give rise to a taking where the invasions are of a recurring and substantial nature. Examples of physical invasion takings include, among others, flooding and water related intrusions and overflight or aviation easement intrusions. [See Appendix to Guidelines, Section III(E)(2).]

3. Regulatory Takings

a. Like physical occupations or invasions, regulation which affects the value, use, or transfer of property may constitute a taking if it goes too far. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922); *Hodel v. Irving*, 107 S. Ct. 2076 (1987); *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 [17 ELR 20918] (1987). Regulation has gone too far and may result in takings liability if:

i. The regulation in question does not substantially advance a legitimate governmental purpose; it is not enough that the regulation or action might rationally advance the purpose purported to be served; or

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ii. In assessing the character of the government action, the economic impact of the action on the property interest involved, the extent to which the regulation interferes with the reasonable, investment-backed expectations of the owner of the property interest, and other relevant factors, justice and fairness require that the public, and not the private property owner, pay for the public use. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922); *Penn Central Transportation Company v. New York City*, 438 U.S. 104 [8 ELR 20528] (1978); *Agins v. City of Tiburon*, 447 U.S. 255 [10 ELR 20361] (1980); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 107 S. Ct. 2378, 2389, n.10 [17 ELR 20787] (1987).

b. Regulatory actions that closely resemble, or have the effect of, a physical invasion or occupation of property are more likely to be found to be takings. See *Nollan v. California Coastal Commission*, 107 S. Ct. 2076 [17 ELR 20918] (1987). The greater the deprivation of use, the greater the likelihood that a taking will be found.

c. Regulation of an individual's property must not be disproportionate, within the limits of existing information or technology, to the degree to which the individual's property use is contributing to the overall problem. Thus, regulatory actions designed to compel public benefits, rather than prevent privately imposed harms, are also more likely to be takings.

[See Appendix to Guidelines, Section III(F).]

C. Special Situations

When implementing a regulatory policy or action and evaluating the takings implications of that policy or action, agencies should consider the following special factors:

1. Permitting Programs

[Executive Order No. 12630, Section 4(a); Appendix to Guidelines, Section III(F)(2).]

The programs of many agencies require private parties to obtain permits before making specific uses of, or acting with respect to, private property, without necessarily effecting a taking for which compensation is due. Those agencies may place conditions on the granting of such permits. However, a condition on the granting of a permit risks a takings implication unless:

a. The condition serves the same purpose that would be served by a prohibition of the use or action; and

b. The condition imposed substantially advances that purpose.

2. Public Health and Safety

[Executive Order No. 12630, Section 4(d); Appendix to Guidelines, Section III(F)(5).]

Policies or actions undertaken to protect public health and safety are ordinarily given greater latitude by courts before being held to give rise to takings. For purposes of that deference, however, the Supreme Court has ruled

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that "public health and safety" is not coextensive with the government's power to act. Public health and safety represents a component of that broader power. Again, that governmental power exists does not mean that its exercise is free of takings concerns. The deference discussed here extends only to public health and safety interests.

a. Where public health and safety is the asserted regulatory purpose, then the health and safety risk posed by the property use to be regulated must be identified with as much specificity as possible and should be "real and substantial." That is, it must be more than speculative. It must present a genuine risk of harm to public health and safety and the claim of risk of harm must be supported by meaningful evidence, in light of available technology and information, that such harm may result from the use to be regulated.

b. Any action taken to regulate property use for public health and safety purposes must address the health and safety risk; that is, it must be designed to counter the identified risk and must substantially advance the public health and safety purpose. The action should also, within the limits of available technology and information, be no more restrictive than necessary to alleviate the health and safety risk created by the use to be regulated.

c. In assessing these issues, an agency should examine the following factors:

i. The certainty that the property use to be regulated poses a health and safety risk in the absence of government action; and

ii. The severity of the injury to public health and safety should the identified risk materialize, based on the best available information in the field involved.

From the perspective of a takings implication analysis, the greater the certainty or the greater the severity, the more stringent measures are justified.

d. Although the ideal is that the response taken to counter the risk be "no greater than" the risk posed, reasonable proportionality presupposes available technology and information.

3. Delay

[Executive Order No. 12630, Section 3(d); Appendix to Guidelines, Section IV.]

Undue delay in decisionmaking processes, whether intentional or unintentional, may give rise to takings liability, or increase the amount of compensation due if the decisionmaking process interferes with the use of property pending the decision. Hence, decisionmaking processes should be kept to the minimum time necessary to allow the agency to meet its obligations.

D. Policy and Action Evaluation Criteria

[Executive Order No. 12630, Section 4; Appendix to Guidelines, Sections II, III, and V.]

When evaluating policies or actions for takings implications, the following criteria (informed by the guidance of Executive Order No. 12630, Sections V(A-C) of these Guidelines, the Appendix to these Guidelines, and applicable case law) will apply. These criteria will form the basis for the assessment of takings implications as outlined in Section VI(A)(2), *infra*.

1. Takings Implication Considerations: Physical Intrusion

Physical intrusion takings analysis is appropriate where the action or policy involves physical presence by the government, or by others pursuant to government authorizations, on private property. Where that presence amounts to occupancy of the property, takings exposure is measured by the physical limits of the occupation. Where the intrusion is less than occupancy, takings exposure turns on both the character of the invasion (for example, overflight, flooding) and a physical presence that is the natural and probable consequence of authorized government action.

2. Takings Implication Considerations: Regulatory Takings

As discussed in Section V(B)(3), regulation may result in a taking of property.

a. Character of the Government Action

In assessing the character of the government action, an agency should examine:

i. The purpose intended to be served by the enabling statute, where the policy or action is taken pursuant to statute. Agencies should examine both the legislative history and the operative terms of the statute to determine that a legitimate purpose identified in the statute is being served;

ii. Whether the policy or action will substantially advance a legitimate public purpose of the enabling statute, where the policy or action is in furtherance of obligations imposed or authorized by statute. The proposed policy or action both must have the purpose of furthering, and must substantially further, the purpose embodied in the statute. It is not enough that the policy or action or regulation might rationally advance the purpose purported to be served;

iii. The degree to which the property-related activity or use that is the subject of the proposed policy or action contributes to a harm that the proposed policy or action is designed to address. The less direct, immediate, and demonstrable the contribution of the property-related activity to the harm to be addressed, the greater the risk that a taking will have occurred; and

iv. The extent to which the intended policy or action totally abrogates a property interest which has been historically viewed as an essential stick in the bundle of property rights.

b. Economic Impact of the Proposed Policy or Action

In assessing the economic impact of the proposed policy or action, an agency should examine:

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- i. To the extent reasonably possible, what economic and property interests will be, or are likely to be, affected by the proposed policy or action. In that context, economic impact should be considered as to each property interest recognized by the applicable law;
- ii. The likely degree of economic impact on identified property and economic interests;
- iii. To the extent reasonably possible, among other relevant factors, the character and present use of the property, the anticipated duration of the proposed or intended action, and variations in state law;
- iv. Whether the proposed policy or action carries benefits to the private property owner that offset or otherwise mitigate the adverse economic impact of the proposed policy or action; and
- v. Whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.

c. Interference with Reasonable Investment-Backed Expectations

To the extent reasonably possible, an agency should examine the degree to which the proposed policy or action will interfere with reasonable, investment-backed expectations of those private property owners affected by the proposed action, even if such expectations are not formally recognized as property interests under the generally applicable law.

3. Determination of Policies or Actions Having Takings Implications or Significant Taking Implications

a. When an agency decisionmaker, in applying the Section V(D) criteria, determines that a policy or action appears to have an effect on private property sufficiently severe as to effectively deny economically viable use of any distinct legally protected property interest to its owner, or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation, that appearance shall be deemed to give rise to a takings implication for purposes of the Executive Order and these Guidelines. See Section IV(B), supra (definition of "takings implication").

b. Similarly, a significant takings implication shall be deemed to exist for purposes of the Executive Order and these Guidelines when, on the basis of available information, the decisionmaker concludes as to any policy or action with a takings implication that:

- i. The proposed policy or action poses a substantial risk that a taking private property may result; or
- ii. Insufficient information as to facts or law exists to enable an accurate assessment of whether significant takings consequences may result from the proposed policy or action.

See Section IV(B), supra (definition of "significant takings implication").

4. Evaluation of Alternatives for Policies and Actions Having Takings Implications

Agencies should strive to the extent permitted by law, consistent with their statutory obligations, to undertake policies or actions in a way which minimizes their takings implications. Where such implications cannot be wholly avoided, the agencies should take appropriate actions to minimize the potential financial impact of takings.

VI. Implementation, Management, and Special Reporting Requirements

A. Implementation and Management Requirements

In order to apply the general principles contained in the Executive Order, Sections V(A)-(C) of these Guidelines, and the Appendix to these Guidelines, through the criteria detailed in Section V(D) of the Guidelines, Executive Order No. 12630 imposes the following obligations on agencies subject to its provisions.

1. Federal Agency Contact

The head of each agency required to review its policies and actions under Executive Order No. 12630 shall designate an agency official to be responsible for ensuring that agency's compliance with the Executive Order and these Guidelines. The designation of this official is solely within the discretion of the agency head. The designated federal agency contact shall serve as the agency's liaison on questions of compliance with the Executive Order and shall make information available to the Office of Management and Budget and/or the Attorney General, upon request, regarding the agency's compliance procedures and activities.

The identity of the designated official shall be communicated, by no later than July 15, 1988, to the Assistant Attorney General, Land and Natural Resources Division, Department of Justice, and the Director, Office of Management and Budget. Notification of any change in this designation shall also be forwarded within ten (10) working days of the effective date of the change.

2. Takings Implication Assessment (TIA)

Before undertaking any proposed action or implementing any policy or action subject to evaluation, each agency shall perform a Takings Implication Assessment (TIA). The TIA shall be made available to the agency decisionmaker responsible for determining whether and how to implement a policy or to undertake an action, in such form and in such manner as is calculated to ensure that the decisionmaker may make meaningful use of the TIA in formulating his or her decision.

a. The TIA is to be integrated, in a form and manner in the agency's discretion, into normal agency decisionmaking processes.

b. The TIA will serve as a tool for assessing the taking implications and related fiscal impact of policies and actions within the Executive Order. It is to provide candid, predecisional advice as a part of the continuing process of developing government policies and actions.

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c. For administrative and regulatory policies and actions subject to evaluation under the Executive Order and these Guidelines, a TIA must include:

- i. An assessment of the likelihood that the proposed action or policy may effect a taking for which compensation is due, in light of the principles referenced in the Executive Order and these Guidelines (see Section V, supra) and under applicable case law;
- ii. Identification and consideration of alternatives, if any, to the proposed policy or action which also achieve the government's obligations under law but would reduce intrusions on the use or value of private property; and
- iii. An estimate of the potential financial exposure to the government should a court find the proposed policy or action to be a taking. It is important to emphasize, in this respect, that this estimate is to be that -- an estimate. Agencies are encouraged to employ available data to the extent possible.

d. For legislative policies and actions subject to evaluation under the Executive Order and these Guidelines, a TIA must include:

- i. An assessment of the likelihood that the proposed policy or action may effect a taking for which compensation is due, in light of the principles referenced in the Executive Order and these Guidelines (see Section V, supra) and under applicable case law;
- ii. An assessment of whether there are alternatives to the proposed policy that could accomplish the legislative objective, but would present a lesser intrusion on the use or value of private property; and
- iii. An estimate of the potential financial exposure to the government should a court find the proposed policy or action to be a taking. This estimate may be presented, in summary, in one of the following alternative forms, or in similar language in the agency's discretion:
 - a. If enacted as proposed, this legislation would pose a substantial risk of significant financial exposure for the United States.
 - b. If enacted as proposed, this legislation would pose a likelihood of some degree of financial exposure for the United States.
 - c. If enacted as proposed, this legislation would pose a limited risk of financial exposure for the United States.
- e. In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, the TIA may be done upon completion of the emergency action in a form and manner in the agency's discretion.

B. Special Reporting Requirements

1. Required Submissions to the Office of Management and Budget

For regulations submitted for Office of Management and Budget review under Executive Order No. 12291, each agency should include a discussion summarizing

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any identified takings implications, consistent with Section VI(A)(2)(c), and addressing the merits of the regulations in light of those implications, if the regulation is:

- a. A "major" rule as defined or designated under Executive Order No. 12291;
- b. Any rule that has "significant takings implications," regardless of whether it is properly classified as a "major rule"; or
- c. Any rule otherwise designated by the Office of Management and Budget.

The agency should retain the Takings Implication Assessment and make it available, upon request, to the Office of Management and Budget.

2. Notices of Proposed Rulemaking

"Significant taking implications" shall be identified and discussed, in form and manner chosen by the agency, in notices of proposed rulemaking.

3. Legislative Proposals

For legislative policies and actions subject to coordination and clearance by the Office of Management and Budget (OMB) under Circular No. A19, Revised, or any successor directive or circular, each agency shall, consistent with Section VI(A)(2)(d), identify the takings implications of the legislation, if any, in such form and manner as the agency deems appropriate. When the agency then elects not to address an identified takings implication in the document submitted for legislative coordination and clearance, the agency shall notify OMB of the existence of such implication. Where an agency determines that a legislative policy or action has significant takings implications, it shall include an evaluation of such implications in its submission to OMB under Circular No. A-19, Revised.

In every instance, agencies should retain the Takings Implication Assessment and make it available, upon request, to the Office of Management and Budget.

C. Agency Budget Submissions

Separate guidance will be provided by the Office of Management and Budget regarding documentation requirements (e.g., OMB Circular No. A-11).

D. Agency Supplementation

1. Purpose

Section 5(e)(2) of Executive Order No. 12630 directs that the Attorney General shall, in consultation with each agency, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that agency. Supplemental guidelines may be issued for one specific agency or for a group of related agencies, as appropriate. The supplemental guidelines shall set forth implementing procedures that will aid an agency in administering its specific program responsibilities in accordance with the analytical and procedural framework presented in the Executive Order and these Guidelines. The supplemental guidelines should not be used to restate the terms of the Executive Order or these Guidelines.

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2. Initiation of Supplementation Process

The Guidelines supplementation process may be initiated either by an affected agency or by the Attorney General, as set forth below. However, in either event, the Attorney General is responsible for final approval and issuance of the supplemental guidelines.

a. Federal Agency Review

Each agency to which Executive Order No. 12630 applies is responsible, on a continuing basis, for reviewing its internal policies and procedures to ensure full compliance with the Executive Order. In conjunction with this review, each agency shall assess whether procedures to supplement these Guidelines (including, for example, exclusions supported by a Takings Implication Assessment, or special processes for certain categories of policies or actions) are necessary and appropriate in light of its specific statutory obligations. Whenever an agency determines that issuance of supplemental guidelines is warranted, the Secretary or head of the agency shall inform the Attorney General and submit proposed supplemental guidelines for review, approval, and issuance by the Attorney General.

b. Department of Justice Review

In conjunction with his responsibilities for oversight of agency implementation of Executive Order No. 12630, the Attorney General may initiate the preparation and issuance of supplemental guidelines for an individual agency or group of agencies. Initiation and development of such guidelines by the Attorney General may be appropriate, for example, to ensure that similar types of government program activities, conducted by several agencies, are evaluated in a comparable manner under the Executive Order. The Attorney General shall consult with the Secretary or head of the individual agency or agencies involved regarding the need for, and advisability of, issuance of such supplemental guidelines.

3. Issuance of the Supplemental Guidelines

The Attorney General has the responsibility under Section 5(e)(2) of the Executive Order to promulgate any such agency supplemental guidelines. Accordingly, the Attorney General shall review an agency's proposed supplemental guidelines, submitted in accordance with Section VI(D) (2)(a) above, for conformance with the Executive Order and these Guidelines. At the completion of this review, including consultation with the agency involved, the Attorney General may, in his discretion, issue agency supplemental guidelines. In the event the Attorney General has initiated preparation and development of agency supplemental guidelines, he shall consult with, and fully consider the recommendations of, the agency involved prior to issuance of Executive Order No. 12630 supplemental guidelines. Any policy or action for which a categorical exclusion has been created by supplemental guidelines will automatically lose that exclusion from the Executive Order No. 12630 process where such conduct is held by a court of competent jurisdiction to have the potential of a taking.

4. National Security Exemption

Executive Order No. 12630 supplemental guidelines may include specific criteria for providing limited exceptions to the provisions of these

guidelines for classified activities and actions. Such activities and actions are those specifically authorized under criteria established by an executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such executive order or statute.

VII. Responsibilities of the Attorney General and the Director of the Office of Management and Budget

A. Attorney General

In addition to the specific responsibilities for implementation of Executive Order No. 12630 set forth above, the Attorney General shall, to the extent permitted by law, take action to ensure that the policies of the agencies are consistent with the principles, criteria, and administrative requirements established in the Executive Order and these Guidelines. The Attorney General shall also revise and reissue these Guidelines, as necessary, to reflect fundamental changes in takings law that occur as a result of United States Supreme Court decisions.

B. Director, Office of Management and Budget

The Director, Office of Management and Budget, shall, to the extent permitted by law, take action to ensure that the policies of the agencies are consistent with the principles, criteria, and requirements stated in Executive Order No. 12630 and that all takings awards levied against agencies are properly accounted for in agency budget submissions.

VIII. Judicial Review and Enforcement

Consistent with Section 6 of Executive Order No. 12630, these Guidelines and the Appendix to the Guidelines are intended only to improve the internal management of Executive Branch agencies and are therefore enforceable only by and within the Executive Branch. Accordingly, like the Executive Order itself, these Guidelines and the Appendix to the Guidelines shall not be deemed to create any right or benefit, substantive or procedural, enforceable by anyone in any court against the United States, its agencies, its officers, or any person. For these reasons, neither these Guidelines, the Appendix, nor the deliberative processes or products resulting from their implementation by agencies shall be treated as establishing criteria or standards that constitute any basis for judicial review of agency actions. Thus, the extent or quality of an agency's compliance with the Executive Order or these Guidelines shall not be justiciable in any proceeding for judicial review of agency action.

Issued in Washington, D.C. the 30th day of June, 1988.

EDWIN MEESE III

Attorney General

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Appendix to Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings

I. Introduction

This Appendix is a part of, and incorporated by reference into, the Guidelines promulgated by the Attorney General pursuant to Executive Order No. 12630. It provides further detail for the case law parameters surrounding the consideration of the risk that a taking may have occurred. See Guidelines, Section V(A)(5). This discussion is not meant to be exhaustive. In that respect, the takings implication consideration and the evaluation of applicable case law will normally be one requiring close consultation between agency program personnel and agency counsel.

As with the Guidelines themselves, this Appendix speaks only to a general framework for the takings implication analysis under Executive Order No. 12630. Similarly, it is important to reiterate that Executive Order No. 12630 contemplates agency-specific supplemental guidelines. See Executive Order No. 12630, @ 5(e)(2); Guidelines, @ VI(D).

II. General Considerations

A. The Framework

Executive Order No. 12630, as further explained in the Guidelines, provides for: (a) completion of a Takings Implication Assessment (TIA) before undertaking any proposed action or implementing any policy as defined by Section 2(b) and 2(c) of the Executive Order (see Guidelines, @ VI(A)(2)) and (b) certain Special Reporting Requirements, including the identification of takings implications of proposed regulatory actions in certain specific submissions to the Office of Management and Budget (OMB), and the identification and discussion of significant takings implications (as defined in the Guidelines) in notices of proposed rulemaking and, subject to the normal OMB legislative coordination and clearance process, messages transmitting legislative proposals to Congress. These obligations will be integrated, in ways to be determined by the agency in light of the particular program, into its normal decisionmaking processes.

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The Guidelines contemplate that agency decisionmakers will continue to meet the obligations imposed upon them by statute. They do not, and should not be read to, preclude actions or policies which the decisionmaker determines necessary to meet those obligations. In those circumstances, the TIA process will identify the takings implications, if any, of the necessary governmental conduct while permitting that conduct to go forward.

B. The Takings Implication Assessment

The TIA serves as an evaluative tool for the takings implications of policies and actions within the Executive Order and provides candid advice on those implications. As a part of the continuing process of developing government policies and actions, the TIA focuses attention on the fiscal and policy concerns arising from takings risk. Intended as a predecisional document, the TIA will be available for meaningful use by the decisionmaker prior to the decision. See Guidelines, @ VI(A)(2).

C. Significance of Factual Information to Takings Implication Analysis

Questions as to the existence of takings require the sifting of numerous facts for the isolation of significant and insignificant factors. This focus on facts also lies at the heart of the advice contemplated by the TIA. Thus, a separate TIA will normally be prepared for each policy or action within the Executive Order. Similarly, because the TIA's do evaluate specific factual settings, a TIA prepared for one policy or action will normally have no precedential value for another policy or action.

III. Takings Implications Analysis: General Principles and Framework

[See Executive Order No. 12630, @@ 1(b), 3(a); Guidelines, @ V(D).]

A. Introduction

The Executive Order requires identification of takings implications. See Executive Order 12630, @ 5(b). This Appendix now turns to a general discussion of the case law framework which provides the current background for assessing takings implications.

B. Fairness and Justice Under the Fifth Amendment

Ratified in 1791, the Fifth Amendment provides, for pertinent purposes:

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

Its terms do not prohibit the taking of private property for lawful purposes. Rather, they operate "to secure compensation in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378, 2386 [17 ELR 20787] (1987). The constitutional guarantee of the Amendment precludes 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, 49 (1959).

1. Focus on Impact of Actions and Self-Executing Character

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The assessment of governmental interference under the Amendment turns ultimately not on what the government may say, or what it may intend, but on the impact of its actions. *Hughes v. Washington*, 389 U.S. 290, 298 (1967); *Armstrong v. United States*, 364 U.S. at 48-49. Moreover, where the interference effects a taking, that governmental action implicates a "constitutional obligation to pay just compensation." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. at 2386. The Amendment has a "self-executing character . . . with respect to compensation." *United States v. Clarke*, 445 U.S. 253, 257 (1980) (citations omitted), quoted in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, *id.*

In the face of this self-executing obligation, it is not enough that an agency discontinue its intrusion when a court finds that a taking has occurred. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. at 2387-2389. In those circumstances, just compensation would still be due for the period between the point at which the government action created compensable interference (see Sections III(E-G), *infra*) and the termination of that intrusion. *Id.* at 2388-2389.

Nor is it necessary that just compensation be paid in advance of a taking, provided that a process is available for meeting the obligation. *Williamson Co. Regional Planning v. Hamilton Bank*, 105 S. Ct. 3108, 3121 (1985).

2. Fact Sensitive Analysis

The takings analysis proceeds in the particular factual circumstances of the governmental impact on property. This leads to what have been described as "ad hoc" analyses in the context of particular facts. See *Hodel v. Irving*, 107 S. Ct. 2076, 2082 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 [10 ELR 20042] (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 [8 ELR 20528] (1978). See Section II(C), *supra*.

3. Public Use Requirement

The Amendment reaches the taking of private property for public use. In that respect, the "public use" requirement is "coterminous with the scope of the sovereign's police powers." *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321, 2329 [14 ELR 20549] (1984) (Hawaii Land Reform Act created condemnation process for transfer of title from lessors in land oligopoly to lessees in order to reduce concentration of land ownership). The Court will not "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" See also *Berman v. Parker*, 348 U.S. 26, 33 (1954) (comprehensive use of eminent domain power for slum redevelopment). Although analysis of the legislative public purpose may include the legislative statement of purpose and the legislative history, the operative terms and provisions of the statute will control any inconsistency between the former and the latter. See *Keystone Bituminous Coal Association v. De Benedictis*, 107 S. Ct. 1232, 1243 n.16 [17 ELR 20440] (1987) ("examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature"). That the Legislature has found a public use does not necessarily, however, answer the more critical question -- for Fifth Amendment purposes -- of whether the lawful exercise of governmental power effects a compensable taking. See Sections III(C-F), *infra*; Guidelines, @ V.

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C. Property Interests Within the Fifth Amendment

[See Executive Order No. 12630, @ 2(b).]

"Property interests . . . are not created by the Constitution." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). Instead, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.* See also *Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1001 [14 ELR 20539] (1983) (trade secret property right). Federal statutes may, however, provide a basis for the perfection of property interests by individuals. For instance, subject to the federal law limitations for establishing that necessary predicates for the vesting of interests have occurred, federal mining claims are private property within the Fifth Amendment. *Freese v. United States*, 639 F.2d 754 (Ct. Cl. 1982). In a later opinion, *Freese v. United States*, 6 Cl. Ct. 1, *aff'd*, 770 F.2d 177 (Fed. Cir. 1984), the court found that plaintiffs had not perfected their claim. *Cf. Cape Fox Corporation v. United States*, 4 Cl. Ct. 223 (1983) (ANCSA "selections" contingent and speculative).

The Amendment reaches property interests of whatever specie -- realty, personalty, or intellectual. In the context of the Fifth Amendment, the word "property" is used in the sense of "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, to use and dispose of it." The provision addresses every sort of interest the citizen may possess. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). See also *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945); but *cf. Reichelderfer v. Quinn*, 287 U.S. 315 (1932) (sovereign-created values may not be private property interests under the Fifth Amendment); *Acton v. United States*, 401 F.2d 896 (9th Cir. 1968), *cert. denied*, 395 U.S. 945 (1969) (no property rights accrued to licensee upon revocation which are compensable in condemnation). Nor are all economic interests property interests. *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945). Where a property interest exists, however, the authority of the government to limit the interest by legal redefinition is constrained by the Fifth Amendment. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 [14 ELR 20539] (1984).

And, even though the right to build on private property can be the subject of legitimate permitting regulation, that right "cannot remotely be described as 'governmental benefit'." *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3146 [17 ELR 20918] (1987).

Further, compensation due under the Amendment when a taking does occur accrues to the owner of the property interest at the time of the taking, not to the owner at an earlier or later date. *United States v. Dow*, 357 U.S. 17 (1958). For special statutory limitations with respect to the assignment of taking claims, see 31 U.S.C. @ 3727 (1986).

D. Congressional Authorization to Act

[See Executive Order no. 12630, @ 3(e).]

Congressional authorization to undertake the government action at issue is an essential element of a taking. See generally, Section 3(e), *supra*. The test is not whether Congress authorized or even contemplated a taking effect from action pursuant to its purpose. Rather, the test is whether the government conduct

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said to give rise to the taking was authorized. See *Florida Rock Industries v. United States*, 791 F.2d 893, 898 [16 ELR 20671] (Fed. Cir. 1986), citing *Portsmouth Harbor Land and Hotel Company v. United States*, 260 U.S. 327 (1922); *NBH Land Company v. United States*, 576 F.2d 317, 319 (Ct. Cl. 1978); *Barnes v. United States*, 538 F.2d 865, 871 (Ct. Cl. 1976). Where Congress has acted so as to preclude implication of authority for takings purposes, however, a taking cannot lie. *NBH Land Company v. United States*, 576 F.2d at 319; *Southern California Financial Corporation v. United States*, 634 F.2d 521, 524 (Ct. Cl. 1980).

E. Physical Intrusion Taking: Physical Occupancy and Physical Invasion

[See Executive Order No. 12630, @ 3(b); Guidelines, @ V(B)(1) & (2).]

1. Physical Occupancy [Guidelines, @ V(B)(1)]

In general, governmental actions resulting in physical intrusions constitute property restrictions long viewed by the Supreme Court as having "an unusually serious character for purposes of the Takings Clause." *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 426 (1982). Moreover, "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." *Id.*

In the circumstances of a physical occupation, the taking reaches to "the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.*, at 425-426. Thus, the presence of CATV cables and related boxes (occupying approximately 1 1/2 cubic feet) pursuant to New York law requiring landlords to permit the facilities on their rental property was a taking. *Id.* at 441.

2. Physical Invasions

[Guidelines, @ V(B)(2)]

The Supreme Court recognizes a distinction between instances of permanent physical occupation and those of physical invasions falling short of occupation. *Id.* at 430. Classic examples of the latter in federal law include, but are not limited to, aviation easement, or so-called overflight, and flooding taking cases.

Thus, where flights of government aircraft are so low and frequent over private property as to constitute a direct and immediate interference with the use and enjoyment of the subjacent land, compensable takings may arise. *United States v. Causby*, 328 U.S. 256 (1946). See also *Aaron v. United States*, 311 F.2d 798 (Ct. Cl. 1963) (finding overflight taking in navigable airspace); *Branning v. United States*, 654 F.2d 88 (Ct. Cl. 1981) (liability from flights over 500 feet AGL not precluded merely by that fact); *Stephens v. United States*, 11 Cl. Ct. 352 (1986) (vast majority of flights in navigable airspace and no peculiar circumstances warranting liability there). Where flights occurring below the navigable airspace are involved, those intruding flights must interfere "substantially with the use or enjoyment of the property" in order to risk taking liability. *Hero Lands Company v. United States*, 1 Cl. Ct. 102, 105 (flights in conjunction with operations of NAS-New Orleans), *aff'd*, 727 F.2d 1118 (Fed. Cir.), *cert. denied*, 466 U.S. 972 (1983).

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Where flooding occurs as the natural and probable consequence of authorized government action and, although intermittent, is inevitably recurring, a taking also may be found. *United States v. Cress*, 243 U.S. 316, 330 (1917). See also *Bartz v. United States*, 633 F.2d 571 (Ct. Cl. 1980); *Barnes v. United States*, 538 F.2d 865 (Ct. Cl. 1976) (alteration of sedimentation patterns resulting in above high water flooding causing taking). The flooding must be productive of substantial interference in order to risk taking liability. *Barnes v. United States*, 538 F.2d at 870 (citing *United States v. Cress*, 243 U.S. at 328).

F. Regulatory Takings

[See Executive Order No. 12630, @ 3(b), 3(c), 4(a), 4(d), 5(b); Guidelines, @ V(B)(3).]

1. In General

Governmental regulatory conduct may go "too far," thus requiring just compensation. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922) (statute prohibited the mining of anthracite coal in a manner causing surface subsidence and damage to overlying structures). Where the Mahon line is crossed and the vehicle for payment of just compensation provided by 28 U.S.C. @ 1491 (1986) is unavailable, for instance, the Court has invalidated federal regulatory action. Specifically, in *Hodel v. Irving*, 107 S. Ct. 2076, 2084 (1987), the Supreme Court invalidated congressional legislation providing that certain property could not descend by intestacy or devise to successors in interest but, instead, would escheat to Indian tribes. Stressing the extraordinary character of the government regulation and the virtual "abrogation of the right to pass on a certain type of property," the Court concluded that the statute went "too far."

The Court has indicated, in land use regulation contexts, that the line will be crossed when a regulation does "not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 [10 ELR 20361] (1980) (zoning density restrictions neither prevented best use of property nor extinguished a "fundamental" attribute of ownership), cited in *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3146 [17 ELR 20918] (1987) and *United States v. Riverside Bayview Homes Inc.*, 106 S. Ct. 455, 459 [16 ELR 20086] (1985). The existence of a permit system, for instance, and the requirement that an individual resort to the system before engaging in a property use does not effect a taking per se. *Id.* "Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *Id.*

2. Permitting Programs and Conditions Substantially Advancing Legitimate Government Purposes

[See Executive Order No. 12630, @ 4; Guidelines, @ V(C)(1).]

a. In General

The programs of many agencies require private parties to obtain permits in order to undertake a specific use of, or action with respect to, private property. Takings precedent requires that permitting programs give special thought with respect to any conditions imposed on the granting of a permit. Specifically, in *Nollan v. California Coastal Commission*, 107 S. Ct. 3141,

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3144 [17 ELR 20918] (1987), the Court addressed a situation where the California Coastal Commission granted property owners a permit to replace a small beachfront bungalow with a larger house on the condition that the owners provide, by easement, additional lateral access for the public to public beaches on the water side of the house.

Analyzing the case under the Takings Clause, the Court first reiterated the proposition that the right to exclude others from property was one of the most essential sticks in the property owners' bundle of rights. *Id.* at 3145. That the burden on this right resulted from a condition on a permit as contrasted to acquisition of an easement for access was insignificant. *Id.* Pointing to the permanent and continuous right given to individuals to traverse the lateral beachfront, the Court found a physical occupation. *Id.* Accord *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 426 (1982).

Analyzing the question of whether exaction of this concession by permit condition effected a taking, Nollan cited *Agins* language and began with the proposition that "land use regulation would not effect a taking if it 'substantially advance[d] legitimate state interests' and [did] not 'den[y] an owner economically viable use of his land.'" *Id.* at 3146 (citing *Agins v. City of Tiburon*, 447 U.S. at 260). Significantly, the Court held that the regulatory requirement must "substantially advance" the legitimate interest and not merely be a requirement which might rationally achieve the governmental objective. *Nollan v. California Coastal Commission*, 107 S. Ct. at 3147, n.3.

The Court assumed, *arguendo*, the legitimacy of the government interest -- protecting the public's ability to see the beach -- in the first instance. *Id.* at 3147. Given that legitimacy, a "condition that would have protected the public's ability to see the beach notwithstanding construction of the new house," for example, would have been constitutional. *Id.* at 3148. Such a condition would have served the same governmental purpose as the building restriction in the first instance.

Where the condition imposed failed to advance the governmental interest which anchored the restriction in the first instance, but instead sought to achieve a different purpose without just compensation, "the building restriction [was] not a valid regulation of land use but 'an out and out plan of extortion.'" *Id.* (citations omitted.) In the Court's view, this nexus failure resulted, for Takings Clause purposes, in something beyond the "outer limits of 'legitimate state interests.'" *Id.*

b. Executive Order and Guidelines Requirements

Accordingly, in the interest of minimizing unanticipated takings, Section 4(a) of the Executive Order and Section V(C)(1) of the Guidelines provide that a permitting requirement imposing a condition on the granting of the permit should: (1) serve the same purpose that would have been served by a prohibition of the use or action; and, (2) substantially advance that purpose.

3. Proportionality of Burden to Risk Created

[See Executive Order No. 12630, @ 4(b); Guidelines, @ V(B)(3)(c).]

a. In General

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It is also important to the justice and fairness analysis compelled by the Fifth Amendment to demonstrate, to the extent possible, that the restriction imposed is proportional to the contribution to that risk occasioned by the restricted use. *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3143 n.4 (1987) ("if . . . singled out to bear the burden . . . although they had not contributed to it more than other . . . landowners . . . [the action] might violate either the . . . Takings Clause or the Equal Protection Clause.").

b. Executive Order and Guidelines Requirements

Accordingly, Section 4(b) of Executive Order No. 12630 provides:

When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

See also Guidelines, @ V(B)(3)(c).

4. Three-Part Regulatory Taking Analysis

[Guidelines, @ V(D)(2)]

a. In General

In addition to the specific requirements with respect to permitting conditions (Section III(F)(2), *supra*), the location of the Mahon "line" requires careful consideration of what has come to be viewed as a three-part regulatory taking test: (1) the character of the governmental action; (2) the economic impact of the action; and (3) the extent of interference with reasonable investment-backed expectations. *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 124 [8 ELR 20528] (1978) (New York Landmark Law prohibited appellants from occupying airspace, i.e., developing, above Grand Central Station but permitted use of the remainder of the parcel as well as sanctioned the transfer of this precluded right to develop to other property; no taking found). This three-part test is applied in Section V(D) of the Guidelines when evaluating regulatory actions for their takings implications.

b. Examples of Application of Three-Part Analysis

The following are examples of the application of the three-tiered test: *Hodel v. Irving*, 107 S. Ct. at 2082 (act effected uncompensated taking; character of action, analogized significance of right to devise property to the right to exclude others; economic impact could be substantial and right to devise property "a valuable right"; taking found even though interference with investment backed expectations was not substantial; *Connolly v. Pension Benefit Guaranty Corporation*, 106 S. Ct. 1018, 1026 (1986) (withdrawal liability provisions of Multi-Employer Pension Plan Amendments of 1980 not takings; character of action, economic reallocation; economic impact, in proportion to experience with pension plan; interference with investment backed expectations, not substantial because of early notice to participants); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 [10 ELR 20042] (1979) (action unlawful taking where petitioners, in presence of government consent and acquiescence, committed substantial investment of resources to link private body of water to navigable water; loss of right to exclude characterized as a fundamental right of

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property; assertion of navigation servitude here would result in physical invasion; impact not insubstantial; expectancies evidenced by substantial investment of funds entitled to protection).

The ad hoc three-part test is not fully predictable, and therefore, proposed actions and policies should be sensitive to takings implications even if the case precedents finding a taking were decided on somewhat different facts. For example, even on the same subject matter, application of the tests can result in different takings conclusions. For instance, in *Keystone Bituminous Coal Association v. De Benedictis*, 107 S. Ct. 1232, 1242 [17 ELR 20440] (1987), the Court considered recent Pennsylvania legislation which -- like the Kohler Act analyzed in *Mahon* -- addressed concerns of subsidence damage associated with coal mining activities. The opinion finds the *Mahon* line unviolated for two reasons.

First, the 1966 Subsidence Act contained specific legislative findings that important public interest warranted the regulation, unlike the Kohler Act which involved "a balancing of the private economic interest of coal companies against the private interests of surface owners." 107 S. Ct. at 1242. Thus, the 1966 legislation brought to bear the "substantial" public interest in "preventing activities similar to public nuisances." 107 S. Ct. at 1246. See @ III(F)(5)(a), *infra*. In determining the purposes, the Court emphasized that, although legislative declarations were important, the analysis required judicial consideration of the operative terms of the statute. 107 S. Ct. at 1243, n. 16.

Second, *Keystone* petitioners demonstrated no material interference with reasonable investment backed expectations on the part of the coal industry. Specifically, the cases presented a facial challenge to the 1966 Act -- essentially, an allegation that the mere enactment of the legislation constituted a taking. 107 S. Ct. at 1242. Petitioners made no claim that the 1966 Act made continued mining of bituminous coal commercially impracticable. Nor did the Court have before it any evidence that the Act's requirement to leave certain coal in place had made mining unprofitable in those locations. These factors stood in contrast to *Mahon's* finding that the Kohler Act rendered mining commercially impracticable. Petitioners' "support estates" (which under Pennsylvania law included the right to remove coal underlying the surface or to leave those layers intact and which could be owned by either the surface or mineral estate owner), in the Court's view, had value only in that they protected or enhanced the mineral estates also owned by petitioners -- that is, the support estate was simply one strand in the bundle of rights owned by the coal owner. The Court stressed that petitioners "retain[ed] the right to mine virtually all of the coal in their mineral estates." Thus, the burden imposed on the surface estate did not constitute a taking.

c. Economic Impact Factors

[Guidelines, @ V(D)(2)(b)]

Among the factors which may be relevant in assessing the economic impact of governmental action are the character of the property, the volatility of property values, variations in state property laws affecting the utility of the property, market, regional and demographic information, the existence of irretrievable economic opportunities, the anticipated duration of the proposed action, and the extent to which the property owner may have enhanced the existing use of the property. This list of factors is illustrative only and

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is neither exhaustive nor obligatory.

5. Regulation in the Service of Public Health and Safety

[See Executive Order No. 12630, @ 4(d); Guidelines, @ V(C)(2).]

a. In General: Deference in Matters of Public Health and Safety

In evaluating government regulatory conduct under the Takings Clause, courts have evidenced a "hesitance" to find takings where the public purpose of the underlying legislation is to "restrain[] uses of property that are tantamount to public nuisances . . ." *Keystone Bituminous Coal Association v. De Benedictis*, 107 S. Ct. at 1245. Important to claiming the deference shown in such public nuisance regulation is recognition of the concept of "reciprocity of advantage" that, in demonstrable ways, each who is regulated benefits from the similar regulation of others. *Id.* Cf. *Mugler v. Kansas*, 123 U.S. 623 (1887) (prohibition of liquor sale in interest of health, safety, or morals of public); *Euclid v. Ambler*, 272 U.S. 365 (1926) (in a facial challenge, conclusion that noise and traffic might be very nearly a public nuisance in an area; thus, regulations bore substantial relationship to public welfare); *Miller v. Schoene*, 276 U.S. 272 (1928) (nuisance rationale sustains state's destruction of cedar rust trees); *Goldblatt v. Hempstead*, 369 U.S. 590, 595-596 (1961) (safety based regulation prohibiting further excavation of sand and gravel mine below water table not unreasonable; plaintiffs failed to meet burden of showing that prohibition would further reduce value of property or that regulation unreasonable).

b. Deference Not Coextensive with "Public Use"

Although "public use" for purposes of the Fifth Amendment is coterminous with the governmental police power (Section III(B)(3), *supra*) the deferential "nuisance exception" discussed here is not coextensive with the police power. *Keystone Bituminous Coal Association v. De Benedictis*, 107 S. Ct. at 1245, n.20. In other words, even when governmental action is designed to protect health and safety, some consideration of that action's economic impact may nevertheless be appropriate. Thus, *Florida Rock v. United States*, 791 F.2d 893, 902 [16 ELR 20671] (Fed. Cir. 1986) has cautioned that a "regulation under the Clean Water Act can be a taking if its effect on a landowner's ability to put his property to productive use is sufficiently severe."

c. Executive Order and Guidelines Requirements

[See Executive Order 12630, @ 5(d); Guidelines, @ VI(A).]

With respect to public health and safety directed actions, then, management must, in any internal deliberative documents and any submissions to the Director, Office of Management and Budget, that are required:

i. Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

ii. Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;

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iii. Establish to the extent possible, that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

iv. Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking. See @ V, *infra*.

Under the Guidelines procedure, this reporting is accomplished by completion of the TIA process and consideration of the factors identified in Section V(C)(2) of the Guidelines for public health and safety actions. The "required submissions" are defined in Section VI(B) of the Guidelines.

6. Examples of Regulatory Takings Litigation

Although clearly not exhaustive, federal regulatory takings litigation include the following examples: Kirby Forest Industries v. United States, 467 U.S. 1, 4-6 (1984) (mere initiation of condemnation action does not result in taking even if accompanied by *lis pendens*); Yuba Goldfields v. United States, 723 F.2d 884 (Fed. Cir. 1983) (taking: government assertion of mineral rights title, was later found inaccurate by court ruling, and related "prohibition" of dredging activity); Deltona Corporation v. United States, 657 F.2d 1184 [11 ELR 20905] (Ct. Cl. 1981) (no taking: multi-stage development; permits as to early stages granted, but two permits under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act denied as to latter stages; where many "economically viable uses" remain, denial of highest and best use not a taking); Jentgen v. United States, 657 F.2d 1210 [11 ELR 20910] (Ct. Cl. 1981) (no taking: Corps of Engineers denied section 404 permits, but offered modification; plaintiffs declined offer); Benenson v. United States, 548 F.2d 939 [7 ELR 20371] (Ct. Cl. 1977) (taking: statutory requirements for development of Pennsylvania Avenue property, in combination with congressionally imposed moratorium, in interest of preserving building facade deprived owner of any reasonable use); Hendler v. United States, 11 Cl. Ct. 91 [17 ELR 20678] (1986) (no taking: issuance of emergency access order under CERCLA alone not a taking; left open question of physical intrusion); Snowbank Enterprises v. United States, 6 Cl. Ct. 476 (1984) (no taking: regulatory constraints imposed by Boundary Waters Canoe Wilderness Act on access not so pervasive as to amount to a taking); Mesa Ranch Partnership v. United States, 2 Cl. Ct. 700 (1983) (no taking: threat of condemnation not a taking; interested party persuasion of local zoning body to down-zone property not a taking).

G. Examples of Non-Categorical Takings Litigation

Government action may not fall clearly into either a physical intrusion or regulatory burden category. In these instances, courts have proceeded to analyze the justice and fairness, in the context of *Armstrong, supra*, of the burden placed on the property owner. Examples include *Eyherabide v. United States*, 345 F.2d 565 (Ct. Cl. 1965) (taking: gunnery range around property; evidence of physical intrusion combined with other factors, such as signs indicating that area within ranch was a gunnery range); *Drakes Bay Land Company v. United States*, 424 F.2d 574 (Ct. Cl. 1970) (taking: government officials found to have ignored means, placed in their hands, to prevent economic harm from congressional taking; instead, found to have taken positive steps to prevent exploitation of land).

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IV. Temporary Takings Resulting from Government Activity

[See Executive Order No. 12630, @ 3(b), 3(d), 4(c); Guidelines, @ V(C)(3).]

A. In General

''[T]emporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. at 2388 (finding that the Constitution's Takings Clause, as applicable to the states through the Fourteenth Amendment, compelled a cause of action for the government's payment for the value of the use of land during a temporary period). Where government action is found to occasion a temporary taking, "the government may elect to abandon its intrusion or discontinue regulations." *Id.* at 2387 (citations omitted). Time consumed by administrative processes in good faith which may be viewed as "normal delay" will likely raise no takings implication. *Id.* at 2389. However, government-imposed moratoria on use raise colorable takings considerations. See, e.g., *Benenson v. United States*, *supra*.

B. Executive Order and Guidelines Requirements

[See Executive Order No. 12630, @ 3(d) & 4(c); Guidelines, @ V(C)(3).]

Conversely, as the Executive Order highlights, "undue delays in decision-making during which private property use is interfered with carry a risk of being held to be takings." Executive Order No. 12630, @ 3(d). In the interest of fiscal responsibility and minimizing the just compensation that might eventually be found due for any temporary taking, the Executive Order provides that:

When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

Executive Order No. 12630, @ 4(c). Types of delay requiring especially careful attention would include moratoria on the development or use or conduct which might be viewed as acquisitory in character.

V. Estimation of Potential Financial Exposure

[See Executive Order, @ 4(d)(4); Guidelines, @ VI(A)(2)(c)(3).]

A. In General

By way of overview, the United States may be held liable for the taking of a fee or lesser interest in property. See *Benenson v. United States*, 548 F.2d at 948 (fee interest); *United States v. Causby*, 328 U.S. at 267 (easement). Importantly, when the government takes, it acquires a property interest. With respect to the compensation due for the taking, the goal is to provide the monetary equivalent necessary to place the property owner in the same position he or she would have been had the taking not occurred. *United States v. Reynolds*, 397 U.S. 14, 15-16 (1970); *Foster v. United States*, 2 Cl. Ct. 426, 445 (1983). Where the taking is for less than a fee interest, the just

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compensation measure is frequently described as the difference between the value of the property before the taking and the value after the taking. *Aaron v. United States*, 311 F.2d at 802. Damages resulting from the loss or destruction of business incidental to the taking are not recoverable as part of the just compensation due. *Mitchell v. United States*, 267 U.S. 341, 346 (1925). But see *Prudential Insurance Company of America v. United States*, 801 F.2d 1295, 1300, n.13 (Fed. Cir. 1985).

The award of just compensation also entitles the successful plaintiff to interest from the date of the taking to the date of payment. See *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933); *Henry v. United States*, 8 Cl. Ct. 389, 393-94 (1985); *Foster v. United States*, 3 Cl. Ct. 738, 745 (1983). Litigation expenses, including the reimbursement of reasonable attorney and appraisal fees, will also be available pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. @ 4654(c) (1986).

B. Financial Exposure

The Guidelines require an estimation of potential financial exposure. First, it is critical to recognize that this is an estimation only. These estimates are not intended to be close approximations of ultimate takings liability, if any, in a given case. Second, the estimates will vary with the nature and scope of the government policy or action proposed. For instance, in the context of a proposed major rule under Executive Order No. 12291 for which a regulatory impact analysis has been prepared, that analysis may provide an appropriate vehicle for exposure estimation. See Sections 3(b) and (d), Executive Order No. 12291. In the context of other proposed rules, an economic assessment of the rule's impact on society will likely be prepared. See Sections 2(b)-(e), Executive Order No. 12291. Treatment of the economic impact of the rule on the use or value of private property within that economic assessment may provide an appropriate vehicle for exposure estimation. In the context of legislation, economic assessments of the impact of such policies and action on the use or value of private property may provide an appropriate vehicle for exposure estimation. In the context of other policies and actions -- for example, permit applications -- applicants may be requested to supply the acquisition cost they paid for the property, adjusted for time to the date of the application.

Cases

✓ • Loretto v. Teleprompter Manhattan CATV Corp.
458 U.S. 419, 433 (1982)

✓ • AG Guidelines (June 30, 1988)

ELR Admin. Materials 35168

• Penn. Coal v. Mahon (?) 260 U.S. 393

✓. msg. article page

Article in favor:

Marzulla, "The New 'Takings' Executive Order and
Environmental Regulation - collusion or Cooperation?"
18 ELR 10254 (July 1988).

To: Lisa Krin

Lisa - Cd you

pls. get copy of

AG guideline for EO.

126307

Thel.

MK

Memorandum



Subject

1993 Federal Grand Jury
Practice Handbook

Date

April 26, 1993

To

All Attorneys

From

ASG

Albert S. Glenn
Acting Deputy Chief
Criminal Section

Attached is a copy of the new Federal Grand Jury Practice Handbook. This is a new collection of law concerning grand jury practice and the handling of grand jury material.

This is a very good collection of grand jury law. It would be worth your time to read through all sections relevant to our work.

If you have any substantive comments on this handbook, including corrections, changes, or proposed additions, please let me know and I will see that they are forwarded to the appropriate people.

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CITATIONS TO: 112 S.Ct. 2886

SERIES: SHEPARD'S UNITED STATES CITATIONS

DIVISION: SUPREME COURT REPORTER

COVERAGE: Shepard's 1943-1986 Supplements Through 01/94 Supplement.

NUMBER	ANALYSIS	CITING REFERENCE	SYLLABUS/HEADNOTE
1	parallel citation	(120 L.Ed.2d 798)	
2	same case	112 S.Ct. 436 SoC	
3	same case	304 S.C. 376	
4	same case	404 S.E.2d 895	
5	same case	424 S.E.2d 484	
6	followed	113 S.Ct. 1574	
7		113 S.Ct. 2290	
8		113 S.Ct. 2304 Cir. D.C.	
9		978 F.2d 1275	

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1987

- X ✓ 107 S.Ct. 2378 - 482 U.S. 301
First English Evangelical Lutheran Church of
Glendale v. County of LA

- X 107 S.Ct. 2076 481 U.S. 704
Hodel v. Irving

- X ✓ 107 S.Ct. 3141 483 U.S. 825
Nollan v. Ca Coastal Comm'n.

- X 107 S.Ct. 1232 480 U.S. 470
Keystone Bituminous Coal v. DeBenedictis

- X 447 U.S. 255 (1980)
Agins v. City of Tiburon

- X 438 U.S. 104 (1978)
Penn Central

- X 112 S.Ct. 2886 (1992)
Lucas v. S.C. Coastal Council

DRAFT

March 1, 1994

PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT

MEMORANDUM FOR MARVIN KRISLOV
SPECIAL COUNSEL TO THE PRESIDENT

FROM: LISA KRIM
LEGAL INTERN

SUBJECT: Constitutionality of Executive Order 12630

This memorandum focuses on the parts of Executive Order 12630 that are inconsistent, to one degree or another, with Supreme Court takings jurisprudence. The language of the Executive order is in bold, followed by a discussion of the problems with that particular language and, in some cases, indicates how the draft Clinton Executive Order would handle the issue.

Physical Invasions

3(b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

Saying that a physical invasion or occupancy of private property may constitute a taking is basically consistent with current Supreme Court holdings. In Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), the Court said that regulations that result in physical invasions "are compensable without case-specific inquiry into the public interest advanced in support of the restraint." Id. at 2893. The Court relied on Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

The Executive Order, however, is not entirely precise because it does not make clear the distinction made by the Court between temporary and permanent physical invasions. The Court said that, "(at least with regard to permanent physical invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." 112 S. Ct. at 2893 (emphasis added). In contrast, temporary invasions seem to be governed by First English Evangelical Church of

Glendale v. County of Los Angeles, 482 U.S. 304 (1987). In that case, the Court held that "'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." Id. at 318.

The Court cases thus leave open whether a regulation which temporarily deprives a landowner of part of the economic benefit or use of his property should constitute a compensable taking. The Executive Order does nothing to fill in this gap in the law. It merely says that a physical invasion "may constitute a taking." Critics of the Executive Order say that this language "may be attempting to create a new, vague factor for finding a taking, and one that the Supreme Court has never articulated."¹

These critics also argue that the second sentence in this section of the Executive Order is "directly incorrect when it conjoins less than complete deprivation with the principle of temporary takings." Id. In First English, the Court specifically limits its holding to the facts of the case in which the landowner was denied all use of its property, 482 U.S. at 321, while the Executive Order says that "less than complete deprivation of all use or value" may constitute a taking.

Draft Executive Order

The draft Clinton Executive Order makes no specific distinction between of physical takings or takings that substantially affect the value or use of land, and takings that minimally or temporarily decrease the value or use of land. It avoids the problems of Executive Order 12630 by not trying to explain what may or may not constitute a taking.

Health and Safety Regulations

3(c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.

¹Jerry Jackson & Lyle D. Albaugh, A Critique of the Takings Executive Order in the Context of Environmental Regulation, 18 ELR News & Analysis 10463, 10465 (November 1988).

This section of the Executive Order is problematic because it misstates the test used by the Supreme Court to determine when takings occur, and it raises a higher barrier to health and safety regulations than to other types of regulations.²

Misstatement of the Test

In Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), the Court says, "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Id. at 834. (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)). However, the Court recognizes that it has never clearly set out a standard for when regulations "substantially advance" a state interest, nor what constitutes a "legitimate" state interest. Id. The Executive Order implies that health and safety regulations that deprive private owners use of their land will constitute takings unless they "advance significantly" the health and safety purpose. Not only does the Executive Order use a word ("significantly") that is not used by the Court in its test, but it also limits legitimate state purposes to health and safety purposes while the Court holds that "a broad range of governmental purposes and regulations satisfies these requirements." Nollan, 483 U.S. at 824-25.

The Lucas case, decided since the Executive Order took effect, shows that the Executive Order continues to conflict with the direction and intent of the Court's takings jurisprudence. In Lucas, the Court explains that, while early opinions allowed the government to regulate "harmful or noxious uses" of property without compensation, the contemporary test is whether the land-use regulation "substantially advances legitimate state interests." 112 S. Ct. at 2897 (quoting Nollan, 483 U.S. at 834). The Court says:

The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one

112 S. Ct. at 2897.

Thus in Lucas, the Court requires a substantial advancement of state interests and considers those interests to be quite broad, in contrast to the Executive Order which requires significant advancement of a health and safety purpose. Critics of the Executive Order explain that, while the "harmful or noxious uses" test (sometimes referred to as the "nuisance exception") was "clearly intended to narrow the circumstances in which regulatory action will result in a judicially determined taking, the

²See Jackson & Albaugh at 10465-66.

Executive Order transforms it into a limitation on when agencies may regulate for health and safety purposes."³

Higher standard

Critics of the Executive Order point out that a second problem with this section is that it erects a higher barrier to health and safety regulation than other types of regulations. Under the Executive Order, it appears that only health and safety regulations, and not welfare regulations, for example, must be based on a showing of "real and substantial threats."⁴

The Executive Order also requires that the regulations be "no greater than necessary" to achieve the health and safety purpose. Critics point out that this is in direct conflict with the Court's statement in Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 487, n.16 (1987), where the Court recognizes that the fact that "land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it." Id. The critics argue that the Court's approach is preferable because it allows Congress or the agencies to determine how much to regulate, instead of using takings law to over constrain agency action.⁵

Draft Executive Order

The draft Clinton Executive Order makes no special distinctions for health and safety regulations and, as discussed above, avoids the problems of Executive Order 12630 by not adding language foreign to Supreme Court takings jurisprudence in an effort to define what may or may not constitute a taking.

Temporary Takings

3(d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use is interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

4(c) When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

³Jackson & Albaugh at 10466.

⁴Jackson & Albaugh at 10466.

⁵Jackson & Albaugh at 10466.

These two sections of the Executive order are both inconsistent with Supreme Court language. As discussed above, First English held that a taking occurs when a landowner is deprived of all use of his or her land, even if use is later restored. This appears to be the language upon which the Executive Order relies. However, First English is limited to its facts and the Court explicitly says that it does not deal "with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." 482 U.S. at 321.

Draft Executive Order

The draft Clinton Executive Order is written to be consistent with the Supreme Court cases. It says that when agencies formulate or implement policies with takings implications (defined as "actions that if implemented or enacted, could effect a taking pursuant to the Just compensation Clause of the Fifth Amendment to the United States Constitution"), they should "[a]void unnecessary delays in decision-making that impact on private property owners, even though such delay does not constitute a taking." (Emphasis added.)

Conditions on Permits

4(a) When an executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

- (1) Serve the same purpose that would have been served by a prohibition of the use or action; and**
- (2) Substantially advance that purpose.**

Critics of the Executive Order call this language in the Executive Order the "broadest leap beyond existing takings law."⁶ These critics argue that this language is based on Nollan, which, like First English, is an extremely narrow holding. Nollan established that "a classic right-of-way easement" is a "permanent physical occupation." 483 U.S. at 832 & n.1. Then the Court created an exception to the rule that all permanent physical invasions constitute takings. It said that regulations may place conditions on permits without creating a taking if the condition "serves the same legitimate police-power purpose as a refusal to issue the permit . . . and if the refusal to issue the permit would not constitute a taking." Id. at 836. Thus the Court has made it possible for the government, through

⁶Jackson & Albaugh at 10467.

regulation, to "extract a permanent physical invasion as a permit condition and do so free of a taking."⁷

Lucas reinforces the argument that the Nollan Court carved out an exception to the general rule that all permanent, physical invasions constitute takings. In Lucas, the Court lays out two discrete categories of regulatory action that are compensable without case specific inquiry into the public interest advanced in support of the restraint: physical invasions and regulations that deprive the owner of all economic beneficial or productive use of the land. 112 S. Ct. at 2893. The Court's one exception to this rule is that the government will not have to compensate landowners if the regulation prohibits a land use that would be prohibited under "background principles of nuisance and property law." Id. at 2901.

In contrast, the Executive Order appears to interpret Nollan as having placed additional restrictions on regulatory agencies' ability to impose conditions on permits. The Order goes further than any Supreme Court language in requiring that any condition on a permit must not only serve the same purpose as a prohibition on the activity would have served, but also "substantially advance" that purpose.

Two critics argue that "a Supreme Court decision that actually held that an uncompensated physical invasion may be effected in some circumstances through a permit condition has been tortured into a rule that all conditions in permits subject to the Order, whether or not they constitute physical invasions, are impermissible unless they meet a standard that was never articulated in that decision."⁸

Another critic of the Order points out the problem with this language:

Agency decisionmakers should not be hamstrung by a requirement to forego each and every condition that is not itself a "substantial" advancement of the underlying regulatory goal. Moreover, under the "takings" decisions the "substantiality" consideration is at most one element in deciding whether a given scheme of regulation goes "too far." . . . The Executive Order, however, makes this element determinative of the regulatory choice--thus precluding certain governmental actions or decisions that are not takings at all.⁹

⁷Jackson & Albaugh at 10468.

⁸Jackson & Albaugh at 10468.

⁹James M. McElfish, Jr., The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?, 18 ELR 10474, 10476 (November 1988)(footnotes omitted, emphasis in

Some of the critics also find fault with the Attorney General's Guidelines issued under this Executive Order that deal with permit programs. The Guidelines say that agencies should consider that placing a condition on a permit "risks a takings implication" unless the condition meets the requirements spelled out in the Executive Order. Guidelines at V(C)(1). The Guidelines appear to give the agencies more flexibility in determining when to use conditions, allowing them to make an assessment, instead of imposing mandatory requirements that the conditions substantially advance the same purpose as would a prohibition. Yet, the critics argue that the Guidelines reflect the same misreading of Nollan as the Executive Order and thus create the same chilling effect on agency action that is inconsistent with the Supreme Court cases.¹⁰

In a memorandum on December 14, 1994 to Linda Lance and Kumiki Gibson, Peter Yu took the position that Nollan should be read narrowly and that the "same purpose" test should only apply to cases in which the condition imposed in an easement or other physical occupation.

Draft Executive Order

The draft Clinton Executive Order addresses conditions on permits by instructing agencies to "carefully tailor any conditions imposed upon the granting of a permit to minimize any unnecessary burdens on private property caused by such conditions, whether or not such burdens constitute a taking." This provision is consistent with the more narrow reading of Nollan and with the Lucas decision. Specifically, it again leaves the determination of what constitutes a taking to the courts and does not try to mandate additional requirements on agencies that wish to condition grants of permits.

Proportionality

4(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

This language in the Executive Order is problematic because it is based on dictum in Nollan and directly contradicts Keystone. In Keystone, the Court said, "The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received." 480 U.S. at 491 n.21. In Nollan the Court articulated the concept of proportionality and

original).

¹⁰Jackson & Albaugh at 10468-69.

said that one principle underlying the Takings Clause is that the Government should not be allowed to place a burden on a few individuals that should be borne by the public as a whole. 483 U.S. 835 n.4. But they also observed that this proportionality theory "is not the basis of the Nollan's challenge." Id.

This language in the Executive Order also fails to embody two other concepts that run through Supreme Court takings cases. First is that "everyone can be expected to bear burdens to promote the public good."¹¹ This principle counteracts the proportionality emphasis in the Executive Order. A second principle emphasized by the Supreme Court, but ignored by the Executive Order, is the concept of reciprocity. In Keystone, the Court notes that, "while each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions placed on others." 480 U.S. at 491. The Guidelines direct agencies to consider this concept of reciprocity, but limit its applicability to situations where the benefit to the private property owner directly offsets economic impacts to the use or value of the land.¹² Guidelines V(D)(2)(b)(iv)

Critics of the Executive Order point out one other flaw with the Guidelines. They note that the Guidelines assert that "[t]he less direct, immediate, and demonstrable the contribution of the property-related activity to the harm to be addressed, the greater the risk that a taking will have occurred." Guidelines V(D)(2)(a)(iii). They point out that the Appendix to the Guidelines contains no authority for this theory.¹³

Draft Executive Order

The draft Clinton Executive Order imposes no specific proportionality requirement.

Policy Issues

-Chilling effect on agencies (the expense and difficulty of the "takings implication assessment")--see Jackson and Albaugh at 10471. The draft order appears to streamline this requirement while allowing monitoring of the costs and frequency of takings claims. The draft gives the agencies far more flexibility, eliminating the Attorney General's guidelines, requiring agencies to consult with the Attorney General only if they need assistance.

¹¹Jackson & Albaugh at 10470. The authors find this concept expressed in Connolly v. Pension Benefit Guaranty Co., 475 U.S. 211, 225 (1986).

¹²Jackson & Albaugh at 10470.

¹³Jackson & Albaugh at 10470.

--Duplicative--makes the law more mucky, not clearer to have the E.O. on top of the case law, also, doesn't keep up with evolving case law.

--Separation of powers--Jackson and Albaugh argue that the proportionality requirement in the Executive Order creates a separation of powers problem because it limits the regulatory agencies' authority to deny permits.

Sec. 2. This Order shall be effective immediately.

THE WHITE HOUSE,
March 8, 1988.

RONALD REAGAN

Executive Order 12629 of March 9, 1988

Nuclear Cooperation With EURATOM

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Section 128a(2) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2155(a)(2)), and having determined that, upon the expiration of the period specified in the first proviso to Section 128a(2) of such Act and extended for 12-month periods by Executive Orders Nos. 12193, 12295, 12351, 12409, 12463, 12506, 12554, and 12587, failure to continue peaceful nuclear cooperation with the European Atomic Energy Community would be seriously prejudicial to the achievement of U.S. non-proliferation objectives and would otherwise jeopardize the common defense and security of the United States, and having notified the Congress of this determination, I hereby extend the duration of that period to March 10, 1989. Executive Order No. 12587 shall be superseded on the effective date of this Executive Order.

THE WHITE HOUSE,
March 9, 1988.

RONALD REAGAN

Executive Order 12630 of March 15, 1988

Governmental Actions and Interference With Constitutionally Protected Property Rights

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows:

Section 1. Purpose. (a) The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection

of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

(b) Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

(c) The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action. In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order. The Guidelines shall be promulgated no later than May 1, 1988, and shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.

Sec. 2. Definitions. For the purpose of this Order: (a) "Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. "Policies that have takings implications" does not include:

(1) Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such commu-

nications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder) but not including the U.S. Army Corps of Engineers civil works program.

(b) Private property refers to all property protected by the Just Compensation Clause of the Fifth Amendment.

(c) "Actions" refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, or Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to Federal regulation or direct physical invasion or occupancy, but does not include:

(1) Actions in which the power of eminent domain is formally exercised;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.

Sec. 3. General Principles. In formulating or implementing policies that have takings implications, each Executive department and agency shall be guided by the following general principles:

(a) Governmental officials should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.

(b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use

or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

(c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.

(d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use is interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

(e) The Just Compensation Clause is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation. Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

Policy
not law

Sec. 4. Department and Agency Action. In addition to the fundamental principles set forth in Section 3, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

(1) Serve the same purpose that would have been served by a prohibition of the use or action; and

(2) Substantially advance that purpose.

(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

(c) When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

(d) Before undertaking any proposed action regulating private property use for the protection of public health or safety, the Executive department or agency involved shall, in internal deliberative documents and any submissions to the Director of the Office of Management and Budget that are required:

(1) Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

(2) Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;

(3) Establish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

(4) Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking.

In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, this analysis may be done upon completion of the emergency action.

Sec. 5. Executive Department and Agency Implementation. (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring compliance with this Order with respect to the actions of that department or agency.

(b) Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any, in all required submissions made to the Office of Management and Budget. Significant takings implications should also be identified and discussed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

(c) Executive departments and agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A "takings" award has been made or a "takings" claim pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in Fiscal Years 1985, 1986, and 1987 and all such pending claims shall be submitted to the Director, Office of Management and Budget, on or before May 16, 1988.

(d) Each Executive department and agency shall submit annually to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601.

(e)(1) The Director, Office of Management and Budget, and the Attorney General shall each, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in Sections 1 through 5 of this Order, and the Office of Management and Budget shall take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions.

(2) In addition to the guidelines required by Section 1 of this Order, the Attorney General shall, in consultation with each Executive department and agency to which this Order applies, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that department or agency.

Sec. 6. Judicial Review. This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN

THE WHITE HOUSE,

March 15, 1988.

Executive Order 12631 of March 16, 1988

Working Group on Financial Markets

By virtue of the authority vested in me as President by the Constitution and laws of the United States of America, and in order to establish a Working Group on Financial Markets, it is hereby ordered as follows:

Section 1. Establishment. (a) There is hereby established a Working Group on Financial Markets (Working Group). The Working Group shall be composed of:

- (1) the Secretary of the Treasury, or his designee;
- (2) the Chairman of the Board of Governors of the Federal Reserve System, or his designee;
- (3) the Chairman of the Securities and Exchange Commission, or his designee; and
- (4) the Chairman of the Commodity Futures Trading Commission, or her designee.

(b) The Secretary of the Treasury, or his designee, shall be the Chairman of the Working Group.

Sec. 2. Purposes and Functions. (a) Recognizing the goals of enhancing the integrity, efficiency, orderliness, and competitiveness of our Nation's financial markets and maintaining investor confidence, the Working Group shall identify and consider:

- (1) the major issues raised by the numerous studies on the events in the financial markets surrounding October 19, 1987, and any of those recommendations that have the potential to achieve the goals noted above; and
- (2) the actions, including governmental actions under existing laws and regulations (such as policy coordination and contingency planning), that are appropriate to carry out these recommendations.

March 9, 1994

MEMORANDUM FOR DISTRIBUTION

FROM: Linda Lance

RE: Meeting of Working Group on Takings

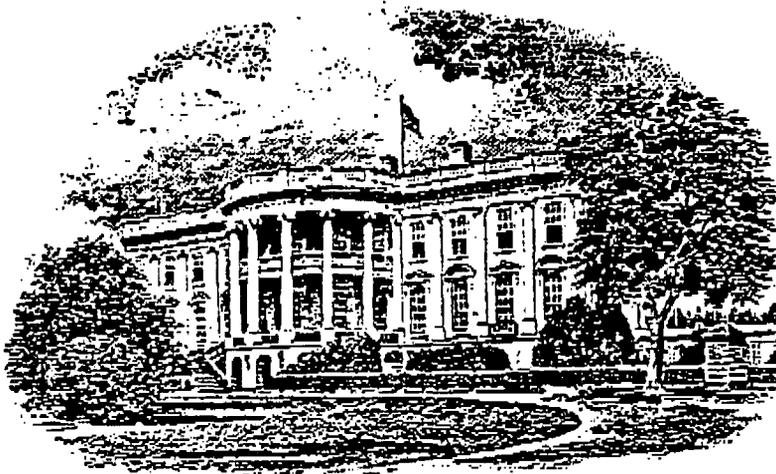
There will be a meeting of the working group on the takings executive order on Friday, March 11, 1994 from 9:30 - 10:30 a.m. in the Vice President's Ceremonial Office. Since we will have to leave the room promptly at 10:30 the meeting will start promptly.

Please be prepared to provide your final comments on the general issue of rescission of the current executive order as well as specific comments on the draft executive order circulated prior to the last meeting. Following this meeting we need to be in a position to prepare the necessary decision documents to resolve this issue.

If you have any questions, feel free to call me at X66222.

Distribution:

Jack Quinn fax X67044
Greg Simon fax X66231
Sally Katzen fax X53047
Joe Stiglitz fax X66947
Ellen Seidman fax X62223
Paul Weinstein fax X67028
Steve Warnath fax X67028
Will Stelle fax X62710
Todd Stern fax X62215
Bob Watson fax X51571
Rosina Bierbaum fax X51571
Jonathan Baker fax X66809
Peter Yu fax X62223
Marvin Krislov fax X61647
Craig Crutchfield fax 395-5691
Lorraine Miller fax X62604
Tracy Thornton fax X62604



FAX TRANSMISSION

**The National Economic Council
The White House**

To: Marvin Krislov

Phone: 67903 FAX: 61647

From: Peter Yu

Phone: 202-456-2802 FAX: 202-456-2223

Date: 3/7/94

Time: _____

Pages to follow: _____

THE WHITE HOUSE
WASHINGTON

March 5, 1994

MEMORANDUM FOR SALLY KATZEN

JOE STIGLITZ & JON BAKER
LINDA LANCE & STEVE WARNATH
PAUL WEINSTEIN
WILL STELLE
TODD STERN
BOB WATSON & ROSINA BIERBAUM
MARVIN KRISLOV

FROM:

PETER YU 

SUBJECT:

ATTACHED DRAFT DECISION MEMORANDUM

Friday, Marvin Krislov of the White House Counsel's office and I met with OLC staff to discuss E.O. 12630. I would summarize OLC's judgment as follows: while on policy grounds, OLC would support rescission of E.O. 12630, any legal imprecision in the Order could be corrected through the issuance of revised Guidelines.

That judgment led me to draft the following decision memorandum. I would appreciate any comments on this draft, and perhaps a brief discussion of it at our next meeting. I am, of course, not wedded to the notion of a Deputies meeting, but thought a draft memorandum would crystallize some of our thinking on this issue.

Thank you.

THE WHITE HOUSE
WASHINGTON

March 5, 1994

DRAFT
DRAFT

MEMORANDUM FOR [DEPUTIES IN INTERESTED WHITE HOUSE OFFICES]

FROM: Interagency Group on Takings Issues

SUBJECT: Decision Requested Regarding Administration Position on Takings Issues

This memorandum summarizes a proposed Administration strategy to respond to anticipated legislative initiatives regarding "regulatory takings" and presents for your decision an issue concerning the Administration's treatment of Executive Order 12630.

I. BACKGROUND

Government regulations--such as permitting requirements, limitations on use, and regulatory restrictions--are often criticized for reducing the value of private property. In recent years, these criticisms have increased, particularly with regard to federal wetlands and endangered-species policies, and have developed into a loosely-knit "wise-use" or "private-property" movement.

In Congress, several bills and amendments designed to reduce such federal actions have been introduced. One such bill would codify Executive Order 12630, which was signed by President Reagan in 1988, and which articulates certain principles for federal regulatory action and requires agencies to complete a "Takings Impact Analysis" (TIA) before undertaking certain actions. Another bill would require the federal government to compensate any owner whose property was reduced in value by more than half due to federal action. These sorts of propositions have been and will be raised as amendments to pending legislation, including the reauthorizations of the Clean Water Act and the Superfund program, as well as the EPA-elevation bill.

II. RESPONSE STRATEGY

An interagency group, chaired by the Vice President's office, has developed a comprehensive strategy for addressing the political and legislative aspects of this difficult situation. The overall objective of the strategy is straightforward: to prevent passage of "takings" legislation and to minimize the deleterious effect that promotion of such legislation will have on the Administration's agenda. The approach includes:

- a coordinated legislative-outreach effort involving the White House and key agencies;
- an economic analysis led by OMB and CEA; and
- a communications strategy involving the White House and key agencies.

DRAFT

-2-

III. TREATMENT OF EXECUTIVE ORDER 12630: OPTIONS & ANALYSIS

One aspect of this strategy--the treatment of E.O. 12630--requires your decision. As suggested above, E.O. 12630 and the guidelines promulgated by the Attorney General pursuant to the Order play an important, if somewhat symbolic, role in the takings debate. Environmental and consumer groups have long criticized the Order as chilling appropriate governmental action and as largely redundant with existing constitutional obligations. The private-property movement has generally supported the Order, although it has criticized executive agencies for not consistently complying with the Order; moreover, some in the movement have urged more substantial action to reduce governmental regulation or to increase compensation.

At this point, we have at least two options.

Option 1: Replace the Executive Order with a revised, more balanced Order. Under this option, a revised Order would be issued that recognized the importance of private property, directed agencies to weigh the risk of takings and to take measures to minimize that risk. The revised Order would not include the more troubling hortatory statements of the current Order and would reduce agencies' obligation to undertake TLA's.

Option 2: Leave E.O. 12630 in place, but revise the Guidelines issued under the Order. Under this option, the Attorney General would promulgate new Guidelines that would both bring the Order in line with current law and substantially revise the operation of the Order. The Justice Department's Office of Legal Counsel has indicated that certain aspects of E.O. 12630 may no longer be accurate statements of the law but that those aspects could be amended through the issuance of new Guidelines, and do not require the rescission of the Order.

Option 1 allows us to eliminate an Order that most in the Administration agree is undesirable, and to leave a Clinton legacy in the area of property rights. Certain constituencies--environmental and consumer groups--would support this Option. Option 2 is less desirable as a policy matter, but may be politically more advantageous. Some argue that, in a context in which many Congresspersons appear to support codification of E.O. 12630, eliminating that Order would only *increase* charges that the Administration does not take property rights seriously. Supporters of Option 2 contend that any Order we were to issue would be viewed as less protective of property rights than E.O. 12630, and thus Option 1 may only increase the pressure for legislative action in the "opposite" direction. While neither environmental and consumer interests nor the private-property movement will be wholly satisfied by Option 2, preserving E.O. 12630 may provide some "cover" for those Members who wish to vote against more radical takings legislation.

III. RECOMMENDATIONS

[to be completed]

Steve Neumann

February 22, 1994

MEMORANDUM FOR DISTRIBUTION

FROM: Linda Lance, Stephen Warnath and Will Stelle

RE: Administration's Takings Policy/Strategy

Friday 11:30-12:30

As discussed at the last meeting of the working group on executive orders, this memo is a first draft planning document for Administration activities on takings and related issues. It is a working draft only, written to give interested offices an opportunity to work from a common vehicle, and does not represent a consensus view at this point. However, some of the offices listed in the assignment section have begun working on the research projects described, which will be necessary regardless of the strategy selected. **There will be a short meeting of the White House working group on this issue on Thursday, February 24, from 10 -11 a.m., in the Vice President's Ceremonial Office.** Please be prepared to provide your comments on the draft executive order and to discuss your views on the assignments outlined in this memo.

This memo provides a brief statement of background on the issue as well as an update on upcoming legislative activities. The memo also discusses possible action on the current executive order, and sets out a preliminary list of actions necessary to prepare for upcoming legislative activities (which pose the greatest short-term risk). As we've discussed, however, the so-called "private property," or "wise-use" movement is not an isolated short-term phenomenon. It is, therefore, imperative that any activities of the Administration in the short-term be viewed in context and set the stage for a substantive position on the subject that reflects the Administration's long-term interests.

BACKGROUND

The "wise use" movement reflects an anti-government perspective that purports to champion the rights of the little guy. It finds its current strength in local backlash against the wetlands and endangered species programs in numerous settings around the United States. Its central premise is the proposition that government has the obligation to compensate landowners for any diminution in the value of their property due to governmental action.

Several pending legislative proposals reflect this approach. For example, H.R. 1388 posits that any Federal action that affects private property rights will entitle the property owner to full compensation for the fair market value of the property. H.R. 404, addressing the wetlands program under the Clean Water Act, states that any regulatory activity under the wetlands program that diminishes more than fifty percent of the fair market value of property will be deemed a taking for purposes of the Fifth Amendment and will entitle the landowner to compensation from the U.S. Treasury.

UPCOMING LEGISLATIVE ACTIONS

Upcoming action on the Clean Water Act reauthorization poses the greatest immediate risk of legislative activity reflecting the interests of the "wise use" movement. The House Merchant Marine and Fisheries Committee has scheduled a hearing on the House Clean Water bill for February 22. The Senate has scheduled a full Committee markup for February 23. The bill is expected to be on the Senate floor sometime in March.

As you know, debates on takings have already occurred in several settings during the 103d Congress: the authorization of and appropriation for funds for the National Biological Survey; the debate on grazing reform; the debate on mining reforms; the reauthorization of the Endangered Species Act; and the EPA Cabinet bill. None of these legislative initiatives are complete, and most will see further action in this Congress.

In addition, the Agriculture Committee has indicated its intention to markup H.R. 561, the Private Property Protection Act, in March. The bill also has been referred to the Judiciary Committee, which has indicated that it does not intend to act on the bill. This bill would preclude an agency regulation from becoming effective unless the Attorney General certified that the affected agency is in compliance with the existing Executive Order (EO 12630). It also would require USDA to prepare a study and report detailing the legislation's effect on the farm economy and agricultural production. USDA has prepared a draft letter from Secretary Espy reflecting the Administration's opposition to this bill, and a decision needs to be made as to whether the Administration should express its views at the Ag markup stage or await further action on the bill.

EXECUTIVE ORDER

his set [The Congressional Research Service (see CRS Letter to Walter B. Jones, et al., Re: Comparison of Taking Principles in EO No. 12630 With Supreme Court Taking Jurisprudence, and Related Questions, 12/19/88), and the Justice Department's Office of Legal Counsel, agree that the current executive order on takings (EO 12630) is seriously flawed as a legal matter and does not correctly state the law on takings even as it existed in 1988 when the EO was written. In addition, it does not reflect significant Supreme Court decisions issued since 1988. The primary problems identified by CRS and DOJ are with sections 3 and 4 of the current EO.

As we've discussed, during the debate on the Clean Water Act there are likely to be amendments to attempt to codify this executive order which will require that the Administration either repudiate or endorse this order. Although no action in this area is free of political consequences, we need to give serious consideration to either amending this order or replacing it with one of our own.

In order to assist consideration of this issue, attached is a first draft of a Clinton

Administration executive order on takings. Please note that this is a working draft that has not yet been shared with any interested parties outside the White House. In order to ensure that the Administration retains all its options in this area, please do not share or discuss this draft outside the White House at this time. Should the Administration decide to move forward with a revised EO, it will be vetted with agencies and other interested parties as appropriate before issuance.

This draft attempts to state and act upon the Administration's concern for private property rights without incorrectly stating the law, and while recognizing the value of health and safety regulation. It attempts to retain as much of the current EO as possible, in order to counter claims that this Administration is less cognizant of the needs of property owners.

Please pay particular attention to two areas of the draft, both of which are, of course, open for discussion and in our view are particularly close calls. First, note that the draft EO rescinds the existing Attorney General's guidelines and appendix, which were, of necessity, based on the erroneous reading of the law set out in the current EO. The draft EO does not require the Attorney General to prepare generic guidelines on takings law, but rather provides that any agency may seek the guidance of the Attorney General on any issue it believes to be necessary.

This approach was taken because the requirement for the issuance of guidelines arguably sets an unfortunate precedent that the agencies cannot interpret the law for themselves, but rather must always await guidance from the Attorney General. The approach taken in the draft makes AG guidance on the law available to the agencies, but does not require them to await such guidance before making a judgment on this or any other constitutional requirement.

Second, the draft retains in amended form the requirement that the agencies give special consideration to the necessity for actions that have "takings implications," and provide those assessments to OMB for actions that OMB would otherwise review that have takings implications. Since the application of this requirement is limited to those actions that have "takings implications" as defined in the order, it is intended to apply only to those few instances in which the agency itself determines that a constitutional taking is likely to occur by virtue of its action. However, such requirements could be made more onerous by a less friendly Administration. Consider whether such assessments should be retained at all.

OTHER INITIATIVES AND ASSIGNMENTS

In order to be prepared for upcoming legislative action, we propose the following activities within the Administration and with our allies on this issue. Our goals in these undertakings include:

- o advancing a constructive approach to the fairness issues that underlie the

takings movement;

- o opposing those legislative proposals that fail to address the real issues and that would otherwise cause significant harm to federal, state and local interests;
- o mounting a concerted internal effort to educate congress on the issues; and
- o coordinating our internal Administration activities, and working closely with the states, local governments, and other constituencies.

1. Convene Interagency Working Group on Legislative Strategy

A small group of senior agency officials should be convened to develop and execute the Administration's legislative strategy in this area. At a minimum, DOI, EPA, DOJ, DOL and FDA should be represented, as well as all interested White House offices, particularly Legislative Affairs. Additional agency support for communications, legal, economic and legislative analysis will likely also be required, and this same group should be given fair warning and begin to divide these responsibilities.

Assignment: DOI lead with EPA, DOJ, DOL and WH participation
Schedule: Begin immediately

2. Convene Substantive Interagency Working Group

The Administration needs a general statement on this subject, acceptable to all agencies and White House offices, that reflects our commitment to protecting private property and individual rights while ensuring that our environment, health and safety are protected. This general statement should be included in any Executive Order issued by the Administration (see draft attached). Secretary Babbitt's speech and the wetlands policy statement, distributed to the working group earlier, contain the primary Administration statements on the issue to date, and any general statement developed should reflect those themes. Once such a statement is agreed to, it can be individualized and tailored for use by the various agencies.

- a. Assignment: WH lead with EPA, DOJ, DOL, HHS/FDA, representation. On message research, WH media should assume the lead responsibility with agency support.
- b. Delivery: White House statement, perhaps in the context of issuance of a new executive order. To be reinforced by statements by individual Cabinet secretaries (Reno, Babbitt, Reich, and perhaps David Kessler (FDA)).
- c. Schedule: March 18

3. Summary of Legal Implications of Existing Legislative Proposals

A short analysis is needed on the specific legal implications of the major legislative proposals that have been made to address this issue: what do they propose, and how would they affect current law?

a. Assignment: Mike Heyman (DOI) and DOJ Office of Legal Counsel.

b. Schedule: Due February 28.

4. Federal Economic Impact Analysis

The dominant legislative proposals that have been made would have a profound effect on Federal budgets, and if made applicable to the states through the operation of the 14th amendment, would have similar effects on state and local budgets. An economic analysis of the impact of these proposals will be required to drive the point home that a vote for these proposals will bankrupt Federal and state governments. If warranted by the language, these proposals (particularly H.R. 1388) should be construed broadly to reach any Federal action affecting any property rights (i.e. patent rights, etc.) and not just real estate, to ensure that the full economic impact is recognized.

a. Assignment (Federal Impacts): OMB, CIA.

b. Schedule: March 11th for estimate on Federal fisc.

fiscal costs

5. Federal Regulatory Impact Analysis

Implementation of many of the pending legislative proposals could have significant impacts on the operation of governmental regulatory programs designed to protect important public values such as public health and safety. An analysis of these potential impacts should be prepared.

a. Assignment: OMB/OIRA

b. Schedule: March 11th

6. Congressional Analysis and Outreach

The Administration must undertake an effort to educate Members of Congress on the implications of these proposals. That effort, which will be time-consuming, may include one or two blanket mailings to set out the Administration position. However, more detailed efforts should focus on those Members who have demonstrated themselves to be swing votes on the issue. Legislative experts within the agencies and the White House should analyze the relevant voting records and develop a set of recommendations on which Members might be important to contact. Also, an effort needs to be undertaken to encourage Members who may represent the proper viewpoint to engage them actively and on a sustained basis in the effort to persuade their colleagues, and to assist them in this endeavor.

a. Assignment: DOI and EPA Legislative Affairs, WH Legislative Affairs.

b. Schedule: February 28 for initial determination of swing votes

7. State Legislative Analysis

Thirty states have considered various legislative takings proposals, which will constitute an important source of experience on the subject. A detailed analysis of those state records should be undertaken to identify what themes work and don't work. Further, the analysis should gather information on state and local economic and regulatory impacts for purposes of the above report. Finally, the analysis should yield a wealth of information on individuals within the states who might be willing to participate in Federal activities.

- a. Assignment: Coordinated by American Resources Information Network
- b. Schedule: March 11 for initial report.

8. State Economic Analysis

Just as these "takings" proposals might dramatically affect the Federal budget, so too might they bankrupt state and local budgets. A major effort should be undertaken to analyze selectively the impacts of the proposals on individual states. This analysis, together with the state legislative analysis, should assist in identifying the key Members who should have an interest in the information.

- a. Assignment: Coordinated by American Resources
- b. Schedule: March 11 for initial report

9. Communications

A major effort should be undertaken to develop a legislative and general communications strategy to convey the necessary information to the proper audiences. A communications strategy should: (1) develop the baseline information; (2) develop and convey the proper anecdotes on the subject; (3) identify major public figures who might lend a hand; (4) identify media markets of greatest interest; (5) etc.

- a. Assignment: DOI/EPA with input from all interested agencies and White House offices
- b. Schedule: Ongoing

10. Coordinating Constituency Activities

The many outside constituencies which have an interest in this subject will be engaging in complementary activities. Those groups should be encouraged to establish a regular meeting, typically held weekly, to coordinate these activities and to ensure that they are mutually reinforcing.

- a. Assignment: Coordinated through American Resources
- b. Schedule: Check with current schedule of American Resources' meetings.

Distribution:

Jack Quinn
Greg Simon
Kumiki Gibson
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Ellen Seidman
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DRAFT

EXECUTIVE ORDER
PRIVATE PROPERTY RIGHTS

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that Executive department and agency decision-making comports with existing law interpreting the Just Compensation Clause of the Fifth Amendment to the United States Constitution, the regulatory reform initiated by Executive Order No. 12866, entitled "Regulatory Planning and Review," and the principles stated herein, it is hereby ordered as follows:

Section 1. Statement of Purpose. Private ownership and use of property is a cornerstone of this country's Constitutional heritage, historical tradition and economic growth. The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. The federal government must be vigilant in recognizing its responsibility in this fundamental protection afforded private property rights.

Principles of good government and sound management of the federal government's limited fiscal resources require that government decision-makers evaluate carefully the effect of their ~~administrative, regulatory, and legislative~~ actions on constitutionally protected property rights. Such assessment must be made to ensure that agency actions have the minimum possible impact on private property consistent with the government's

obligation to protect and improve the health and safety of our citizens and their environment.

Even when a government action does not constitute a taking under the Fifth Amendment, the government nevertheless has an obligation to treat all citizens fairly and reasonably, and to act in the least intrusive way in order to minimize unnecessary impact on private property.

The purpose of this Order is to ensure that Executive departments and agencies (hereafter collectively "agency" or "agencies") evaluate the constitutional implications arising from the Just Compensation Clause of the Fifth Amendment when planning and implementing government actions to ensure that the Federal government's Constitutional obligations are recognized, evaluated, and fulfilled. It is also the purpose of this Order to ensure that legitimate government objectives be implemented in a manner that seeks to minimize unnecessary adverse impact on property owners even if those government actions do not constitute a taking under the Just Compensation Clause.

Sec. 2. Definitions. For purposes of this Executive Order: (a) "Actions" refers to proposed Federal regulations, proposed Federal legislation, and actions taken pursuant to Federal law. It includes, but is not limited to, federal regulations that propose or implement licensing or permitting requirements.

(b) "Policies that have takings implications" refers to actions

that if implemented or enacted, could effect a taking pursuant to the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

(c) "Private property" refers to all property protected by the Just Compensation Clause of the Fifth Amendment.

Sec. 3. General Principles. In formulating or implementing policies that have takings implications, each agency shall:

(a) Consider the obligations imposed by the Just Compensation Clause of the Fifth Amendment to ensure that all governmental actions are in compliance with that Constitutional requirement.

(b) Seek opportunities to reduce the risk of unnecessary or inadvertent burdens on the public fisc resulting from lawful government actions triggering valid Just Compensation claims.

(c) Attempt to minimize the extent of any impact of an agency's action upon private property, consistent with achieving the lawful goal of the government action, even if such action does not constitute a taking.

(d) Avoid unnecessary delays in decision-making that impact on private property owners, even though such delay does not constitute a taking.

(e) When requiring a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, carefully tailor any conditions imposed upon the granting of a permit to minimize any unnecessary burdens on private property caused by such conditions, whether or not such burdens constitute a taking.

Sec. 4. Agency Action. (a) Before taking any action which in the agency's judgment has takings implications, in order to support informed evaluation of takings issues, each agency shall perform the following analyses, and shall provide such analyses as part of any submission required to be made to the Office of Management and Budget:

- (1) an assessment of the likelihood that the proposed action or policy may effect a taking for which compensation is due;
- (2) an estimate of the potential cost to the government in the event that a court later determines that the action constitutes a taking;
- (3) identification of reasonably feasible alternatives, if any, to the proposed policy or action, identified by the agencies or the public, which also achieve the government's purpose but would not affect a taking, and an explanation^{of} why the planned action is preferable to

the identified potential alternatives.

(b) Each agency shall designate the Regulatory Policy Officer, appointed pursuant to Executive Order No. 12866, as the official to be responsible for ensuring compliance with the Order with respect to the actions of that agency.

Sec. 5. Agency Guidance. (a) The Regulatory Working Group, established by Executive Order No. 12866, shall serve, as necessary, as a forum to assist agencies in addressing regulatory issues involving takings implications.

(b) The Department of Justice ("DOJ") shall provide legal guidance, in response to an agency's request, to assist the agency in complying with this Order. DOJ shall respond to such requests within 21 days of receipt of an agency's request.

Sec. 6. Reporting Requirements. (a) Agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A takings award has been made or a takings claim is pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in each fiscal year and all such pending claims shall be submitted to the Director, Office of

Management and Budget and to the Attorney General on an annual basis beginning October 1994.

(b) Each agency shall submit on an annual basis beginning in October 1994 to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601.

Sec. 7. Revocation. Executive Order No. 12630, and guidelines and other directives issued pursuant thereto, are hereby revoked.

Sec. 8. Judicial Review. This Order is intended only to improve the internal management of the Executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

THE WHITE HOUSE,

March ____, 1994

THE WHITE HOUSE
WASHINGTON

December 14, 1993

MEMORANDUM FOR LINDA LANCE & KUMIKI GIBSON

FROM: Peter Yu

SUBJECT: Comments on Executive Order 12630

This memorandum summarizes my initial reactions to E.O. 12630, discussing both substantive and strategic considerations.

Legal Analysis. The substantive requirements of the E.O. seem to me largely unproblematic in that they are largely coextensive with constitutional standards. The only section I find troubling is § 4(a). That section provides in part that

any conditions imposed on the granting of a permit shall

- (1) Serve the same purpose that would have been served by a prohibition of the use or action; and
- (2) Substantially advance that purpose.

The "[s]ubstantially advance" requirement simply reiterates existing law (which dates back at least to *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). How that phrase is applied in various cases is a matter of some controversy, but the words themselves are unproblematic.

Section 4(a)(1) is more troubling. That section, which seems to have its origins in the *Nollan* decision, suggests that it is not enough that a condition serve a legitimate state purpose, but that it serve the *same* purpose as *denial* of the permit would serve. Thus, while the Nollans' new house might block the view of the ocean *from the street*, a beachfront easement would not serve to redress *that* problem--while a visual easement from street to shore would. Under this standard, an agency could condition a permit to fill wetlands on certain protections of the site's groundwater, but could not condition the permit on the clean-up of some other, unrelated groundwater problem (e.g., groundwater at a different site or contaminated by a different source). Thus a narrow reading of this requirement would be in some tension with the tradeable-permits scheme now being tested in several regulatory regimes.

Section 4(a)(1) reflects one reading of *Nollan*. Others (including myself) read *Nollan* more narrowly, to stand for the proposition that the "same purpose" test applies only to cases in which the condition imposed is an easement or some other physical occupation. Read this way, *Nollan* is an extension of *Loretto*, not a revision of *Agins*. Replacing the broader interpretation

of *Nollan* with the narrower interpretation appears, at my first reading, to be our primary legal problem with the E.O.

Policy Analysis. As a policy matter, E.O. 12630 raises at least two distinct questions: (i) is it desirable to reiterate constitutional obligations in an Executive Order, and (ii) assuming we do so, are the mechanisms for "operationalizing" those obligations sound.

With regard to the first, I generally believe it undesirable to restate either statutory or constitutional obligations in an Executive Order. Such restatements are superfluous and create risks of differential interpretations of obligations under the Order and other laws, and--particularly in an area such as takings law that is in flux--impose significant transition costs. Thus, if we were writing on a blank slate, I would argue against an Executive Order on takings.

Assuming one were to have such an Order, the mechanisms set forth in the E.O. are neither attractive nor inherently flawed. The Takings Impact Analysis, while a variation on a traditional theme, is not a particularly elegant way to address takings concerns, and can be quite cumbersome. At the same time, however, there is some risk that agencies will discount the risk of takings--both in terms of litigation costs and out-year liability--and thus it is reasonable to impose a "think-before-you-act" requirement. In short, while I believe an Executive Order is generally not desirable, the current E.O. is not, in policy terms, untenable.

Strategic and Tactical Considerations. Based on the political assessments offered at the last two meetings, it seems best (i) not to disturb the E.O., (ii) to convince the wise-use groups of the Administration's seriousness about the E.O., and (iii) to contain the effects of the E.O. This path would reduce the risk of codification of the E.O., while at the same time reducing the anxiety of environmental and other groups.

Toward these ends, a two-part strategy might be pursued. In general, the approach would emphasize that we believe the E.O. to be simply a restatement of constitutional obligations--no more and no less. As a first step, we might correct the issues raised by § 4(a)(2) by amending the guidelines rather than by amending the E.O. One way to do this would be to craft guidelines that made clear that the word "purpose" in § 4(a)(1) should be interpreted *broadly*. Under this approach, the "purpose" of the condition on the wetland permit discussed above would be "to maintain and improve the quality of groundwater supplies." Conditioning the permit would then serve the same purpose as denying the permit--namely, maintaining and improving the quality of groundwater supplies.

It is likely that the wise-use groups would view such a change alone as a retreat from the constitutional standard. Thus, to meet the requirements of *Nollan* (and mitigate the concerns of wise-use groups), we might also state in the guidelines that the "purpose" of a condition should be defined more narrowly when the condition involves a physical occupation. This is basically the "unconstitutional conditions" reading of *Nollan*: the government cannot condition a permit on something that would otherwise be unconstitutional--that is, a physical occupation without

just compensation.

As a second part of this strategy, in order to demonstrate that the E.O. was alive and well and codification unnecessary, we might begin *immediately* enforcing the E.O. through OIRA. This should not be too difficult: a line or two summarizing takings analysis in each NPRM in the *Federal Register*. This would strengthen our case against codification by demonstrating that the E.O. was not dormant.

In sum, I believe these two steps would, at once, minimize any legal error in E.O. 12630, reduce the likelihood of codification, and minimize political dissatisfaction surrounding this issue.

cc: Jack Quinn
Greg Simon
Sally Katzen
Joe Stiglitz
Ellen Seidman
Paul Weinstein
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The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?

by James M. McElfish Jr.

In its final year before the 1988 election, the Reagan Administration has issued a number of pronouncements attempting to cement in place several of the doctrinal changes it has wrought in the regulatory landscape over the past eight years. This recent efflorescence has included two sweeping executive orders—one on "Federalism," designed to consolidate and ratify the "New Federalism" philosophy announced in the Reagan first term,¹ and another setting out limits upon federal regulation, entitled "Government Actions and Interference With Constitutionally Protected Property Rights."² This latter Executive Order, while premised on "takings" jurisprudence under the Fifth Amendment, is more fundamentally a restatement of the Administration's core political philosophy of minimizing the intrusiveness of federal regulation upon private interests.³

The "takings" Executive Order is purportedly a response to two recent Supreme Court decisions—*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*⁴ and *Nollan v. California Coastal Commission*.⁵ But it goes beyond the holdings in either decision to prescribe for the federal government a strict regime of regulatory self-restraint. The Order has three features that will make the task of regulation more difficult. These are: (1) the Order's requirement that agencies prepare and submit to the Office of Management and Budget (OMB) takings implication assessment documents with proposed governmental actions that may affect private interests; (2) the requirement that no action be taken to regulate use of property unless the restriction or condition imposed will "substantially advance" the "same" governmental purpose as an outright governmental prohibition of the use or activity; and (3) the requirement that governmental regulation of any private property use may not be "disproportionate" to that use's contribution to the "overall problem" that the regulation is designed to redress.

A further feature of the Order should prove illuminating. The Order requires federal agencies to report on previous regulatory "takings" adjudications, and to update that information annually. This requirement should aid governmental decisionmakers by illustrating how seldom federal regulation is found to create a compensable "taking" within the meaning of the Fifth Amendment to the Constitution.

Mr. McElfish is a Senior Attorney at the Environmental Law Institute.

1. Exec. Order 12612, 52 Fed. Reg. 41685, ELR ADMIN. MATERIALS 45035 (Oct. 30, 1987). See Symposium, *The New Federalism in Environmental Law: Taking Stock*, 12 ELR 15065 (1982).
2. Exec. Order 12630, 53 Fed. Reg. 8859, ELR ADMIN. MATERIALS 45037 (Mar. 18, 1988).
3. Marzulla, *The New "Takings" Executive Order and Environmental Regulation—Collision or Cooperation?*, 18 ELR 10254 (July 1988) discusses the Order, drafted by the President's Task Force on Regulatory Relief. Assistant Attorney General Marzulla emphasizes the jurisprudential basis for the Order, portraying it simply as the logical governmental response to two Supreme Court decisions discussed *infra*.
4. 107 S. Ct. 2378, 17 ELR 20787 (1987).
5. 107 S. Ct. 3141, 17 ELR 20918 (1987).

The Takings Implication Assessment

The Executive Order provides that, with certain enumerated exceptions, federal agency heads must evaluate the takings implications of proposed federal policies and actions—including proposed legislation and regulations—that affect or may affect the use of or interests in private property.⁶ The primary vehicle for this evaluation is the "takings implication assessment" (TIA).⁷ The TIA is another regulatory "hoop" for governmental regulators. It resembles the Regulatory Impacts Analysis (RIA) already required under Executive Order 12291, which was the Reagan first term effort designed to gain control over the federal bureaucracy in order to prevent perceived over-regulation.⁸ The TIA is an additional requirement designed to make agencies take a "hard look" at their proposed policies, actions, and regulations affecting private interests. It must be included in any submissions to the Office of Management and Budget—already required by Executive Order 12291—and undoubtedly will give OMB further control over regulations and policy decisions.

As both the Executive Order and the Justice Department Guidelines interpreting the order make clear, the TIA dictates a policy choice of the alternative that poses the "least risk" to private interests.⁹ This is an interesting variation of risk assessment, which Congress more typically structures so as to compel the agencies to adopt policies and regulations that produce the least risk to *public* interests (i.e., health, safety, environment).¹⁰

The TIA must analyze the extent to which the proposed action will interfere with private property interests, applying the "governmental purpose" and "proportionality" tests discussed *infra*. In addition, it must arrive at a dollar "estimate" of the potential Tucker Act liability of the government should the action, legislation, or regulation be found to be a taking. Interestingly, this latter requirement only applies to "proposed action[s] regulating private property use for the protection of public health or safety."¹¹ This is probably due to a drafting error in the Order

6. The Order exempts actions abolishing regulations, discontinuing governmental programs, or modifying regulations in order to lessen restrictions on the use of private property. It also exempts various law enforcement and military-related functions, planning and research, and communications with state or local land-use planning agencies. Exec. Order §2, ELR ADMIN. MATERIALS 45037.
7. This is the term coined by the Justice Department in its "Guidelines" implementing the Executive Order under §1, ELR ADMIN. MATERIALS 45037. Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings 21 (June 30, 1988), ELR ADMIN. MATERIALS 35172 [hereinafter Guidelines].
8. 3 C.F.R. §127, ELR ADMIN. MATERIALS 45025 (Feb. 17, 1981).
9. Guidelines, *supra* note 7, at 2, ELR ADMIN. MATERIALS 35168 ("In those instances in which a range of alternatives are [sic] available, each of which would meet the statutorily required objective, prudent management requires selection of the least risk alternative.")
10. For example, Congress required that the primary national ambient air quality standards (NAAQSs) Clean Air Act under §109 provide for protection of public health with an "adequate margin of safety." 42 U.S.C. §7409, ELR STAT. CAA 007. Compare Safe Drinking Water Act §1401, 42 U.S.C. §300f, ELR STAT. SDWA 41102.
11. Exec. Order §4(d), ELR ADMIN. MATERIALS 45038. Assistant Attorney

itself; the Justice Department's Guidelines make no such distinction. Under the Order as issued, however, regulatory actions aimed at the general public "welfare" (as opposed to health and safety) are arguably subject to *less* internal scrutiny.¹²

The TIA process is peculiar in a number of ways. First, it will clearly require a great deal of staff time to implement. The agencies are even now engaged in drafting their "supplemental guidelines" under §5(e)(2) of the Order in cooperation with the Department of Justice. The agencies are attempting to develop valuation methodologies and internal guidance for the implementation of the ongoing TIA requirements. Staff economists and policymakers are devoting considerable efforts to this task. An agency official must be designated as the TIA compliance official. Each future rulemaking package, policy, legislative proposal, and other action must be accompanied by a completed TIA. When added to the existing RIA requirements, Paperwork Reduction Act requirements, small business impact analyses, National Environmental Policy Act (NEPA) obligations, and internal agency and OMB review, the TIA may well be the innovation that finally paralyzes the federal bureaucracy.

Second, the TIA appears to run counter to the protection of the public fisc. The creation of documents in the rulemaking record, or permit or policy record, that (1) actually assess takings possibilities in terms of "likelihoods" that these actions will be found to be takings, and (2) "estimate" probable dollar exposures, can only encourage litigation challenging those governmental actions that do occur and those regulations that are adopted.¹³ The assertion that the TIA and related materials are pre-decisional documents will not necessarily protect them from disclosure in civil discovery.¹⁴ Although the Executive Order contains the usual *caveat* that it is "not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States,"¹⁵ the government's own estimates set forth in the TIA will

General Marzulla appends the words "or for other purposes" outside the quotation marks in his discussion of the TIA requirement under this section. See Marzulla, *supra* note 3, at 10258.

12. This contrasts with the usual takings analysis employed by the courts, wherein health and safety regulation receives *greater* deference than measures aimed at the general public "welfare." *E.g.*, *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S. Ct. 1232, 17 ELR 20440 (1987). Of course, if the omission of "welfare" in this section of the Order were deliberate, it may be that the Administration intended its agencies to apply greater scrutiny precisely in those areas where it knew the courts would not. It is most probable, however, that the Order was drafted with less care than it might have been and that all actions were intended to be subject to the same basic TIA requirements, relying on §5(b) of the Order, ELR ADMIN. MATERIALS 45038.
13. Indeed, under the Order the estimated dollar value must be assigned even if the risk of a takings finding is deemed to be low. See, *e.g.*, Guidelines, *supra* note 7, at 22, ELR ADMIN. MATERIALS 35173. This requirement creates potentially adverse material in the administrative record should someone subsequently bring a Tucker Act claim challenging the governmental action. Given that most regulatory and permitting activity is *required* by statute, the rules will be adopted and actions will be undertaken. They will merely hereafter be accompanied by documents potentially beneficial to private litigants.
14. Assistant Attorney General Marzulla suggests that the TIA will "normally" be exempt from production under the Freedom of Information Act, 5 U.S.C. § 552, ELR STAT. ADMIN. PROC. 011. Marzulla, *supra* note 3, at 10258. Like the RIA, however, the TIA will be part of the rulemaking record, and hence discoverable in actions challenging the federal rules.
15. Exec. Order §6, ELR ADMIN. MATERIALS 45039.

clearly be at least evidentiary in any action challenging a federal regulation, permit condition, or permit denial as taking in violation of the Fifth Amendment. It is likely that the Department of Justice lawyers handling the Tucker Act dockets will not find their task simplified by the existence of TIAs assessing the likelihood of takings findings and assigning a probable value.¹⁶

The "Substantially Advances" the Governmental Purpose Provisions

The Executive Order contains provisions that require that governmental agencies restrain themselves from marginal improvements in public health, welfare, and safety. It provides:

When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

- (1) Serve the *same purpose* that would have been served by a prohibition of the use or action; and
- (2) *Substantially advance* that purpose.¹⁷

* * *

Before undertaking any proposed action regulating private property use for the protection of public health and safety, the Executive Department or agency involved shall . . . :

- (2) Establish that such proposed action *substantially advances the purpose* of protecting public health and safety against the specifically identified risk.¹⁸

These provisions purport to find their basis in the "nexus" requirement enunciated by the Supreme Court in *Nollan v. California Coastal Commission*.¹⁹ In *Nollan*, the Court held that the California Coastal Commission's attempt to require private property owners to convey a public access easement across their beachfront as a condition of receiving a building permit gave rise to a taking. In its analysis the Court said that if an outright ban on an activity were sustainable as a noncompensable exercise of the police power, a less burdensome condition could also be upheld (and not give rise to a taking) if it served "the same governmental purpose" as the ban. The Court also referred to the "substantially advance the legitimate state interest" language found in *Agins v. City of Tiburon*,²⁰ stating that "we are inclined to be particularly careful about the adjective where the actual conveyancing of property is made a condition to the lifting of a land use restriction."²¹ Ultimately, the Court concluded that there was

16. An additional peculiarity of the TIA process is that the designated Justice Department official for overseeing agency implementation (and who must be notified of the agency officials responsible for ensuring compliance with the Executive Order) is the Assistant Attorney General for the Lands and Natural Resources Division, rather than the Assistant Attorney General for the Civil Division. Guidelines, *supra* note 7, at 21, ELR ADMIN. MATERIALS 35172. One would expect that most regulatory defenses and the majority of the Tucker Act docket would be handled by the latter official. Clearly, the chief impetus for this Executive Order has come from Administration desires to control undue environmental and natural resources regulation.
17. Exec. Order §4(a), ELR ADMIN. MATERIALS 45038 (emphasis added).
18. Exec. Order §4(d), ELR ADMIN. MATERIALS 45038 (emphasis added).
19. 107 S. Ct. at 3147, 17 ELR at 20921. See Marzulla, *supra* note 3, at 10257.
20. 447 U.S. 255, 10 ELR 20361 (1980).
21. 107 S. Ct. at 3150, 17 ELR at 20922.

an insufficient nexus between the Commission's presumed lawful ability to preserve visual access by denying the building permit outright, and its attempt to condition the permit in order to preserve lateral physical access (i.e., by requiring conveyance of an easement).

The Executive Order, however, goes well beyond the "nexus" requirement in *Nollan* in circumscribing federal permitting and health and safety regulation. It requires that if a condition is imposed it *must* serve the "same" purpose as a denial of a permit or prohibition of the activity, and that the condition or governmental regulation must "substantially advance" that purpose.²² In effect, the Order does not countenance either indirect regulation of activities, or the imposition of "optional" conditions.

Regulation and permitting actions, however, commonly include conditions that do not advance the "same" purpose as that which would be served by a denial or outright prohibition of a given activity. For example, government regulations may effectuate secondary purposes, or be designed to induce an unrelated but desired behavior (e.g., tax regulations imposing nondiscrimination requirements upon tax-exempt institutions; or Fair Labor Standards provisions applicable to government contractors). Licensing or permitting regulations also may have requirements or conditions that do not serve the same purpose as a "denial" of the license or permit (e.g., "fairness doctrine" requirements that broadcasters provide air time at no cost for responses on controversial issues).²³ A regulation need not serve the same purposes as a prohibition to be sustainable.

Similarly, many permits have conditions aimed entirely at providing greater ease in governmental oversight and enforcement. Specifications of reporting requirements, site access, monitoring equipment and monitoring frequency, for example, do not necessarily serve the "same" purpose as a "prohibition" of the regulated activity. Indeed, less intrusive provisions could probably be devised at less cost to the permittee and greater cost to the government (e.g., the government could conduct all sampling). Nevertheless, these enforcement-based conditions plainly satisfy the nexus test of *Nollan*.

The problem with the version of the nexus requirement set forth in the Executive Order is even more apparent when the "substantially advance" component of the requirement is examined. Many common permit provisions marginally advance the underlying governmental purpose, to the greater protection of the public health, safety, and welfare. Yet the Order states that "any" condition must not only serve the same purpose as a denial but must also "substantially advance" that purpose. This policy requirement may, in truth, be aimed at preventing the imposition of "nickel and dime" conditions upon hapless permittees by presumed overzealous governmental regulators. But it does not plainly flow from the *Nollan* decision.

22. In *Nollan*, the Court did not say that sustainability of a ban on an activity was the only test for a regulation or restriction. Indeed, many regulations are sustainable precisely because they are *not* a ban (or substitute therefor)—e.g., many regulatory permit schemes are sustainable, while an outright prohibition of the permitted activities might constitute a taking. The "nexus" requirement is only relevant where the claim is that the challenged action is less restrictive than a plainly lawful prohibition.

23. This example was, of course, itself the subject of deregulation efforts by the Administration prior to the recent "takings" decisions and Executive Order 12630.

The "substantially advance" language found in the majority opinion in *Nollan* is expressly drawn from *Agins v. City of Tiburon*. In *Agins*, the Court applied this standard to review a general zoning ordinance's effect on a parcel of property—viz. did the down-zoning of the appellants' property bear a substantial relationship to protection of public health, welfare, and safety? The Court found that the "general" scheme of regulation as applied to a particular property substantially advanced "legitimate state interests."²⁴ The substantiality test is not a requirement to conduct a condition-by-condition review of a permit to conduct a regulated activity. Rather it is used to evaluate the effect of the regulation as a whole. Thus, in *Nollan*, the Court held that the real effect of the challenged governmental action was to require conveyance of a public easement, and hence was not substantially related to the claimed public purpose.²⁵ The regulatory link between the scheme and the public purpose is the basis of the substantiality test. The Executive Order, however, looks not to the link between the overall regulatory scheme and a legitimate public purpose, but to condition-by-condition review.

In many permitting decisions, there are numerous permit conditions involved. Some of these "substantially advance" the governmental purpose that would be served by a permit denial. Other conditions contribute more marginally to advance the governmental purpose. The latter are not constitutionally suspect by virtue of their limited intrusiveness. They in fact serve to protect public health, welfare, and safety. For example, permit conditions that specify a network of 12 monitoring wells rather than the minimum of 4 around a RCRA hazardous waste management unit may add only marginally to the protection of the public health and safety. But the regulatory scheme *as a whole* serves a legitimate public interest. Yet the Executive Order expressly directs agency decisionmakers that "any" permit conditions must "substantially advance"—not merely advance—the governmental purpose. This is not required by the Supreme Court decisions. Indeed, to the contrary, the courts give substantial deference to agency expertise in setting permit conditions in matters of public health and safety.

Agency decisionmakers should not be hamstrung by a requirement to forego each and every condition that is not itself a "substantial" advancement of the underlying regulatory goal. Moreover, under the "takings" decisions the "substantiality" consideration is at most one *element* in deciding whether a given scheme of regulation goes "too far."²⁶ Other elements include whether or not economically viable uses of the property remain. The Executive Order, however, makes this element *determinative* of the regulatory choice—thus precluding certain governmental actions or decisions that are not takings at all. This outcome clearly owes more to a political philosophy of regulation than to a neutral understanding of "takings" jurisprudence or to preservation of the public fisc.

24. 447 U.S. at 260, 10 ELR at 20362.

25. In *Nollan*, the Court found it unnecessary to decide how "substantial" a fit existed between the potential building permit denial and the permit condition requiring the landowners to convey a public access easement, holding that "this case does not meet even the most untailored standards" for the nexus. 107 S. Ct. at 3147, 17 ELR at 20921.

26. "[I]f regulation goes too far it will be recognized as a taking." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

The Proportionality Requirement

The most unusual feature of the Executive Order is its creation of an entirely new requirement of "proportionality." The Order provides:

When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.²⁷

This provision is purportedly based on footnote four to the *Nollan* decision.²⁸ In that footnote Justice Scalia suggested that if the landowners in that case had been "singled out" to bear the burden of remedying a problem to which they had contributed no more than other coastal landowners, the governmental action at issue "might violate either the incorporated Takings Clause or the Equal Protection Clause."²⁹ This footnote is the jurisprudential underpinning for the new "proportionality" requirement.

But the proportionality (of a use's contribution to a public health, welfare, or safety problem vs. the solution of the problem) is not a takings issue at all. The proper inquiry is whether the state's action is a valid exercise of the police power—which must include its conformance to equal protection standards. Then, and only then, does the takings inquiry occur—*viz.* does this exercise of the police power destroy a distinct property interest so as to deny economically viable use of the property? The Court's hint that the legitimate governmental purpose of the regulation could be assessed by looking to whether certain costs should be borne by the public as a whole rather than a single property owner goes to whether there is a *scheme* plan of regulation (i.e., rather than a "spot zoning" form of taking). Where a neutral scheme or plan exists, the governmental action is less likely to be deemed a taking, despite its impact on particular pieces of property.³⁰ Also, despite the import of the Executive Order to the contrary, the Court did not use the term "proportional" or "proportionality" in *Nollan*. Proportionality is not a takings test.

The Executive Order postulates that regulations must "fit the crime"—i.e., by "fixing" only that part of the "overall problem" caused by the regulated property owner. This position, however, is contrary to virtually every form of police power regulation of property. For example, zoning laws typically regulate *future* uses, while those past uses which contribute "proportionally" to creation of the "problem" (e.g., overcrowding, loss of green space, in-

adequate transportation and sewage capacity) are allowed to continue. Similarly, governments often regulate that portion of the problem-causing activity that is easiest to correct, most cost-effective to correct, or that must be regulated first as a practical precondition to further action. For example, although point source discharges contribute far less to the pollution of U.S. waterways than non-point sources (such as agricultural runoff, road salt, etc.), they were regulated first—and more stringently—than their "contribut[ion] to the overall problem" of water pollution. The same is true for the strict regulation of commercial hazardous waste treatment, storage, and disposal facilities under RCRA. These are strictly regulated even though discharges of hazardous pollutants to sewer lines or land application of pesticides, which also contribute to the problem, are less strictly regulated. Oil and gas industry wastes were excluded from regulation as hazardous wastes under RCRA because of congressional judgments about the effect of such requirements upon the industry. Their exclusion means that other hazardous waste generators are bearing a "disproportionate" share of the cleanup and prevention responsibilities. Nearly every police power regulation falls disproportionately upon some segment of the industry, the general population, or property owners.³¹

Moreover, the very nature of governmental regulation requires that proportionality (i.e., fairness) be only one of many components considered in protecting the public health, welfare, and safety.³² The Executive Order, however, makes it determinative. By casting the issue in terms of the specific contribution to the "overall problem," the Order potentially thwarts creative, closely targeted, cost-effective solutions to serious problems of health, pollution, worker safety, and the like.

If applied, the new "proportionality" requirement will make rational regulation extremely difficult. The solutions to problems of public health, welfare, and safety are rarely mirror images of the conditions that led to their creation. Some forms of regulation or technical solutions for some contributing factors will remain unknown. Shall the government make no attempt—or only a "proportional" attempt—to solve a problem where certain contributing factors are beyond its reach? The Executive Order's requirement that government shall not burden any property owner with regulation beyond its own contribution to the "overall problem" reflects a political philosophy far more than a response to extant takings law.

The Beneficial Provision: An Inventory of Prior Regulatory Takings

Along with the three problematic provisions—the TIA, the "substantially advance" test, and the "proportionality" test—the Executive Order contains one very useful provi-

27. Exec. Order §4(b), ELR ADMIN. MATERIALS 45038.

28. See, e.g., Marzulla, *supra* note 3, at 10257 ("The *Nollan* decision contributes to the evolution of regulatory takings law by setting forth the principles of 'nexus' and 'proportionality'."). The Guidelines expressly rely on footnote 4 to the *Nollan* decision as creating the proportionality "principle." Guidelines, *supra* note 7, Appendix at 9, ELR ADMIN. MATERIALS 35177.

29. 107 S. Ct. at 3148 n.4, 17 ELR at 20920 n.4. The point was not expanded upon in the text, and the throwaway nature of the footnote was made clear both by Justice Scalia's use of the word "might," and the Court's further observation that "that is not the basis of the *Nollan*'s challenge here." *Id.*

30. See, e.g., Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 8 ELR 20528 (1978), cited in *Nollan*, 107 S. Ct. at 3146, 17 ELR at 20920 (upholding scheme of historic preservation against challenge that it "took" individual structures for the benefit of the public).

31. A proportionality standard is inconsistent with technology-based solutions as well. If we can achieve meaningful air quality improvements through reducing emissions by 90 percent from a class of industry, but such industry is only 20 percent responsible for the "overall problem" of air pollution, shall we limit our regulation of that industry so that we achieve no more than 20 percent of our overall reduction by regulating its emissions?

32. The proportionality feature of the Order is in some respects reminiscent of the recent Superfund Amendments and Reauthorization Act debate on who should pay for Superfund—manufacturers or chemical companies.

sion. It requires all departmental and executive agency heads to submit to the Office of Management and Budget by May 16, 1988, an "itemized compilation" of all takings awards made against rules and regulations of the respective agencies in Fiscal Years 1985, 1986, and 1987.³³ Such compilations are thereafter to be updated annually.³⁴

The value of this provision is that it should reveal the limited scope that the "takings" clause plays in ordinary governmental regulation and permitting. Claims dockets may be high, but actual awards against regulatory programs are infrequent and low. The data show that Executive Order 12630 is largely a philosophy of regulation built on a slim factual and jurisprudential foundation.

According to OMB, in response to a request under the Freedom of Information Act, the "takings" reports filed by the agencies pursuant to the Executive Order show *no* regulatory takings awards against the government in fiscal years 1985, 1986, and 1987. For its part, the Land and Natural Resource Division of the Justice Department filed its entire Tucker Act "takings" award figures for those three years. These were \$23.1, \$5.5, and \$20.2 million, respectively. Of these figures, the vast majority were traditional nonregulatory takings.³⁵ There is no substantial

record of takings by permit or regulation. Thus, the rationale of protecting the federal treasury through the Executive Order is unsupported by the data or recent judicial experience. The recent and continuing flurry of procedures, guidelines, economic analyses, and the like under the Order has undoubtedly already exceeded in cost the successful takings claims likely to be avoided.

This factual record makes it difficult to assess the effect, if any, of the Executive Order in avoiding future claims and awards. If, as is apparent, most or all regulatory takings claims are currently unsuccessful, then it is also apparent that even without the Executive Order the government has not engaged in significant regulation taking private property without just compensation. The claimed prophylactic effect of the Executive Order is unnecessary. As a result, it is difficult to understand why the Order has been issued at all, except as a statement of regulatory philosophy—or as a technical means of slowing the pace of regulation. It has little to do with judicial realities in defending governmental actions against private claims.

undation of private property by federal dams. Of the \$23.1 million listed for fiscal year 1985, \$21.0 million fit into these traditional takings categories. Likewise, \$4.1 million of the \$5.5 million in fiscal year 1986, and \$14.1 million of the \$20.2 million in fiscal year 1987 plainly fit into these categories. The remainder of the claims, with few exceptions, were simply not sufficiently characterized to permit a clear assessment as to whether any might be deemed "regulatory" takings. The bulk of the unclassified amount for fiscal year 1987 is a \$5.5 million settlement for cancellation of the Fort Chafee oil and gas leases, which might conceivably be a one-time regulatory taking.

33. Exec. Order §5(c), ELR ADMIN. MATERIALS 45038.

34. Exec. Order §5(d), ELR ADMIN. MATERIALS 45038.

35. The takings awards and settlements listed by the Department of Justice involved property claims related to inclusion of lands within national park and wilderness area boundaries, claims against the government by its lessors and contractors, and claims involving in-



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December 19, 1988

TO : Hon. Walter B. Jones
Hon. Jack Brooks
Hon. John Dingell
Hon. Morris K. Udall
Hon. Glenn M. Anderson
Hon. Gerry Studds
Hon. Mike Synar
Hon. E. (Kika) de la Garza
Hon. George Miller
Hon. Bruce F. Vento
Attention: Don Barry, Will Stelle
House Comm. on Merchant Marine and Fisheries

FROM : American Law Division

SUBJECT : Comparison of Taking Principles in Executive Order No. 12630 with Supreme Court Taking Jurisprudence, and Related Questions

You have asked, by letter dated July 22, 1988, for an analysis of (a) the degree to which the constitutional taking principles enumerated in Executive Order No. 12630 accurately reflect those set forth by the United States Supreme Court, (b) whether there is legal justification for the especially restrictive treatment accorded public health and safety programs in the Order, and (c) how the Order might affect federal environmental programs.

Executive Order No. 12630, titled "Government Actions and Interference with Constitutionally Protected Rights," was signed by President Reagan on March 15, 1988.¹ Its stated purpose is to assist federal departments and agencies in gauging the taking implications of their actions, with a view toward "due regard for the constitutional protections [of private property] provided by the Fifth Amendment" and "reduc[ing] the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental

¹ 53 Fed. Reg. 8859 (March 18, 1988).

action."² In the brief period since its issuance, the Order has already been the subject of extensive comment.³

We consider each of your questions in turn. Reference to the Department of Justice Guidelines mandated by the Executive Order⁴ is made only where the Guidelines significantly illuminate or alter the meaning of the Order.

Comparison of Executive Order and Supreme Court Taking Precepts

The "General Principles" Section

Principles of taking law are asserted in Executive Order 12630 primarily in section 3, calling for Executive departments and agencies to be "guided by ... general principles," and in section 4, commanding those same departments and agencies to "adhere, to the extent permitted by law, to the following criteria." Here we discuss the "general principles" of section 3; following, the "criteria" of section 4.

As a threshold matter, we note that several of the Order's general principles take the form: such-and-such government action "may" be a taking. "May," of course, covers a multitude of sins, ranging from almost never to near certain -- making the general principles somewhat elusive targets, even as explicated in the Guidelines. In the following, we read "may" to mean "of more than minimal probability."

1. "Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property ... may constitute a taking." Exec. Order § 3(b).

This is undoubtedly true. The Supreme Court has repeatedly characterized the right to exclude others from one's property as among the

² Exec. Order No. 12630 § 1(c).

³ A Reagan Administration defense of the Order is contained in an article by the Assistant Attorney General for the Justice Department's Lands and Natural Resources Division, where the Order and implementing Guidelines reportedly originated. Marzulla, *The New "Takings" Executive Order and Environmental Regulation -- Collision or Cooperation?*, 18 Env'l Law Rptr. 10254 (July 1988). Articles critical of the Order are Jackson and Albaugh, *A Critique of the Takings Executive Order in the Context of Environmental Regulation*, 18 Env'l Law Rptr. 10463 (Nov. 1988), and McElfish, *The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?*, 18 Env'l Law Rptr. 10474 (Nov. 1988).

⁴ Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, issued June 30, 1988 (unpublished).

most precious strands of the "bundle of sticks" (rights) making up the concept of property.⁵ Hence, physical intrusions of property by government traditionally have been considered "of an unusually serious character,"⁶ and are more likely to be deemed takings than "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."⁷ Indeed, in using the ambiguous "may" the Order *understates* the chance of a taking holding as regards one subset of physical intrusions: "permanent physical occupations." These, the Supreme Court has declared, are *always* a taking, regardless of the importance of the public interest asserted or the physical extent of the occupation.⁸ By contrast, mere temporary "physical invasions" may or may not be takings, depending on a balancing of the invasion's frequency and impact against the governmental interest underlying it.

2. "[R]egulations imposed on private property that substantially affect its value or use ... may constitute a taking." Exec. Order § 3(b).

This statement is overbroad, both as to "value" and as to "use." Supreme Court decisions indicate that government regulations generally must do more than "substantially affect" value or economic use, but must eliminate them totally, before a taking will be discerned based chiefly on either of these factors. Though "substantially" is not defined in either the Order or the Guidelines, the everyday sense of the term clearly encompasses lesser degrees of government interference with private property than the Court's taking threshold.

Beginning with "value," we note that the Supreme Court continues to cite as good law two of its early decisions in which government-caused reductions in property value of 90% and 75% provoked no substantive due process objections from the Court.⁹ More recently, the Court pointed out that its

⁵ *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3145 (1987) (citing earlier cases).

⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 433 (1982).

⁷ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1244 n.18 (1987), *quoting* *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 124 (1978).

⁸ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-438 (1982).

⁹ *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (90% reduction); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (75% reduction). Though, as noted, these are due process rather than taking decisions, they are cited as authority in the Court's recent taking analyses -- undoubtedly because
(continued...)

decisions sustaining local land-use regulations that are fairly within the police power "uniformly reject the proposition that diminution in property value, standing alone, can establish a taking."¹⁰ Lower federal courts are similarly unimpressed with reduction-in-market-value arguments by property owners.¹¹

Proponents of the diminution-in-value standard are fond of citing the words of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.¹²

Despite Justice Holmes, and despite more modern judicial lip service to the relevance of value loss,¹³ federal courts today are more likely to focus on whether a government restriction denies all economically viable use of land than on whether it results in an impermissibly large loss in market value.

As for "use," Supreme Court decisions in the land-use field assert that for a taking to occur, property must be deprived of *all* "economically viable"

⁹(...continued)

substantive due-process doctrine is the direct forbear of some latter-day taking jurisprudence.

¹⁰ *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 131 (1978).

¹¹ *See, e.g., Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir. 1987) (89% reduction in property value effects no taking); *William C. Haas v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (90% loss in property value effects no taking). *Cf. Q.C. Construction Co. v. Gallo*, 649 F. Supp. 1331, 1337 (D.R.I. 1986) (taking occurred where land suffered 90% loss in value *and* only had passive use as an empty lot), *aff'd without opinion*, 836 F.2d 1340 (1st Cir. 1987).

¹² 260 U.S. 393, 413 (1922).

¹³ *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1248 (1987) ("Our test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains in the property").

use¹⁴ -- clearly a tighter standard than the Order's threshold that property use be merely "substantially affect[ed]." Outside the land-use arena, taking suits prompted by "substantially affected" property use are repeatedly rebuffed by the Court where plaintiffs fail to prove that reasonable return on investment is precluded under the challenged restriction.¹⁵ In this connection, the Court has stressed that eliminating a property's most profitable use -- arguably "substantially affecting" it -- is not without more a taking.¹⁶

3. "Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature." Exec. Order § 3(b).

The first clause of this quote, dealing with "less than ... complete" deprivation of use or value, may on one reading do no more than clarify the "substantially affects" phrase in quote number 2. If that is its intent, our analysis under quote number 2 applies and the quote here would appear to overstate the taking danger. If, on the other hand, the Executive Order is trying to explain that factors other than deprivation of value and economic use may work a taking even where value and economic use remain in the property, then it is correct. As noted elsewhere, the existence of a physical invasion, or possibly a use restriction not substantially related to a legitimate government interest, may bring about a taking even when considerable value or economic uses remain in a tract.¹⁷

The second portion of the quote, dealing with less-than-complete deprivation of separate and distinct "interests" in the same property, is also ambiguous. "Interests" could mean traditional less-than-fee interests in property such as easements, leaseholds, liens, life estates, mineral estates, water rights, and the like, rather than each individual use to which a property may lawfully be put. If so, then the second portion of the quote is

¹⁴ *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3146 (1987), quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

¹⁵ See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1247-1248 (1987); *Andrus v. Allard*, 444 U.S. 51, 66 (1979); *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 136 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

¹⁶ *Andrus v. Allard*, 444 U.S. 51, 66 (1979); *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962).

¹⁷ Another indicium of taking independent of remaining value or economic uses in the subject property has not been mentioned here. Elimination of an individual's right to pass on property to heirs is a *per se* taking, regardless of property uses available during the individual's life. *Hodel v. Irving*, 107 S. Ct. 2076 (1987).

certainly true, particularly if the deprivation it speaks of occurs through government appropriation. All the foregoing interests have been held property for taking-clause purposes,¹⁸ and governmental appropriation of any one is likely a taking per se, regardless of uses or value left to the property owner. If, on the other hand, "interests" extends to physical components of a tract of land, use of which is eliminated by regulation alone, then the quote goes beyond recognized taking principles. The Supreme Court has said twice that it will not countenance physical "segmentation" of a tract as a basis for arguing that even though economic uses remain elsewhere on a tract, any segment deprived of all economic use has been taken. The remaining-use test is to be applied to the property *as a whole*.¹⁹

The third portion of the quote, asserting that a taking is no less so by virtue of being temporary, is generally true. The Court has repeatedly held that if a government action constitutes a taking, it is no defense that the action's impact was short-lived.²⁰ In fact, the principle is crucial to the Court's recent stress on regulatory takings: if temporariness were a defense, government could invariably escape compensation liability by simply rescinding property restrictions found by a court to be a taking.

Notwithstanding, it deserves mention that the temporariness of a governmental interference with property may keep that interference from being viewed as a taking *in the first place*. For instance, a few overflights by government aircraft, or a few floods caused by government dams, are likely actionable solely in tort rather than as a taking.²¹ And some regulatory

¹⁸ See, e.g., *United States v. Welch*, 217 U.S. 333 (1910) (easements); *United States v. General Motors*, 323 U.S. 373 (1945) (leaseholds); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935) (real estate liens).

¹⁹ *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 130-131 (1978); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1248-1250 (1987). A four-justice dissent by Chief Justice Rehnquist in the latter case, however, appears to be accepting of segmentation.

²⁰ *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987) (summarizing cases).

²¹ In the leading overflight case of *Causby v. United States*, 328 U.S. 256, 266 (1946), the Court articulated the current standard: to be a taking, overflights by government aircraft must be "so frequent" as to be a direct and immediate interference with the use and enjoyment of land.

Similarly, flooding case law makes clear that where the flooding is not permanent, the taking plaintiff must at least be able to demonstrate that it is "inevitably recurring." *United States v. Cress*, 243 U.S. 316, 318, 328-329 (1917); *Amick v. United States*, 5 Cl. Ct. 426, 429-430 (1984). In practice, this standard has been read as meaning "sufficiently frequent": flooding that

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interferences of circumscribed duration, such as development and production moratoria with foreseeable termination dates, have been held not actionable under any legal theory.²²

4. "Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking." Exec. Order § 3(c).

This assertion fails to make clear that in most instances the judicial deference accorded government actions protecting public health and safety is not merely "broader," but almost total. The issue has a long history.²³ In 1887 the Supreme Court sustained against taking attack a state ban on the sale or manufacture of alcoholic beverages, noting that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot ... be deemed a taking."²⁴ In effect, the Court was advancing a categorical exception to taking liability for uses of state police power to curtail "injurious" use of property. Such a broad immunity appeared to be qualified in 1922, however, in *Pennsylvania Coal Co. v. Mahon*,²⁵ where the Court saw a taking in a state ban on coal mining that might cause subsidence of land on which certain structures were located. Still, *Pennsylvania Coal* involved special issues of contractual right and narrow private benefit, and an early-Sixties

²¹(...continued)

occurs at least annually is usually held a taking, while less frequent flooding is rarely so held.

²² See, e.g., *Union Oil Co. v. Morton*, 512 F.2d 743, 750-752 (9th Cir. 1975), discerning a taking where the Secretary of the Interior, after the Santa Barbara oil spill, suspended oil company operations under their leases for an indefinite period, rather than providing for termination of the suspension upon the occurrence of a specified future event. See also *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369 (D. Md. 1975), rejecting a claim by developers that a five-year-old county moratorium on sewer hook-ups was a taking.

²³ See generally R.J. Marzulla, *The New "Takings" Executive Order and Environmental Regulation - Collision or Cooperation?*, 18 Env'l Law Rptr. 10254, 10258-59 (1988).

²⁴ *Mugler v. Kansas*, 123 U.S. 623, 668 (1887).

²⁵ 260 U.S. 393 (1922). Justice Brandeis, in a dissenting opinion, would have reaffirmed the police-power exception.

decision of the Court again appeared to equate police-power abatement of noxious property use with taking immunity.²⁶

The modern view, first advanced in a 1978 dissent, is that there may be a "nuisance exception" to taking liability allowing government to prohibit without compensation property uses akin to common-law nuisances, even if those are the only economically viable uses of a property.²⁷ Critically, however, this nuisance exception is said not to be coterminous with the police power, but rather narrower.²⁸ Those government health-and-safety actions not addressed to nuisance-like activity remain fully subject to taking challenge, the Court implies, though even as to this group the historical deference of courts to government prohibitions of noxious property use makes takings unlikely.

In light of the above, the quote from the Executive Order seems to inflate greatly the taking danger where a government action "to protect public health and safety" takes aim at nuisance-like property uses. The Order speaks only of "broader latitude," whereas the modern Court appears to be fashioning an absolute, total exemption. Even as to government health-and-safety actions aimed at property uses *not* constituting nuisances, the Order could be more explicit as to just how small the taking danger is, given the longstanding deference of courts in this area.

5. "Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose." Exec. Order § 3(c) (immediately following quote #4 above).

This statement is cast as a directive, rather than as precepts of taking law. Nonetheless, the quote seems intended to at least embody such precepts – namely, that actions responding to "real and substantial" health and safety threats, "advanc[ing] significantly" such purpose, and "no greater than necessary" are less likely to be takings. Supreme Court taking decisions in the health and safety area, however, nowhere appear to state the foregoing precepts, and in some instances arguably contradict them.

The requirement that property interests not be infringed in the absence of "real and substantial" health and safety threats may have been drawn from

²⁶ Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

²⁷ Penn Central Transp. Co. v. New York City, 438 U.S. 104, 145 (1978) (Rehnquist, J. dissenting); Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1245 (1987).

²⁸ Keystone Bituminous Coal Co. v. DeBenedictis, 107 S. Ct. 1232, 1245 n. 20 (1987).

the Court's assertion in the land-use context that government regulation must advance "legitimate" governmental interests.²⁹ It is precarious, however, to extend taking criteria developed for evaluating comprehensive *land-use* control schemes to the health and safety area, one where greater judicial deference to government actions has always been shown. Moreover, it is certain that the Order's "real and substantial" represents a quantum leap beyond the Supreme Court's "legitimate."

The "advance significantly" phrase appears to have been extracted from the same Supreme Court taking decisions involving broad schemes for regulating land use. Thus, once again, its applicability to narrow property-use prohibitions directed at specific health and safety threats must be doubted. Moreover, it has been said that "no court has ever found that a taking has occurred solely because a legitimate state interest was not substantially advanced."³⁰

Finally, the "no greater than necessary" requirement seems indirectly contradicted by the Court's lax attitude toward questions of over- or under-inclusiveness with regard to land-use controls.³¹ In the less closely scrutinized area of health and safety regulation, it would be anomalous indeed for the Court to adopt a rigid "no greater than necessary" standard.

To be sure, the Court has articulated three interrelated principles that could be regarded as loosely undergirding the Order's implied precepts. These principles are (1) that the taking determination involves a balancing of public and private interests,³² (2) that proportionality of private burden and public benefit may be one factor in taking analysis,³³ and, most broadly, (3) that "fairness and justice" should underly all taking determinations.³⁴ Speculative inference from these very general rules, however, is scant justification for the Order's specific and peremptory directive. The Supreme Court to date has shown no taste in its taking decisions for fine dissection of the degree of threat to the public health and safety, or the precise probability that the

²⁹ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3146 (1987).

³⁰ *Loveladies Harbor, Inc. v. United States*, No. 243-83 L (Cl. Ct. Aug. 12, 1988).

³¹ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1243 n.16 (1987) ("That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it.").

³² *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980).

³³ *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 226 (1986); *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3147 n.4 (1987).

³⁴ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

government's chosen remedy will bring about a solution. Where the Court accepts that the government-imposed burden is rationally related to averting a plausible threat, that has ended the Court's inquiry and led it to sustain the remedy.³⁵

6. "While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use if [sic] interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred." Exec. Order § 3(d).

The first assertion, that "undue" delays in government decision-making can be takings, is misleading in suggesting that this is an established principle of federal taking law. In fact, the Supreme Court has not yet addressed the issue directly, and pertinent decisions in the lower federal courts are sparse.

Research reveals only two mentions of the delay issue in Supreme Court taking cases. In a 1987 opinion holding that the fifth amendment requires compensation for temporary regulatory takings, the Court noted that:

We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.³⁶

From this statement, some appear to have inferred that the Court was cautioning that government processing delays longer than "normal" may be takings, while in fact the Court *assumed* that a taking occurred in the case and focussed exclusively on the remedy required. Thus, the meaning of the statement is ambiguous. In its only other mention of government delays, the Court appeared to be quite tolerant of them, albeit in the different context of land-value fluctuation during government planning activities. Said the Court:

Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, *absent extraordinary delay*, are incidents of ownership.

³⁵ See, e.g., *Keystone Bituminous Coal Co. v. De Benedictis*, 107 S. Ct. 1232 (1987); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887).

³⁶ *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2389 (1987).

They cannot be considered as a taking in the constitutional sense.³⁷

Research reveals only one federal court decision to squarely address the issue of whether delay in granting or denying an environmental permit constituted a taking -- holding, on the facts presented, that it did not.³⁸ In the related circumstance of temporary moratoria on property use, courts have been similarly disinclined to find takings.³⁹

In light of this scant record, the claim in the Order that undue government processing delays may effect a taking seems premature and can have little content for federal decision-makers charged with implementing it. Moreover, by raising the spectre of takings in connection with all undue delays "during which private property is interfered with," the claim misleads in another sense. Under current case law, it is not *any* interference with land use, but only *complete deprivation* of economically viable use, that may result in a taking.

The second assertion in the quote, that a processing delay may increase significantly the size of compensation due if a taking is later found to have occurred, appears to be true -- granting that a taking is later found to have occurred. Though the measure of compensation for a temporary regulatory taking has yet to be fully developed in the courts, logic dictates that the compensation owed must be in direct proportion to the duration of the taking.⁴⁰ Hence, it follows that the longer the processing delay after that

³⁷ *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1979) (emphasis added; quotation marks omitted).

³⁸ *Lachney v. United States*, 765 F.2d 158 (Fed. Cir. 1985). In response to plaintiff's claim that the passage of two years between the application for and issuance of a Clean Water Act section 404 permit effected a temporary taking, the court said: "Mere passage of time during the administrative process for issuance of a permit under the Clean Water Act ... does not constitute an event upon which a taking suit ... may be maintained."

³⁹ See, e.g., *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369 (D. Md. 1975) (five-year-old moratorium on sewer hook-ups in county did not constitute taking); *Union Oil Co. v. Morton*, 512 F.2d 743, 750-752 (9th Cir. 1975) (moratorium on OCS lease operations effected taking chiefly because no terminating event or date was specified). See also *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (upholding, against impairment of contracts attack, moratorium on the repayment of mortgages during the Depression).

⁴⁰ After holding in 1987 that the fifth amendment requires compensation for temporary regulatory takings, the Supreme Court suggested in dicta that the measure of compensation might be "the value of the use of the land (continued...)"

point in time -- if any -- when the delay effects a taking, the greater the constitutionally required compensation.

The "Criteria" Section

Section 4 of the Executive Order instructs federal departments and agencies to "adhere, to the extent permitted by law, to the following criteria when implementing policies that have taking implications." Some of these criteria, which take the form of mandatory action requirements, clearly derive from the Supreme Court's recent decision in *Nollan v. California Coastal Commission*,⁴¹ as follows.

1. "When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall: (1) serve the same purpose that would have been served by a prohibition of the use or action, and (2) substantially advance that purpose." Exec. Order § 4(a).

The criterion embodied in this mandate doubtless is drawn from *Nollan*. There, the Court informed the California Coastal Commission that it could not condition the issuance of a building permit on the applicants' grant of a public right-of-way across the beach portion of their property, without offending the taking clause. California argued that the right-of-way was needed to assure "visual access" to the beach by passersby on the road in front of the Nollans' property; the Court saw no relation between the two. Hence, a taking occurred, since, the Court held, an easement imposed as a permit condition must advance the *same* legitimate governmental interest as the permit to which it is attached.

Nollan is a tough case to fathom: its holding is arguably narrow, but its rationale is couched in broad terms. A narrow and quite arguable view of the

⁴⁰(...continued)

during this [regulatory taking] period." *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2388 (1987). Clearly implied in this standard is that the amount of compensation varies with the duration of the taking. Indeed, one can hardly imagine how it could be otherwise.

Only one lower federal court has attempted a more precise formulation of the measure of compensation since *First English*. In *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987), a landowner found to have suffered a temporary regulatory taking was held to be entitled to "the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair value with the restriction" -- again, a duration-based standard.

⁴¹ 107 S. Ct. 3141 (1987).

decision is that it applies only to permit conditions like easements which, had they been appropriated directly, would have resulted in a taking. Under this reading, *Nollan* at bottom establishes an exemption from taking liability, allowing government to obtain gratis property interests that would be compensable were it not for the fact that they take the form of permit conditions satisfying *Nollan*. By contrast, the broadest construction, that implicitly adopted in the Order, is that *Nollan* applies to *all* permit conditions. This view comports with some language in the opinion but flies in the face of common sense by elevating minor inconsistencies between permits and technical, non-physically invasive permit conditions to the level of constitutional takings.

If, as we believe, the narrow reading above is the proper view of the case, then the Executive Order stretches *Nollan* substantially. The Order applies its nexus requirements to "any" conditions on permits, not merely those which, if appropriated directly, would effect takings. Thus, the Order brings within its scrutiny a wide gamut of environmental permit conditions - involving monitoring, reporting, financial responsibility, effluent limits, etc. - that, in our view, are beyond the scope of *Nollan*.

2. "When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress." Exec. Order § 4(b).

The Attorney General's Guidelines attribute this criterion to a footnote in *Nollan*, as follows:

If the Nollans were being singled out to bear the burden of California's attempt to [ensure the public's ability to see the beach], although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause.⁴²

The Guidelines do not mention, however, that this statement is only dictum, the Court revealing in the same footnote that the Nollans did not press a "singled out" theory.⁴³

On the other hand, the status of proportionality as at least one factor for consideration in a taking analysis is suggested in another recent Supreme

⁴² 107 S. Ct. at 3147 n.4. See Appendix to Guidelines at 9.

⁴³ 107 S. Ct. at 3147 n.4.

Court taking decision.⁴⁴ In addition, the Supreme Court repeatedly stresses "fairness and justice" as the equitable foundation of taking jurisprudence, suggesting that it might some day be receptive to articulating a proportionality requirement, as difficult as proportionality is to determine. Still, whether current authority supports the absolute, across-the-board criterion in the Order is at best debatable.

3. "When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary." Exec. Order § 4(c).

See discussion at pages 10-12.

4. Before undertaking any proposed action regulating private property use for the protection of public health and safety, the ... agency ... shall ... (1) identify ... the risk ... created by the private property use ..., (2) establish that such proposed action substantially advances the purpose of protecting ... against the specifically identified risk, [and] (3) establish ... that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk Exec. Order § 4(d).

As to requirement "(2)," see discussion at page 9. For requirement "(3)," see discussion at pages 13-14.

In closing this section, it warrants mention that the overstated taking danger in many of the Order's principles and criteria has some parallel in the Order's failure to list almost any of the factors cutting *against* the existence of a taking. Mentioned earlier in this memorandum was the recently asserted "nuisance exemption" to taking liability, the Court's repeated declarations that interference with property rights through adjustment of economic benefits and burdens to promote the common good is generally not a taking, and the rule against segmentation.

Legal Justification for Restrictive Treatment of Government Actions Having Public Health and Safety Purposes

We find nothing in federal taking jurisprudence to suggest why federal health and safety actions, alone among all federal actions with taking implications, should be accorded the restrictive treatment in the Executive

⁴⁴ In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the Court upheld against taking challenge a statutory monetary penalty imposed on employers who withdraw from multiemployer pension plans. Among other grounds for its decision, the Court pointed out that "[t]here is nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan." *Id.* at 226.

Order.⁴⁶ To be sure, the Order is correct in saying that generally "the mere assertion of a public health and safety purpose is insufficient to avoid a taking" -- as discussion on pages 7-8 shows. Nonetheless, as the same discussion notes, health and safety actions are still the *least* likely to generate successful taking claims. Data on recent and pending taking actions against the United States amply confirm this point.⁴⁶ If, as the Executive Order claims, its concern is reducing unanticipated taking liability, then the restraints it imposes on health and safety actions would far more profitably be imposed elsewhere -- as, for example, on federal actions in the nature of direct land-use control or physical invasion.

One could conceivably argue that the Order does not single out federal health and safety programs because of hostility to them, but rather because of their sheer number. In contrast with local government, the United States is not regularly involved in land-use control, far more often affecting activity on private property through its myriad health, safety, and environmental programs. Notwithstanding, the argument fails, for it is still the non-health-and-safety programs that historically have generated the overwhelming majority of the taking suits against the United States.⁴⁷

Possible Impact of the Executive Order on Federal Environmental Programs

Your final question asks that we assess how the Executive Order could affect federal environmental programs -- particularly those likely to result in

⁴⁶ Exec. Order 12630 §§ 3(c), 4(d). Under the Guidelines, certain requirements in sections 3(c) and 4(d) are made applicable to *all* government actions with taking implications, not merely those with health and safety purposes.

⁴⁶ The General Accounting Office (GAO) recently listed twenty taking actions against the United States in which disbursements from the Judgment Fund (31 U.S.C. § 1304) were made during fiscal years 1985 through 1988. None of these cases, judging from GAO's capsule descriptions, appears to have involved federal health and safety regulation. Letter of Oliver Krueger, GAO Associate Director, to the Honorable Walter B. Jones, Chairman, House Comm. on Merchant Marine and Fisheries, dated September 28, 1988 (enclosure).

The rarity of successful taking actions against the United States in the health and safety area appears to be largely due to the fact that relatively few such actions are brought. Thus far, required submissions to the Office of Management and Budget under the Executive Order reveal that only a minute fraction of pending taking actions against the United States involve the Environmental Protection Agency. (Figures were not available, however, for the other health-and-safety agencies, such as the Occupational Safety and Health Administration.)

⁴⁷ See, e.g., *id.*

land use restrictions. Of course, predicting with precision the impact of a new, broadly worded executive order on the myriad federal environmental programs is an impossible task. How the Department of Justice, Office of Management and Budget (OMB), and the program agencies choose to effectuate the Executive Order will undoubtedly prove pivotal in determining the degree of burden or regulatory chilling effect that the Order may entail. Hence, we can do no more here than make a preliminary cut.

At the outset, it is clear that under any objective reading of Supreme Court taking criteria, most federal environmental programs raise taking issues on only rare occasion. Air and water emission standards, maximum contaminant levels under the drinking water program, workplace exposure standards, hazardous materials transport standards, manifest requirements for tracking hazardous waste, groundwater monitoring regulations, and countless other such federal requirements simply do not in the typical case affect property use or value in a substantial way, and even where they do are unlikely to result in takings.

The improbability of taking issues in connection with such environmental actions means that they *should* be beyond the reach of Executive Order 12630. The Guidelines, however, state a rather expansive version of the Order's coverage. Under them, agencies must evaluate policies and actions "that affect, or may affect, the use or value of private property ..."⁴⁸ — dropping the qualification in the Order that the effect be "significant."⁴⁹ The Guidelines' universe of application is thus a potentially huge one, of which only a small subset would likely pose a taking danger. Taking them literally, a Takings Implication Assessment (TIA)⁵⁰ could be required for each EPA determination on a proposed SIP revision relaxing an air emissions standard,⁵¹ for each EPA decision on an NPDES permit application,⁵² or for many of

⁴⁸ Guidelines at 4.

⁴⁹ Exec. Order No. 12630 § 3(e).

⁵⁰ Guidelines at 21-23.

⁵¹ SIPs are state implementation plans, required under the Clean Air Act. An EPA decision on a proposed easing of a plant's emission ceiling arguably "may affect the use or value of private property," thus falling under the Guidelines.

⁵² Under the Clean Water Act, discharges of pollutants into the waters of the United States are prohibited, unless covered by a National Pollutant Discharge Elimination System (NPDES) permit. Denial of a permit, or granting one with excessively burdensome restrictions, could arguably "affect the use or value" of a commercial operation, hence come under the Guidelines.

EPA's written comments on proposed actions of other federal agencies.⁶³ These items likely total a thousand or so annually, and the resultant TIA preparation burden could potentially constitute a significant drain on agency resources.

On the other hand, the Order and Guidelines allow for "supplemental guidelines," written in the usual instance by the departments and agencies and submitted to the Department of Justice for approval. Supplemental guidelines may contain "categorical exclusions" for classes of agency action that typically have no taking implications, despite their effect on use or value.⁶⁴ Categorical exclusions, we are informed by the Department of Justice, will be approved where a category of agency actions has never been held to effect a taking, or has affirmatively been held not to effect a taking. Presumably, then, categorical exclusions could be used to remove from the takings evaluation process those actions mistakenly brought in by overbroad threshold criteria in the Order and Guidelines. Draft supplemental guidelines written by EPA, for example, seek to exempt the lion's share of the agency's regulatory program through such exclusions, though it remains to be seen whether the Justice Department will approve them.⁶⁵

Parenthetically, we note that the Order and Guidelines themselves recite specific "exclusions" -- in addition to the "categorical exclusions" developed for individual program agencies. The former exemptions would appear to have little relevance, however, to those aspects of federal environmental regulation raising genuine taking issues.

We move on to the minority of federal environmental activities that are not likely to qualify for categorical exclusions, and thus could regularly trigger the Order's evaluative process. Likely examples are:

1. *Dredge-and-fill permits.* Clean Water Act section 404 prohibits the discharge of dredged or fill material into "waters of the United States," interpreted to include wetlands, unless the discharger obtains a "404 permit" from the Corps of Engineers. Wetlands often having no economic use to their

⁶³ The Guidelines require an abbreviated TIA for "[w]ritten agency comments or recommendations by other than the lead agency on policies or actions within the Executive Order ... whenever such comments or recommendations are required by law." Unfortunately for EPA, such comments appear to be *always* required by law. Clean Air Act § 309, 42 U.S.C. § 7609.

⁶⁴ "Supplemental guidelines" are expressly authorized by both the Order, section 5(e)(2), and the Guidelines, section VI(D). "Categorical exclusions" are mentioned only in the Guidelines, section VI(D), not in the Executive Order.

⁶⁵ EPA Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings.

owner if not filled in, the decision whether to grant a 404 permit obviously meets Executive Order 12630's evaluation threshold. History confirms, there being more court decisions adjudicating taking attacks on 404-permit denials than any other federal environmental program. Several decisions assert that denials of 404 permits may, in proper circumstances, effect takings.⁵⁶

In contrast with its decision granting or denying the permit, the Corps' prior determination that a given wetland falls under its regulatory jurisdiction cannot be a taking. This purely jurisdictional determination, the Supreme Court has ruled, works no property interference of itself; it is only when a permit is denied so as to bar all economic use of a property that a taking arguably occurs.⁵⁷ On the other hand, EPA's pre-permit decision that a wetland is unsuitable for discharge⁵⁸ represents a direct limitation on property use. Thus, the Corps' determination would seem an ideal candidate for a categorical exclusion,⁵⁹ while the EPA one would not.

2. *Wild and scenic rivers.* Recommendations to Congress by federal agencies and the President of additions to the national wild and scenic rivers system, and administratively proposed additions of state-designated wild and scenic rivers, would presumably come under the Executive Order.⁶⁰ Such recommendations and proposals might meet the Guidelines' criterion "may affect the use or value of private property," since system components are to be administered "[so] as to protect and enhance the values which caused it to be included within said system ...,"⁶¹ possibly constraining activities on private inholdings.

However, federal advice and technical assistance for state/local efforts to establish wild, scenic, and recreational rivers would be outside the Executive

⁵⁶ See, e.g., *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986) (en banc), *cert. denied*, 107 S. Ct. 926 (1987); *Loveladies Harbor v. United States*, No. 243-83 L (Cl. Ct. Aug. 12, 1988).

⁵⁷ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

⁵⁸ Clean Water Act § 404(c).

⁵⁹ The Corps' draft supplemental guidelines under the Executive Order would reportedly establish a categorical exclusion for jurisdictional assertions under section 404.

⁶⁰ Wild and Scenic Rivers Act § 4, 16 U.S.C. § 1275.

⁶¹ 16 U.S.C. § 1281(a). Indeed, in another provision of the Act, 16 U.S.C. § 1284(b), the possibility that water rights may be taken following inclusion in the system is expressly acknowledged.

Order, either under its exemption for "communications" between federal and state agencies⁶² or pursuant to probable categorical exclusion.

3. *National Park System inholdings.* Policies adopted by the National Park Service in order to discourage incompatible uses of private inholdings directly affect the use or value of such inholdings. In the small subset of instances where interference with inholding use has been egregious and protracted, takings have been judicially discerned.⁶³

4. *Surface mining restrictions.* A variety of actions under the Surface Mining Control and Reclamation Act⁶⁴ seemingly would come under the Executive Order. Obvious examples are governmental entry upon property for abating the adverse effects of past coal mining or for conducting studies related thereto, promulgation of performance standards, and promulgation and operation of federal programs where states fail to submit or enforce their own, including in particular the designation of non-federal lands as unsuitable for surface mining.⁶⁵

5. *Rails to trails.* Under the National Trails System Act, the Interstate Commerce Commission (ICC) may approve interim use of railroad rights of way as trails, where a qualified entity comes forward to take responsibility for trail operation.⁶⁶ Where the railroad's interest in the right of way is conditional upon its continued use for railroad purposes, such ICC approvals come under the Order with respect to their impact on any reversionary interests or underlying fee title in the right of way.⁶⁷

6. *Endangered species.* Designation of critical habitat under the Endangered Species Act might well fall under the Executive Order, since such designation ultimately could constitute a ground for denying federal permits

⁶² Exec. Order No. 12630 §§ 2(a)(5), 2(c)(5).

⁶³ *Althaus v. United States*, 7 Cl. Ct. 688 (1985); *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970).

⁶⁴ 30 U.S.C. § 1201 et seq.

⁶⁵ In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), the Supreme Court rejected only a facial taking challenge to the surface mining act; the possibility of subsequent, as-applied attacks was expressly recognized. *Id.* at 297 n.40.

⁶⁶ 16 U.S.C. § 1247(d).

⁶⁷ See, e.g., *National Wildlife Federation v. ICC*, 850 F.2d 694 (D.C. Cir. 1988) (rails-to-trails rules remanded to ICC for consideration of whether such conversions may effect taking of reversionary interests).

and hence presently affects property value.⁶⁸ It seems appropriate, however, that critical-habitat designations be accorded a categorical exclusion, since it is not the designation, but rather the permit denial, that might form the basis for a taking action.⁶⁹ Consultation responsibilities of the Department of the Interior (DOI) under the Act, to ensure that federal agencies do not jeopardize listed species or designated habitat, may require DOI to prepare abbreviated TIAs assessing the chance that the action as modified effects a taking.⁷⁰

Though other wildlife-protective activities of the United States have occasioned taking actions, such activities would not appear to routinely trigger the Executive Order. Moreover, the fact that all such taking actions to date have proved unsuccessful⁷¹ would likely warrant categorical exclusion status for many federal wildlife protections.

7. *Superfund response actions.* Response actions under the Superfund Act may raise taking implications where they either interfere with a landowner's making economic use of his property, or where, through installation of monitoring equipment and the like, they bring about an enduring physical invasion.⁷² Case law to date affirms the possibility that such actions may effect takings, as to either a tract that is the source of contamination or adjacent tracts.⁷³ The Order does make plain, however, that where there is a health and safety emergency requiring immediate response, Order-mandated analysis may be postponed until after the emergency action.

In contrast, EPA condemnations to gain remedial access are entirely exempt from the Order as "[a]ctions in which the power of eminent domain is formally exercised."⁷⁴

⁶⁸ 16 U.S.C. § 1536(a)(2).

⁶⁹ See discussion of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), text accompanying note 57 *supra*.

⁷⁰ Guidelines at 5.

⁷¹ See, e.g., *Andrus v. Allard*, 444 U.S. 51 (1979); *Mountain States Legal Fdn. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (en banc), *cert. denied*, 107 S. Ct. 1616 (1987); *Bailey v. Holland*, 126 F.2d 317, 324 (4th Cir. 1942).

⁷² See esp. 42 U.S.C. § 9604(e)(5).

⁷³ *United States v. Charles George Trucking Co.*, 682 F. Supp. 1260, 1271 (D. Mass. 1988); *Hendler v. United States*, 11 Cl. Ct. 91 (1986).

⁷⁴ Exec. Order No. 12630 § 2(c)(1).

We reiterate that how the executive branch implements the Order may be the dominant factor in determining its impact. Informal reports are that several agencies are striving to keep the burden to an absolute minimum.⁷⁶ Plainly there is considerable latitude in making such choices, given the breadth of the Order and Guidelines and the generality of Supreme Court regulatory taking precepts. One should pay close attention, in particular, to proposed supplemental guidelines submitted to the Department of Justice, and how that Department reacts. What proportion of an agency's actions, for example, will be immunized through categorical exclusions and one-time generic TIAs?

Despite the unpredictability of implementation details, a few factors may be commented upon -- one tending to mitigate any chilling effect the Executive Order could have on environmental programs, but several others arguably contributing thereto.

On the mitigating side is the qualification in the Guidelines that the Order's requirements apply only "to the extent permitted by law,"⁷⁶ notwithstanding the absence of such limitation in section 3 of the Order.⁷⁷ While this only makes explicit what is legally obvious -- that an executive order cannot inject into agency decisionmaking factors that are precluded by Congress⁷⁸ -- it is a welcome clarification nonetheless.

⁷⁶ Agencies may have a dual motivation for keeping documentation under the Executive Order as cursory as possible. In addition to conserving energies, preparation of a broad, general TIA might prove less harmful to the agency should the TIA be deemed discoverable in a subsequent taking action against the agency.

⁷⁶ Guidelines at 20. Similarly, the Guidelines state: "Neither the Executive Order nor these Guidelines prevents an agency from making an independent decision about proceeding with a specific policy or action which the decisionmaker determines is statutorily required." *Id.* at 2.

In determining what is "statutorily required," agencies are not to adopt narrower statutory constructions simply because to do so might reduce the number of takings when the statute is implemented. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

⁷⁷ Recall that section 3 contains the prescription that health and safety actions be "undertaken only in response to real and substantial threats, ... advance significantly the health and safety purpose, and be no greater than is necessary" In the absence of the Guidelines' qualifier, one might well ask whether this quote is consistent with triggers for agency response in several federal statutes.

⁷⁸ See, e.g., *Hazardous Waste Treatment Council v. EPA*, 28 Env't Rptr. (Cases) 1305, 1308 (D.C. Cir. Oct. 7, 1988).

Tending to promote less aggressive environmental regulation, on the other hand, is a plethora of factors -- some enumerated in the very text of the Order and/or Guidelines, others more in the nature of practical effects.

Textual factors include the Order's directive that agencies "prevent unnecessary takings" and the Guidelines' companion instruction that where a range of alternatives satisfies statutory criteria, the alternative carrying the least risk of causing takings be selected.⁷⁹ Quite literally, this calls for more cautious environmental regulation -- if applicable and the law allows. Moreover, statutory standards in federal environmental laws are often broadly worded, providing latitude in which the aforementioned mandates could operate.

Another textual factor of a similar, openly inhibiting nature, is the Order's requirement that government health and safety actions (to which the Order applies) respond only to real and substantial threats, advance significantly the health and safety purpose, and be no greater than necessary.⁸⁰ Again, the actual degree of impact will be a function of the range of activities to which the Order applies and the degree to which program statutes allow this directive room to operate.

Still other textual restraints are the related factors of proportionality and contribution. The Order's proportionality requirement⁸¹ could lead regulators to be more cautious when acting under a statute which, based on cumulative past contributions to an environmental problem, authorizes disproportionate burdens on future proposed activities contributing to the problem. Illustrative here are the dredge-and-fill-permit regulations, requiring an evaluation of cumulative impacts as one factor in ascertaining whether to allow filling in of a wetland.⁸² A close cousin of proportionality is the Guidelines' contribution factor,⁸³ asserting that the less directly a property use contributes to an environmental problem, the greater the taking risk when that activity is regulated. Where an agency is wrestling with whether to permit an activity linked to environmental harm only indirectly, through intermediate steps, might this principle skew the decision against interference?

⁷⁹ Exec. Order No. 12630 § 1(b); Guidelines at 2.

⁸⁰ The Guidelines imply that the "significantly advance" requirement applies to all actions under the Executive Order, whether directed at health and safety threats or not. Guidelines at 18.

⁸¹ Exec. Order No. 12630 §§ 4(b), 4(d)(3).

⁸² 33 C.F.R. §§ 320.4(a)(1), 320.4(b)(3). EPA also considers cumulative impacts in deciding whether to veto a fill site under Clean Water Act § 404(c).

⁸³ Guidelines at 18.

Other aspects of the Order and Guidelines may as a practical matter prompt hesitation in property use-restricting environmental programs. First and foremost, there is the cumulative "justification load" facing an agency considering whether to initiate a rulemaking -- partly the result of earlier Reagan Administration executive orders. Besides having to prepare a TIA (with attendant economic analysis), the agency may face the daunting prospect of having to do a Regulatory Impact Analysis under Executive Order 12291⁸⁴ (with more economic analysis) and a Federalism Assessment under Executive Order 12612,⁸⁵ not to mention a Regulatory Flexibility Analysis under the Regulatory Flexibility Act⁸⁶ and an Environmental Impact Statement under the National Environmental Policy Act.⁸⁷ The sheer quantity of analysis and paperwork required by these executive orders and statutes may very likely nip some worthwhile regulatory initiatives in the bud, at least where such initiatives are not statutorily mandated.

As always, however, there are implementation imponderables. All three executive orders above require that the reports mentioned be submitted (routinely or upon request) to OMB.⁸⁸ Will OMB utilize Executive Order 12630 to increase substantially its influence and control over environmental programs, or will the Order prompt only a marginal expansion of the OMB role over that authorized in earlier executive orders and statutes? The question is a central one; it was Executive Order 12291 and OMB's role thereunder that, in the view of many, brought about a substantial drop in

⁸⁴ 46 Fed. Reg. 13193 (Feb. 19, 1981), 5 U.S.C. § 601 note. This Order also requires that to the extent permitted by law the potential benefits of regulation outweigh potential costs, and that among alternative approaches the alternative involving the least net cost to society be chosen.

⁸⁵ 52 Fed. Reg. 41685 (Oct. 30, 1987).

⁸⁶ 5 U.S.C. §§ 603, 604.

⁸⁷ 42 U.S.C. § 4332(2)(C).

⁸⁸ The Guidelines instruct that for "major" and other regulations submitted to OMB under Executive Order 12291, the agency should include "a discussion summarizing any identified taking implications, and addressing the merits of the regulations in light of those implications." This "discussion" is apparently distinct from the TIA, which the Guidelines declare shall be made available "upon request" of OMB.

federal regulations promulgated during the Eighties.⁸⁹ One commentator describes a pervasive OMB input into EPA decisionmaking under 12291.⁹⁰ Still, if agency efforts to exclude the majority of their actions through categorical exclusions are approved by the Justice Department, Executive Order 12630 may yet prove a minor hindrance compared to its predecessors.

A second practical issue is the public obtainability and litigation discoverability of documents prepared pursuant to the Executive Order, an issue fueled by concern that availability of such documents might invite taking litigation rather than discourage it. The Order states that it "is intended only to improve the internal management of the Executive Branch and is not intended to create any right or benefit ... enforceable at law by a party against the United States ..."⁹¹ Based on this, the Administration has indicated it will assert the privilege for predecisional deliberative matter in discovery proceedings, and the Freedom of Information Act (FOIA) exemption for "inter-agency or intra-agency memorandums ... which would not be available by law to a party ... in litigation with the agency."⁹² Should the United States succeed in establishing the former, it will be entitled *ipso facto* to the latter.⁹³

Whether the Administration's theories will succeed in preventing disclosure is beyond the scope of this memorandum; pertinent case law is voluminous. We note only a Supreme Court ruling that if an agency in making a final decision "chooses *expressly* to adopt or incorporate by reference" a predecisional document, that document loses its protection under

⁸⁹ See, e.g., Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 Harv. L. Rev. 1059, 1063 n.17 (1986).

OMB figures document the decline in federal rulemaking during the Eighties, at least judged by annual figures on the number of pages and the number of final rulemaking documents in the Federal Register. OMB, *Regulatory Program of the United States Government* (April 1, 1988 - March 31, 1989) App. IV, Exhibit 16. Looking at the annual number of published rulemaking documents, some of the largest declines during the period are shown to be at the Environmental Protection Agency and the Department of the Interior. *Id.* at Exhibit 18.

⁹⁰ Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 1984 Virginia J. Nat. Res. L. 1 (1984).

⁹¹ Exec. Order No. 12630 § 6.

⁹² Marzulla, *The New "Takings" Executive Order and Environmental Regulation - Collision or Cooperation?*, 18 *Env't'l Law Rptr.* 10254, 10258 (1988). The quoted FOIA exemption, commonly called "Exemption 5," is at 5 U.S.C. § 552(b)(5).

⁹³ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

the FOIA exemption.⁹⁴ Disclosure is further mandated by the Guidelines themselves, which require that discussion of "significant taking implications" be included in notices of proposed rulemaking published in the Federal Register.⁹⁵ Hopefully, TIA estimates of property value loss will be devoid of detailed factual support, allowing the United States leeway to substitute more modest value-loss figures before a court. Still, a TIA assertion that the probability of taking is high at least makes it awkward for government litigators to later argue the contrary.

A minor issue raised by the Executive Order is the impact of taking awards on agency budgets. The Order instructs OMB to "take action to ensure that all taking awards levied against agencies are properly accounted for in agency budget submissions," said to require that after being paid out of the Judgment Fund,⁹⁶ taking awards are to be subtracted on a dollar-for-dollar basis from an agency's next-fiscal-year budget request to Congress.⁹⁷ Whether this provision will provoke a budget-conscious timidity among environmental program managers is impossible now to say: we are unable to ascertain from OMB the extent to which taking awards were set off against agency budgets prior to the Executive Order, and as previously noted the size of such taking awards is likely to be small.

Summary

We have concluded first 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. Second, there appears to be no justification in federal taking jurisprudence for the added demands imposed by the Order on government actions aimed at protecting public health and safety. Finally, by explicit text and practical effect the Order has the potential to burden implementation of federal environmental programs. Such potential may be substantially mitigated, however, by widespread use of categorical exclusions,

⁹⁴ *Id.* at 161 (emphasis in original).

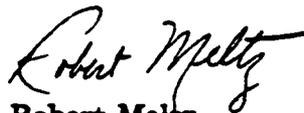
⁹⁵ Guidelines at 23.

⁹⁶ 31 U.S.C. § 1304.

⁹⁷ Remarks of Assistant Attorney General Roger Marzulla before the United States Claims Court Bar, November 4, 1988.

Of course, Congress may, if it sees fit, disregard the budget request and appropriate an amount not including any Order-mandated reduction. As long as the agency's budget request itemizes this reduction, Congress is at least on notice.

generic TIAs, and other streamlining devices, and by the degree of flexibility shown by DOJ and OMB as they carry out their watchdog roles.



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