

**Testimony of Roger J. Marzulla Before the
House of Representatives Committee on the Judiciary
Subcommittee on the Constitution**

**Subcommittee Hearing on “The GAO’s Recent Report on the Implementation
of Executive Order 12630 and the State of Federal Agency
Protections of Private Property Rights”**

**Thursday, October 16, 2003
2141 Rayburn House Office Building
10:00 a.m.**

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity of testifying today with respect to the federal government’s implementation of Executive Order 12,630, “*Governmental Actions and Interference With Civil Constitutionally Protected Property Rights.*” I congratulate the Subcommittee on instituting the first inquiry in more than a decade into whether federal agencies are complying with their obligations under the Takings Executive Order, which is designed to protect individual constitutional liberties in property while saving money for the federal government. Regrettably, in a report issued today by Defenders of Property Rights, we conclude that widespread noncompliance with the Takings Executive Order has resulted in massive violation of constitutionally-guaranteed property rights, subjecting the federal government to liability for \$1 billion or more.

I take special interest in this Subcommittee’s investigation because, as an attorney with the United States Justice Department, I had the honor of being designated by former Attorney General Edwin Meese III to head up the team that helped draft the Takings Executive Order and the Attorney General’s guidelines. Today, I serve as General Counsel to Defenders of Property Rights, the nation’s only nonprofit legal foundation dedicated exclusively to the protection of our cherished constitutional right to own, use and possess private property. At Defenders of Property Rights, every day we receive urgent requests for help in vindicating constitutionally guaranteed property rights from homeowners and retirees, farmers and ranchers, small businessmen, and ordinary Americans who see government with impunity destroying their homes, their businesses and their dreams. The Takings Executive Order was designed to minimize this violation of constitutionally-protected property rights, but it can do so only if federal agencies comply with the analytic and planning tools which the Takings Executive Order provides.

I. WHY CONSTITUTIONAL PROPERTY RIGHTS ARE IMPORTANT

If you believe in individual freedom, then you must believe in property rights. As the Supreme Court has said:

Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth a “personal” right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972).

The protection of rights in property lies at the heart of our constitutional system of government. The Founding Fathers, in drafting the Constitution, drew upon classical notions of legal rights and individual liberty dating back to the Justinian Code, Magna Carta, and the Two Treatises of John Locke, all of which recognize the importance of property ownership in a governmental system in which individual liberty is paramount. Concurrently, the constitutional framers drew upon their own experience as colonists of an oppressive monarch, whose unlimited powers vested him with the ability to deprive his subjects of their God-given rights of “life, liberty, and property.”

The United States Constitution imposes a duty on government to protect private property rights. Thus, within the Bill of Rights, numerous provisions directly or indirectly protect private property rights. The Fourth Amendment guarantees that people are to be “secure in their persons, houses, papers, and effects” The Fifth Amendment states that no person shall “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation” The Fourteenth Amendment echoes the Due Process Clauses of the Fifth Amendment, stating that no “State shall deprive any person of life, liberty, or property without due process of law” Additionally, the Contracts Clause of the Constitution indirectly protects property by forbidding states from passing any “law impairing the Obligation of Contracts.”

The protection of private property receives such strong emphasis in the United States Constitution because the right to own and use property was historically understood to be critical to the maintenance of a free society. To understand this concept, one must understand that property is more than just land. Property is buildings, machines, retirement funds, savings accounts, and even ideas. In short, property is the fruit of one’s labor and the ability to use, enjoy, and exclusively possess the fruits of one’s labor is the basis for a society in which individuals are free from oppression. Arguably, there can be no true freedom for anyone if people are dependent upon the State for food, shelter, and other basic needs. Under such a system, nothing is safe from being taken by a majority or a tyrant because the citizens, as government dependents, are powerless to oppose any infringement of their rights.

The United States Supreme Court has repeatedly explained that the primary purpose for protecting property rights is to bar 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.”¹ During the birth and growth of the administrative regulatory state, federal government agencies ignored these principles and implemented policies that deprived owners of the use and benefit of their property without providing compensation. Moreover, Congress consistently failed to codify property rights protection into federal law and the judicial system’s maze-like procedures and hurdles made seeking redress for the infringement of private property rights in the courts impractical for many property owners. Thus, private property rights have become one of our most endangered liberties.

II. THE TAKINGS EXECUTIVE ORDER

In June of 1987 the United States Supreme Court handed down two blockbuster cases, *First English Evangelical Church v. County of Los Angeles*² and *Nollan v. California Coastal Commission*.³ The *First English* and *Nollan* cases sent a shock wave through the federal government, where new and far-reaching regulatory programs such as Superfund,⁴ the Clean Water Act,⁵ and the Endangered Species Act⁶—all good ideas—could now not be implemented without paying for the private property rights taken in the process. Former United States Attorney General Edwin Meese III was among the first to realize that the government lacked any plan for avoiding unnecessary regulatory takings, or for paying those whose property had been taken by regulation. His concerns quickly reached the White House and the Office of Management and Budget—and the President.

Accordingly, in his legislative and administrative message to the Congress of January 25, 1988, President Reagan discussed the significance of these two landmark Supreme Court decisions, simultaneously reaffirming the central importance of property rights to our constitutional system and the need to plan for inevitable just compensation obligations of the government:

It was an axiom of our Founding Fathers and free Englishmen before them that the right to own and control property was the foundation of all other individual liberties. To protect these rights, the Administration has urged the courts to restore the constitutional right of a citizen to receive just compensation when government at any level takes private property through regulation or other means. Last spring, the Supreme Court adopted this view in *Nollan v. California Coastal Commission*. In a second case, the Court held that the Fifth Amendment requires government to compensate citizens for temporary losses that occur while they are challenging such a government regulatory “taking” in court. In the wake of these decisions, this Administration is now implementing new procedures to ensure that federal regulations do not violate the Fifth Amendment prohibition on taking private property; or if they do take a

¹ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

² 482 U.S. 304 (1987).

³ 483 U.S. 825 (1987).

⁴ Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2003).

⁵ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq. (2003).

⁶ 16 U.S.C. §§ 1531 et seq. (2003).

citizen's property for public use, to ensure that he receives constitutionally required just compensation.⁷

On March 15, 1988, President Reagan signed Executive Order 12,630, "*Governmental Actions and Interference With Constitutionally Protected Property Rights*."⁸ Executive Order 12,630 draws heavily upon the regulatory coordination function of the Office of Management and Budget established by Executive Order 12291⁹ and the Executive Order on federalism. Threads of the environmental assessment process under the National Environmental Policy Act are woven into the fabric of this Order, as are aspects of the budgetary planning process. Executive Order 12,630 reflects thoughtful consideration and vigorous debate throughout the affected government agencies, establishing a practical and workable procedure for implementing the Supreme Court's holdings in *Nollan* and *First English*.

The legitimacy of the Executive Order is premised both upon the duty of the government to respect constitutional protections afforded by the Bill of Rights and upon the management principle that government should not undertake programs without knowing and planning for their potential costs:

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.¹⁰

The Executive Order requires that "[i]n formulating or implementing policies that have takings implications, each Executive department and agency shall be guided" by the principles established in *Nollan* and *First English*. These "general principles," set forth in Section 3 of the Executive Order, include the doctrines of nexus and proportionality established by *Nollan* and the self-actuating right to just compensation set forth in *First English*. Although some actions are exempted from coverage, most traditional government regulatory functions fall within the scope of the Order. The presidential Order singles out permitting processes and the creation of restrictions upon private property use, requiring that all departments and agencies observe the doctrines of nexus and proportionality and that they minimize processing delays.

Perhaps the most challenging of the Order's requirements, however, is the takings implications analysis (or "TIA,") which must be prepared "before undertaking any proposed action regulating private property use for the protection of public health or

⁷ President's Legislative and Administrative Message to Congress, 24 WEEKLY COMP. PRES. DOC. 91 (Jan. 25, 1988)

⁸ Exec. Order No. 12630, 53 Fed. Reg. 8859 (Mar. 18, 1988).

⁹ Exec. Order No. 12291, 3 CFR 128 (1981).

¹⁰ Exec. Order No. 12630, 53 Fed. Reg. 8859 (Mar. 18, 1988).

safety” or for other purposes. When regulations focus on public health and safety purposes, the TIA must identify “with as much specificity as possible” the public health and safety risk created by the proposed private property use, establish that the proposed governmental action “substantially advances the purpose of protecting public health and safety against the specifically identified risk,” establish that the proposed restrictions are “not disproportionate” to the landowner’s contribution to the overall risk, and “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.”¹¹ To encourage thoroughness and candor, the TIA will normally be considered an internal deliberative document not subject to production under the Freedom of Information Act, and, in any event, the Executive Order “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.”¹²

Finally, the Order requires that the attorney general promulgate guidelines for the evaluation of risk and the 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.”¹³ This guidance discusses the constitutional principles that *Nollan* and *First English* established and, to some degree, also identified issues on which the Supreme Court had not at that time opined. To avoid obsolescence, the Attorney General was ordered to periodically review and update the guidelines to reflect subsequent clarification of constitutional principles by the Supreme Court. Those guidelines were issued on March 18, 1988.¹⁴ They have not been reviewed or updated since.

III. FINDINGS OF OUR INVESTIGATION

To determine whether the Executive Order process, ostensibly in effect for fifteen years, had reduced government impairment of private property rights, we initially sought government records tabulating just compensation payments for inverse condemnation. We found none. We sought annual reports to the Office of Management and Budget, which agencies are required to file under the Executive Order, summarizing takings judgments entered against those agencies. Again, we found none. We sought records or reports of TIA, required under the Executive Order. We found one prepared by the Environmental Protection Agency in 1990. We sought anecdotal evidence, and learned that many agency officials of this and prior administrations had never even heard of Executive Order 12,630, and were doing nothing to comply with it. Finally, we decided to undertake an examination of court records to at least find out how much court-ordered just compensation had been paid in cases filed after January 1, 1991 (a date after the Executive Order for which a database was available) through August 1, 2003.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ U.S. Attorney General, “Guidelines for the Evaluation and Avoidance of Unanticipated Takings (June 30, 1988.).

Because avoiding unnecessary takings protects both constitutional rights and the public treasury, the Executive Order is an important tool for management of regulatory programs. Adherence to the requirements of the Executive Order should thus result in a sharp decline in non-condemnation takings of private property, and in the amounts of taxpayer money paid out in just compensation for such takings. To determine whether such a decline in takings and just compensation payments had occurred since issuance of the Executive Order, we undertook a review of more than 500 taking suits filed against the federal government since 1991. In brief, our findings were:

- In that time period more than 500 new taking cases have been filed against the federal government in the Court of Federal Claims.
- Of these nearly 400 have been resolved.
- In those cases, the court has awarded \$111,966,012.10 in just compensation.
- Approximately 22.4% of the successful cases were awards against the Corps of Engineers.
- Approximately 24.4% of the successful cases were awards against the Department of Interior and the Forest Service.
- Approximately 6.1% of the successful cases were awards against EPA.
- Another 80 cases were dismissed on joint motion of the parties, representing in most cases a settlement the amount of which could not be ascertained but which can be estimated at more than \$200 million.
- Federal agencies, including the Corps of Engineers, Department of Interior, Forest Service and EPA, have made almost no effort to avoid unnecessary takings or to provide compensation for unavoidable takings of private property.

Since issuance of the Attorney General's guidelines in 1988, scores of important decisions on private property rights have been handed down by the United States Supreme Court, as well as the United States Court of Appeals for the Federal Circuit and the Court of Federal Claims.

We have provided the Subcommittee with copies of our report, and request that it be included in the record of this hearing. The report is also available at www.yourpropertyrights.org

IV. RECOMMENDATIONS

We urge Congress in the strongest terms to address this massive violation of the Takings Executive Order, and callous disregard for constitutional rights. Our recommendations are:

1. Immediately update the Attorney General's guidelines under the Executive Order to reflect important Supreme Court takings decisions over the past fifteen years, as well as, decisions of the Federal Circuit and Court of Federal Claims.

2. Immediately update the agency guidelines, at least those of the Corps of Engineers, Interior Department, Forest Service (which has none) and EPA (which are not publicly available).
3. Pass legislation making the Executive Order legally enforceable, similar to NEPA, Small Business Regulatory Reform Act, and the Paperwork Reduction Act.

Thank you again for the opportunity to address this important constitutional issue. I would be happy to answer any questions the Subcommittee may have.