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LEGAL OPINION

Question: Does E.O. 12630 apply to grant-in-aid programs such as the Federal-aid highway program?

Answer: No, E.O. 12630 does not apply to grant-in-aid programs in general, or the Federal-aid highway program in particular.

This legal opinion considers whether any actions taken in the administration of the Federal-aid highway program are subject to Executive Order No. 12630, 53 Fed. Reg. 8859 (Mar. 18, 1988) (Takings Order), "Governmental Actions and Interference with Constitutionally Protected Property Rights." In particular, it analyzes the potential liability of the United States under the proposed amendment to the Highway Beautification Act, 23 U.S.C. § 131, contained in the Federal Highway Administration's (FHWA) proposed Surface Transportation Assistance Act of 1991. The Takings Order requires agencies to

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.

§ 5(b).

The Federal-aid highway program is a program of financial assistance to State highway departments (23 U.S.C. § 145). In this program, the FHWA interacts only with State highway departments (23 U.S.C. § 302). The only Federal actions which take place in this program are contracting with the State highway departments, formulating the terms of the contracts, and assuring compliance with those terms. Under this program, the FHWA takes no regulatory actions directly affecting property. The only regulations it issues relate to the terms and conditions of the grants-in-aid contracts. All actions to construct highways and to carry out conditions on the receipt of Federal-aid funds are taken by the States. The Federal government is not obligated to provide financial assistance, and the States are not obligated to receive it. Only about 25% of all highway funds expended in the United States in a given year are Federal.

Therefore, even if the Takings Order applies to the Federal-aid highway program, no takings within the meaning of the Takings Order occur. Discussions of the nature of grant-in-aid programs, and the Federal-aid highway program in particular; the kinds of actions to which the Takings Order applies; amortization and federalism implications of the HBA under E.O. 12612, "Federalism" (Federalism Order); and pertinent FHWA cases follow.

The Takings Order Applies to Regulatory Programs

The Takings Order applies to potential takings of property by the Federal government stemming from direct government restrictions on the use of such property. Such regulations may arise under various sources of constitutional authority.¹ Therefore, it logically follows that it applies to regulatory programs, not to grants-in-aid programs, which are not based on governmental regulatory power and do not directly limit the use of property. When the United States administers a grant-in-aid program, its actions are akin to those of a private party promoting its purpose through contract and purchase. The United States takes no actions directly which affect the rights of private citizens who are not parties to the grant contract, nor does it preempt State law or regulate State conduct. These are not the kind of actions which result in takings, as illustrated by the discussion of the highway program, below.

The Takings Order came after several Supreme Court cases dealing with State and local regulatory actions and programs. In *First English Evangelical Lutheran Church v. City of Los Angeles*, 482 U.S. 825, 107 S.Ct. 2378 (1987), the taking was effected by an interim ordinance of the County of Los Angeles in response to increased flood risks resulting from a forest fire which destroyed the watershed draining into a canyon. It declared the canyon an interim flood protection area, and prohibited construction of buildings or structures therein. The plaintiff church had been operating a campground for handicapped children in that area. The Court did not actually hold that the plaintiff had been denied all use of its property, but decided that if it had, payment was required, even for a temporary "regulatory taking." Clearly, the governmental action in this case was a direct interference with the use of specific property through regulation of land use.

¹ Although general police power resides with the States, Federal courts frequently refer to the "police power" when discussing direct Federal regulation for health and welfare, as well as other Federal regulatory actions which directly impact individuals or property.

In *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987), the taking occurred in the course of a permitting program administered by the California Coastal Commission, a regulatory agency. The landowner of beachfront property was required to provide an easement to the public along the ocean as a condition to a permit to replace the house on the property. The Court found that the condition was not sufficiently related to the ostensible public purpose of maintaining visual access to the beach from the other side of the houses to be a constitutionally valid use of governmental regulatory power. Again, there was direct regulation of land by the government.

In *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232 (1987), the Court found that a state statute regulating the amount of coal which can be removed from the ground to prevent subsidence was a valid exercise of governmental regulatory power, and not a taking requiring just compensation, because it substantially advanced legitimate state interests without significantly diminishing the value of the property and investment backed expectations. Again, the action involved was land use regulation by the government. It is clear that these three cases -- or any other case on exercise of governmental regulatory power and eminent domain -- all involve sovereign acts.

Further, the Takings Order itself, although it does not state "this order applies to regulatory programs," is explicitly limited to Federal actions which could result in a taking of proprietary interests, implicitly, therefore, limiting itself to Federal regulatory actions. Its fundamental premises, after all, are that governmental regulatory power should be validly exercised, and any possibility that the power will be exceeded must be recognized, and that the cost consequences for the United States should be assessed. The Order throughout refers to regulatory types of actions and uses the words "regulatory" and "regulation" to designate exercises of governmental regulatory power. The definitions section is strong evidence that regulatory actions are the focus of the Order. For example, § 2(a) states that

"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.
[Emphasis added.]

Applying the rule of *ejusdem generis*, it can readily be seen that the actions intended to be covered by the Order are regulatory in nature, and none of which are performed by the FHWA.

Further, § 5(b) of the Order, which contains the requirement that agencies identify and analyze takings implications, clearly makes this requirement applicable to "proposed regulatory actions." There is no reason to believe that the word "regulatory" is used in any but its proper and logical sense.

Thus, given the nature of grant-in-aid programs in general, and of the FHWA in particular, these programs do not come within the purview of the Takings Order.

The Nature of Grant-In-Aid Programs

The authority employed by the government in creating and administering grant-in-aid programs was definitively discussed in detail in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981). In that case, the Supreme Court made clear that grant-in-aid programs are voluntary programs with the States, in which the Federal government must make any requirement it wishes to impose a specific contract provision -- which the States may accept or reject. "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'". 451 U.S. at 17, 101 S.Ct. at 1540. Further, "a mere federal-state funding statute" whose purpose is "simply 'to assist'" "does no more than express a congressional preference". 451 U.S. 18-19, 101 S.Ct. 1540-1541. Clearly, there is no exercise of sovereign power, although the option to do so certainly exists. As explained by the Court,

Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goals, serve as a nudge in the preferred directions. 451 U.S. at 19, 101 S.Ct. at 1541. (Quoting *Rosado v. Wyman*, 397 U.S. 397, 413, 90 S.Ct. 1207, 1218.)

The voluntary, contractual nature of the Federal-aid highway project agreement has long been acknowledged by the courts. "While the state is constitutionally free to operate its own highway system, the federal government is not bound constitutionally or statutorily to grant highway funds to states which do not operate their systems in accordance with

federal guidelines." *State of Nebraska v. Tiemann*, 510 F.2d 446 (8th Cir. 1975). The project agreement is treated as an "express contractual agreement" when its terms are litigated, e.g., *People of the State of California v. United States*, 551 F.2d 843 (Ct.Cl. 1977), cert. denied, 434 U.S. 857 (1977).

These judicial findings are directly applicable to the Federal-aid highway program. It is the States that design, hold public hearings on, acquire property for, let and administer contracts for, own, operate, maintain, and control signs adjacent to, highways. In fact, the only amendment to the National Environmental Policy Act was enacted to accommodate the States' direct control over the highway project development process. Pub.L. 94-83; 1975 *U.S. Code Cong. and Ad. News*, p. 859. Any influence that the FHWA has on these processes is achieved through a voluntary contract, the project agreement.

It is also pertinent that Congress has decided that regulatory programs have enough of an impact upon members of the public to warrant at least the opportunity for notice and comment procedures, 5 U.S.C. § 553, or hearings, §§ 554, 556, in the issuance of regulations or rulemaking, but that there is not enough impact upon members of the public to require the same for grant-in-aid programs (or other similar internal and financial actions which any organization might perform). Section 553(a)(2) of the Administrative Procedure Act states:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved --

(2) a matter relating to agency management of personnel or to public property, loans, grants, benefits, or contracts.

The FHWA/State relationship is specifically defined in FHWA's statutory authorization. It is made very clear that the States retain their sovereignty and that they have absolute control over the extent of their participation in the Federal-aid highway program. Title 23 provides:

The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program. 23 U.S.C. § 145.

The Supreme Court has specifically addressed and upheld this interpretation of the Federal/State relationship in *South Carolina State Highway Department v. Barnwell*, 303 U.S. 177,

58 S.Ct. 510 (1938). The Court explained that the Federal-aid highway program has "left undisturbed whatever authority [to regulate the operation of highways] the states have retained under the Constitution." 303 U.S. at 184, 59 S.Ct. at 513.

Further, the Federal role in highway construction is not even substantive enough involvement to impose tort liability for negligent design and construction upon the United States. *Mahler v. United States*, 306 F.2d 713 (3d Cir. 1962), cert. denied, 371 U.S. 923 (1963), contains an exhaustive discussion which concludes that the FHWA involvement in approving the design and construction of a highway is simply "a means of protecting the federal investment." 306 F.2d at 722. In fact, the FHWA does not make substantive decisions on individual highways and cannot be compelled to do so, even when it refuses to accept a State proposal. *Citizens to Preserve Overton Park, Inc. v. Brinegar*, 494 F.2d 1212, 1215 (6th Cir. 1974). There are conditions relating to the acceptance of grant funds, some of which apply to projects which are actually funded with Federal-aid funds, and others, such as outdoor advertising control, size and weight limitations on trucks, speed limits, etc., which apply on a system wide basis. In all cases, however, these are conditions on the grant of funds and not direct regulation of conduct.

Thus, Title 23, case law on grants-in-aid and highway programs, and the policy embodied in the APA exemption for internal matters and financial transactions from public notice and comment, all form a coherent pattern and lead to the conclusion that any regulatory action in the highway program is performed by the States under their own authority.

The Takings Order Does Not Apply to the Compensation Provisions of the HBA

The Department of Justice (DOJ) has expressed particular interest in the proposal for the repeal of the compensation provisions of the HBA in its present form. The existing requirement of the HBA is found at 23 U.S.C. § 131(g), "[j]ust compensation shall be paid upon the removal of any outdoor advertising sign" This provision does not impose a land use scheme, but a contract condition upon the States. Enforcement of this provision of the HBA, as for the other provisions, is withholding 10% of what would otherwise be that State's share of apportioned Federal-aid highway funds. 23 U.S.C. § 131(b). The Department of Transportation's Reauthorization Bill would omit the "just compensation" requirement, allowing State law to govern the issue of whether payment is required.

Thus, the new HBA could involve compensation programs (i.e., acquisition/eminent domain) or land use regulation under the authority of State law, at the option of the State. The DOJ is concerned about the takings implications of this action (proposing to omit the "just compensation" requirement).

There are number of reasons why the Takings Order does not apply to the repeal of § 131(g). In the first instance, the Takings Order does not apply to the repeal of § 131(g) because the actions which would result in takings (if any) are performed by the States, not the Federal government. Further, under the proposed legislation, the HBA would no longer require removal of existing signs, so any such removals would be at the option of the States. The proposed amendment on its own terms does not explicitly discourage or encourage the removal of any sign.

In addition, the Order specifically provides that it does not apply to actions "abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property," § 2(a)(1). The repeal of certain provisions of the existing HBA program is "discontinuing a governmental program," and simply removes the Federal presence from State operations, returning the parties to the *status quo ante* and eliminating the requirement for States to provide statutory compensation if the State constitution does not require it.²

The repeal of a statute cannot logically be considered as interference with constitutionally protected uses of private property. Since a statute cannot alter rights which are constitutionally guaranteed, neither can its repeal. The contention that the repeal would interfere with the use of private property, then, is predicated solely on the assumption that it is a deprivation of Federal constitutional rights to return compensation issues to the States -- an untenable position, especially in view of the Executive Order on Federalism (E.O. 12126).

Section 5 of the Federalism Order prohibits submission of legislation to Congress which would "attach to Federal grants conditions that are not directly related to the purpose of the grant" (§ 5(b)), or legislation that would "preempt State law, unless preemption is consistent with the fundamental federalism principles . . . , and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria . . . , cannot otherwise be met" (§ 5(c)). The

² This takings analysis deals with the exposure of the United States to a takings claim. The exposure of a State acting pursuant to its own authority is not directly relevant to this analysis.

purpose of the Federal-aid highway grant is to construct highways and control signs, not make State law uniform or provide a benefit program for the advertising industry.

Thus, a Federal law interfering with or seeking to abrogate the power of the States to use amortization, especially when the Constitution would allow them to do so, would be inconsistent with these principles of the Federalism Order. Prohibiting amortization is not necessary to construct highways or control signs, cf. § 5(b). Such a legislative proposal is also inconsistent with the policymaking criteria of the Federalism Order, which prohibit encroachment upon the sovereign powers reserved to the States, cf. § 3(b)(2), and intrusive Federal oversight of State administration, cf. § 3(c).

Another reason that the Takings Order does not apply to the repeal of § 131(g) is that § 131(g) does not affect constitutional rights. Section 131(g), if taken literally, is a tautology. The right to just compensation is fully protected by the Fifth Amendment. This right is not strengthened by the very general language on compensation found in the HBA. Therefore, § 131(g) was interpreted to mean that compensation had to be paid as if compensation were constitutionally required, i.e., to afford statutory rights. Therefore, even if the repeal of a statute could result in a taking -- which seems extremely unlikely -- the repeal of § 131(g) results only in the loss of statutory benefits. Loss of statutory benefits is not protected by the Takings Order, nor does it give rise to a cause of action under the Fifth Amendment to the United States Constitution.

Cash compensation remains an option under the proposed law for those States that wish to, or must, provide it. The proposed amendment also provides grant funds to States which pay compensation. Thus, not only are sign removals not required; there is not even an outright retreat from the provision of compensation. The States remain free to provide it, much as they do now.

All that is changed is that the new provision would remove the threat that a State's highway grant might be reduced if a State fails to pay cash compensation. It is hard to see how the size of a State's highway construction grant is related to a billboard owner's property rights, as a matter of constitutional law.

Even under existing law, it is clear that there is no right of action by a private party asserting that he or she has been denied the "benefits" of a grant condition. Enforcement of the HBA by the Secretary is through a penalty against a State and the exercise of the sanction is left to the

prosecutorial discretion of the Secretary. Private parties lack standing to require the imposition of sanctions. *Sierra Club v. Larson*, 882 F.2d 128 (4th Cir. 1989).

The Influence of the United States Upon the States to
Remove Signs Does Not Create Liability Under the
Just Compensation Clause

It has been suggested that the United States could be held liable under the Just Compensation Clause on the theory that the United States is in some way coercing, or otherwise influencing, the States to deprive their citizens of just compensation. However, the HBA neither creates rights enforceable by signowners under Federal law, *National Advertising Co., v. City of Ashland*, 678 F.2d 106 (9th Cir. 1982), nor coerces States with the threat of the loss of funds, *State of Vermont v. Brinegar*, 379 F.Supp. 606, 617 (D.Vt. 1974). This issue has also been considered with regard to an almost identical "penalty" imposed by 23 U.S.C. § 158, which provides for a 10 % loss of funds (5 % the first year of noncompliance) for a State's failure to enact the national minimum drinking age. The Supreme Court rejected the coercion argument and characterized the statutory scheme as "relatively mild encouragement," *South Dakota v. Dole*, 483 U.S. 203, 211, 107 S.Ct. 2793, 2798 (1987). Thus, reducing the amount of Federal-aid funding available to promote a collateral purpose is not coercive.

Further, as we have noted above, the proposed amendments to the HBA do not require the removal of signs, do not encourage or discourage States to remove signs without compensation, and even continue to provide funds to States wishing to pay compensation. This is not "influence" to deny compensation.

The DOJ has cited to case law which might suggest liability under the Just Compensation Clause based on conduct by the government which might constitute "influence" to induce a taking. However, this case law can be distinguished from the Federal-aid highway program and the HBA. In addition, there are cases on point in the context of the Federal-aid highway program which hold the opposite.

In *Langenegger v. United States*, 756 F.2d 1565 (Fed.Cir. 1985), the plaintiffs made a number of claims against the United States on the grounds that the United States had influenced the government of El Salvador to institute reforms, resulting in the expropriation of the plaintiffs' land in El Salvador (facts taken as true for purposes of summary judgment). The Court of Appeals held that even in the context of foreign affairs, the United States, acting *qua* sovereign, is not liable for persuading another sovereign to effect a taking.

Where the actual expropriation is by the hand of a foreign sovereign, the United States cannot be held responsible merely because its activity is that of "friendly" persuasion regarding general policy, common among allies, or when the sole benefit to the United States is the political stability of its neighbors. *Langenegger*, 756 at 1572.

It reversed one of the lower court's findings that this action did not amount to a taking as a matter of law, and remanded the plaintiffs' claim for dismissal without prejudice until it became clear whether that claim had been extinguished by the action of the United States in an international forum.

The actions of the United States in *Langenegger* are clearly distinguishable from its actions in the Federal-aid highway program. In an international context, the actions taken are those among sovereigns. The pressure of the United States, economic and military, on El Salvador is taken as a relevant factor in *Langenegger*. The influence of the United States in foreign affairs is in sharp contrast to the grant-in-aid concept, in which the parties are contracting voluntarily to achieve mutual goals. In fact, the Court in *Langenegger*, recognizing that authorized federal officers could effect takings in other countries when not in the context of war, specifically distinguished domestic actions:

However, it has been held that United States officials can hardly effect a taking by measures, however drastic, they merely advocate should be taken by state or local officials, *NBH Land Co., Inc., [v. United States]*, [576 F.2d 317 (Ct.Cl. 1978)], *De-Tom Enterprises, Inc., v. United States*, 552 F.2d 337, 213 Ct.Cl. 362 (1977).

The possibility of liability of the United States under the Just Compensation Clause in *Langenegger* (if supported by the facts) was predicated upon the contention that the United States had caused "extinguishment of a claim under international law." 756 F.2d at 1573. Even if liability for the influence of Federal officers on other sovereigns existed in the domestic context, clearly there is no extinguishment of a claim in the Federal-aid highway program.

Yancey v. United States, 10 Ct.Cl. 311 (1980), and *United Nuclear Corp. v. U.S.*, 912 F.2d 1432 (Fed.Cir. 1990), both involve the direct exercise of governmental regulatory power by the United States, and are thus distinguishable from the grant-in-aid function. In *Yancey*, the question before the court was actually whether the Department of Agriculture's

statutory authority provided for compensation of the loss of the value of healthy animals under quarantine. In *United Nuclear Corporation*, the governmental action which was held to be a taking occurred in the context of regulation of uranium mining and in the United States' capacity as trustees of the Navajo Tribe. These functions are clearly exercises of sovereignty and governmental regulatory power, unlike the Federal-aid highway program. The mining on Indian land clearly could not go forward without the consent of the United States, whereas the prosecution of highway programs requires no Federal consent.

There have been cases in which the United States has been sued for alleged regulatory takings in the administration of the Federal-aid highway program. The courts have uniformly found that there is no liability under the Just Compensation Clause for these actions. For example, in *D.R. Smalley & Sons, Inc. v. United States*, 372 F.2d 505 (Ct.Cl. 1967), cert. denied 389 U.S. 835, the court held that

These grants are in reality gifts or gratuities. It would be farfetched indeed to impose liability on the Government for the acts and omissions of the parties who contract to build the projects, simply because it requires the work to meet certain standards and upon approval thereof reimburses the public agency for a part of the costs. 372 F.2d at 507

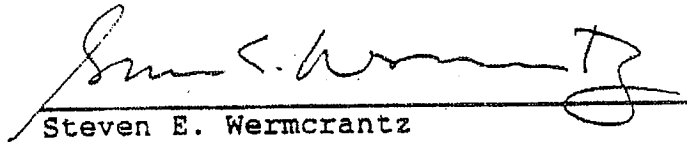
Further, although the United States had established the standards and regulations pursuant to which the contracts were drafted, approved the contracts, approved all changes in the contract, and reimbursed the costs, the court found that this involvement did not create legal liability under the Just Compensation Clause, ruling that the plaintiff's complaint "does not allege a single affirmative act on the part of defendant that deprived it of any of its property nor that interfered with or disturbed its property rights in any way." 372 F.2d at 508.

In *Custom Contemporary Homes v. United States*, 5 Ct.Cl. 88 (1984), the Claims Court squarely addresses the issue of FHWA's liability for takings resulting from governmental action. The plaintiffs' homes were located in a corridor through which a freeway was planned, and were allegedly "rendered unmarketable and valueless." The FHWA had approved final location of the freeway, approved the environmental impact statement, authorized right of way acquisition, provided funding for the project, and determined compliance with numerous other Federal laws. The court held that "[t]his involvement is insufficient for plaintiffs to maintain a taking claim against the United States." 5 Ct.Cl. at 91. This conclusion is based on the fact that "the project is clearly a State project and not a federal project.

Plaintiffs do not allege any affirmative acts on the part of the United States that deprive them of any of their property. Liability, if any, lies with the State, and not the federal government." 5 Ct.Cl. at 92.

Conclusion

There is no exposure for the United States to a taking claim based on the HBA, either under current law or as it is proposed to be amended by the Administration. In fact, the Federal-aid highway program should be categorically excluded from the Takings Order because the kind of the actions and involvement of a Federal agency in a grant-in-aid program in general, and the Federal-aid highway program in particular, are not covered by the provisions and intent of the Order; any governmental regulatory power in such programs is exercised by the States.



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