

Testimony of Defenders of Property Rights
Before the U.S. House of Representatives Committee on Resources

Ms. Barbara Wally

October 27, 2005

Mr. Chairman and Members of the Committee:

I am pleased to be here today on behalf of Defenders of Property Rights, the only national public interest legal foundation devoted exclusively to protecting private property rights. Through a program of litigation, education and legislative support, Defenders seeks to realize the promise of the Fifth Amendment of the U.S. Constitution, that private property shall not be "taken for public use, without just compensation." Defenders, which is based in Washington, D.C., has a large national membership comprised of property owners, users and beneficiaries of the rights protected by the Constitution and traditional property law. Defenders participates in litigation when it is in the public interest and when the property rights of its members are affected, and has also devoted significant resources to analyzing legislative proposals concerning property rights at both the state and federal level.

Today, I am here to comment on H.R. 3405, Strengthening the Ownership of Private Property Act of 2005 (STOPP). By prohibiting federal financial assistance under any federal economic development program to any State, State agency, or local government, that uses its eminent domain power for private commercial development or fails to provide relocation assistance for persons displaced by use of eminent domain for economic development, this bill seeks to prevent the taking of private property for public use without just compensation, as required by the Fifth Amendment to the United States Constitution.

I. The Constitution Imposes a Duty on Government to Protect Private Property Rights Because Property Rights are an Essential Element of a Free Society.

As reflected in various provisions in the Constitution, the Founding Fathers clearly recognized the need for vigorously protected property rights. They also understood the vital relationship between private property rights, individual rights and economic liberty. Property rights is the "line drawn in the sand" protecting against tyranny of the majority over the rights of the minority.

The Founding Fathers, in drafting the Constitution, drew upon classical notions of legal rights and individual liberty which recognize the importance of property ownership in a governmental system where individual liberty is paramount. Concurrently, the constitutional framers drew upon their own experience as colonists of an oppressive monarch, whose unlimited powers allowed him to deprive his subjects of their "life, liberty, and property" (subsequently revised by Thomas Jefferson to substitute "the pursuit of happiness" for "property").

To the framers of the Constitution, the protection of individual liberty was essential. The fundamental liberties guaranteed by the Bill of Rights include freedom of speech and religion; freedom of press and assembly; the right to bear arms; the right to trial by jury and cross examination of accusing witnesses; and freedom from cruel or unusual punishment. Recognizing that a government could easily abuse these civil rights if a citizen's property and livelihood were not guaranteed, the United States Constitution also 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." In addition to the Bill of Rights provisions, the Fourteenth Amendment echoes the Due Process Clause of the Fifth Amendment, stating that no "State shall deprive any person of life, liberty or property without due process of law. . . ." Indirectly the Contracts Clause of the Constitution also protects property by forbidding any state from passing any "law impairing the Obligation of Contracts." U.S. Const. art. 1, § 10.

The Constitution places such strong emphasis on protecting private property rights because the right to own and use property was historically understood to be critical to the maintenance of a free society. The ability to use, enjoy and exclusively possess the fruits of one's own labor is the basis for a society in which individuals are free from oppression. Indeed, some have argued that there can be no true freedom for anyone if people are dependent upon the state for food, shelter, and other basic needs. Understandably, where the fruits of citizen's labor are owned by the state and not individuals, nothing is safe from being taken by a majority or a tyrant. Ultimately, as government dependants, these individuals are powerless to oppose any infringement on their rights due to absolute government control over the fruits of

their labor.

Accordingly, it is a founding principle of our nation that private land may not be taken for public use (unless it be purchased from the owner). This basic principle – that the government must lawfully acquire private land rather than merely seize it – is predicated upon fundamental notions of fairness. As the Supreme Court stated in *Armstrong v. United States*, “[t]he Fifth Amendment . . . was designed 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.” 364 U.S. 40, 49 (1960).

The Founding Fathers understood the vital relationship between private property rights, individual rights, and economic liberty. However, the Founding Fathers could never have envisioned the growth of government that has occurred of late years. Never before have government regulations threatened to destroy private property rights on so large a scale and in so many different contexts as they do today. In just two short decades, the United States has developed from scratch the most extensive governmental regulatory programs in history. Environmental regulations have become an elaborate web of intricate laws and regulations covering every conceivable aspect of property use, yet very few recognize the fundamental importance of property rights to our Constitution and our system of government under law.

II. The Supreme Court’s October 2004 Term

The Supreme Court’s October 2004 term provided an excellent opportunity for the Court to straighten out the law with regard to the meaning of the Fifth Amendment’s “public use” requirement, the application of the “substantially advances” test, and the ability of plaintiffs to get their just compensation cases before the federal courts. Instead, in *Kelo v. New London*, 125 S. Ct. 2655 (2005), *Chevron v. Lingle*, 125 S. Ct. 2074 (2005), and *San Remo Hotel v. San Francisco*, 125 S. Ct. 2491 (2005), the Court offered a series of disappointing decisions that did nothing to further an individual’s fundamental property rights. Moreover, these decisions were fraught with internal inconsistencies, as well as inconsistencies with previous just compensation decisions. Let me briefly outline the Court’s decisions in these three just compensation cases:

Kelo v. New London

The *Kelo* case is certainly the most talked about of last year’s three Supreme Court takings cases. In *Kelo*, private property owners had their property taken from them and turned over to a private development corporation to be redeveloped for private use. The question before the Court was whether taking land from one private landowner and giving it to another, violated the public use requirement of the Just Compensation Clause, where that taking was part of an economic redevelopment plan. The Court upheld the taking.

In upholding the taking, the Court rejected a bright-line rule that would have clearly prevented the state from taking private property from A and giving it to B, instead favoring a test that asks whether the development plan serves a “public purpose.” The dissent, and judging from the public reaction, much of the public, rejected the majority’s interpretation. The dissent reasoned that after *Kelo*, “[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.” 125 S. Ct. at 2671. According to the dissent, the majority had “effectively . . . delete[d] the words ‘for public use’ from the Takings Clause of the Fifth Amendment.” *Id.*

Chevron v. Lingle

In *Chevron v. Lingle*, the lower courts had applied the “substantially advances” formula set forth in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), to determine whether a Hawaii law, which limits the rent that oil companies may charge dealers who lease service stations owned by the companies, effects a taking. The lower courts held that the rent cap effects an uncompensated taking of private property in violation of the Fifth and Fourteenth Amendments because it does not substantially advance Hawaii’s asserted interest in controlling retail gasoline prices. The Supreme Court reversed the lower courts’ straight forward application of the “substantially advances” test, holding that the “substantially advances” test was a test of due process and has no place in the Court’s takings jurisprudence.

The Court reasoned that “[i]nstead of addressing a challenged regulation’s effect on private property, the ‘substantially advances’ inquiry probes the regulation’s underlying validity.” 125 S. Ct. at 2084. The Just Compensation Clause, according to the Court, “does not bar government from interfering with property rights, but rather requires compensation ‘in the event of otherwise proper interference amounting to a taking.’” *Id.*

San Remo Hotel v. San Francisco

The Court, in *San Remo Hotel v. San Francisco*, dealt with a question that involved the ability of property owners, who have had their property taken by state or local governments, to get those claims into federal courts. Under the standards set forth in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), a just compensation claim against a state or local government cannot be brought in federal court until after the claimant seeks just compensation in state court. However, in *San Remo*, when the claimants went to state court, the court addressed the claimants federal constitutional claims; thus preventing later consideration of the case on its merits in federal court. In other words, the claimants could not originally bring their case in federal court because they had not been denied just compensation in state court, and once they were denied just compensation in state court they could not bring a new case in federal court because their case had already been decided in state court.

In a concurrence, the late Chief Justice Rehnquist, joined by three of his fellow justices, wrote that he believed, echoing the position taken by Defenders of Property Rights as amicus curie, that *Williamson County's* requirement that once a government entity has reached a final decision with respect to a claimant's property that claimant must seek redress first in state court, was incorrectly decided. However, without the needed fifth vote, property owners will continue to be denied a federal forum in which to bring an original action.

III. Legislative reform is essential to fully protect all Property Rights and to realize the purpose of the Fifth Amendment.

From the perspective of those who cherish private property rights, the Supreme Court's last term was disappointing. In the three just compensation cases that came before the Court, the Court effectively deleted the words "for public use" from the Just Compensation Clause, eliminated one of tests that limited the ability of the government from taking private property, and declined an invitation to extend a federal forum to property owners who had their property taken by a state government. On the bright side, however, the Supreme Court is not the only arbiter of the Constitution under our system of government. There is a role for Congress as well. The Strengthening the Ownership of Private Property Act of 2005 is an excellent vehicle for Congress to step in and re-invigorate a fundamental right the Supreme Court has weakened through its decisions of the last term.

Although it is often stated that it is the role of the courts to say what the law is, the members of Congress also take an oath to support, defend, and bear true faith and allegiance to the Constitution of the United States. Here, through the use of a power specifically enumerated to Congress in the Spending Clause, Congress has an opportunity to fulfill its oath to the Constitution and reaffirm that document's fundamental protections for private property. When the courts fail, it is up to Congress to make the federal, state, and local governments give the rights of private property owners the respect and deference that the Constitution requires .

IV. Conclusion

The proposed bill, H.R. 3405, goes along way in attempting to restore the damage done to the text of the Just Compensation Clause by the Supreme Court's recent ruling in *Kelo*. The reform embodied in H.R. 3405 will attempt to ensure that State and local governments do not use their eminent domain powers for private commercial development and, that when eminent domain power is used, those governments will provide relocation assistance for property owners displaced for economic development.

I would be pleased to answer any questions you may have concerning my testimony.