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## Eroding constitutional limits on governmental takings

*By Ilya Somin*

It's not easy for a judge to undermine property rights further than the Supreme Court did in 2005 in *Kelo v. City of New London*. But Judge Sonia Sotomayor, now herself up for the Court, succeeded. In the 2006 case of *Didden v. Village of Port Chester* she signed on to perhaps the worst federal court property rights decision in recent memory. In *Kelo* the Court held that the government can condemn a person's property and transfer it to someone else in order to promote economic development. In *Didden*, Judge Sotomayor's panel went further, upholding the government's condemnation of property after the owners refused to pay extortion money to a politically influential private developer.

In 1999 the village of Port Chester, N.Y., established a "redevelopment area," giving designated developer Gregg Wasser a virtual blank check to condemn property within the area.

When local property owners Bart Didden and Dominick Bologna sought a permit to build a CVS pharmacy in the area, Wasser demanded that they pay him \$800,000 or give him a 50 percent partnership interest in the store, threatening to have their land condemned if they said no. They refused, and a day later the village condemned their property.

Didden and Bologna challenged the condemnation on the ground that it was not for a "public use," as the Constitution's Fifth Amendment requires. Their argument was simple and compelling: extortion for the benefit of a private party is not a public use. In a short, cursory opinion, Sotomayor's panel upheld the condemnation.

Although based partly on *Kelo*'s very broad definition of "public use," the ruling extended the term beyond what Justice John Paul Stevens had in that case. In particular, Stevens had noted that "the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit," was not enough to count as a "public use."

As an example of such an unconstitutional pretextual taking, he cited a case with far less egregious facts than *Didden*—a California district court ruling invalidating the condemnation and transfer of a 99 Cents store to Costco, rationalized on the ground that Costco might produce more tax revenue and economic growth.

Like the *Didden* property, the 99 Cents store was located in a redevelopment area. But, the rationale for the 99 Cents condemnation and transfer was at least plausible, since the upscale Costco store might have generated more economic activity and hence a public benefit.

In *Didden*, by contrast, there was no plausible public benefit. Wasser's plan, once the transfer was completed, was to build a Walgreens pharmacy—virtually identical to *Didden* and Bologna's plan. In any event, *Didden* and Bologna's land would not have been condemned but for their refusal to pay Wasser the money he demanded. If that isn't a pretextual taking, it is hard to imagine what is.

To be sure, Wasser disputed part of *Didden* and Bologna's account of the facts. But Sotomayor's panel was required to assume the truth of their claims since it was ruling on the Village's motion to have the case dismissed, before a jury decided those claims, on the ground that they had no possible legal basis for their suit. What is truly frightening about the panel's ruling is that it concluded that *Didden* and Bologna had no case even if their account of the facts was true.

In addition to rejecting the owners' claim on the merits, the panel also denied it on procedural grounds, arguing that they had filed their claim too late. But that ruling was based on the dubious notion that Didden and Bologna were required to file their takings claim soon after the redevelopment area was established in 1999, despite their having no possible claim of a pretextual taking until 2003, when their rejection of Wasser's demand led to the condemnation of their property.

Kelo was a close 5-4 decision, denounced by many on both left and right. The next few Supreme Court nominees could well determine whether it is overruled—or instead is expanded to weaken property rights even further.

Under the guise of "redevelopment," local governments across the country often condemn property for the purpose of transferring it to politically favored interests. Since World War II, hundreds of thousands have lost their homes. Usually, those displaced are poor, minorities, or the politically weak—a point emphasized by the NAACP in its amicus brief in Kelo. The stakes here are very high.

Judge Sotomayor's ruling in Didden suggests that she would uphold even the most abusive condemnations, taking the Court even further in the same misguided direction.

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