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Will the Supreme Court Hear the Columbia University Eminent Domain Case?

Damon W. Root | December 10, 2010

Cato Institute legal scholar Ilya Shapiro highlights a big feature story from *The Columbia Daily Spectator*, Columbia's undergraduate newspaper, on New York's controversial decision to use eminent domain on behalf of the elite private university. As Shapiro notes, the Supreme Court is discussing today whether or not to hear property owner Nick Sprayregen's lawsuit challenging the eminent domain taking, and a decision is expected as early as Monday.

At least four justices will have to vote yes if the full Court is going to take the case. Unfortunately, the liberal bloc will likely vote no. Justices Ruth Bader Ginsburg and Stephen Breyer both joined Justice John Paul Stevens' disgraceful majority opinion in *Kelo v. City of New London* (2005), so there's little reason to think they're interested in limiting or overturning that unfortunate eminent domain precedent now. As for the new faces, Justice Sonia Sotomayor has her own dubious record when it comes to protecting property rights in the Empire State, and as a self-professed fan of judicial restraint, Justice Elena Kagan may not want to subject New York's practices to much judicial scrutiny.

But that still leaves five possible yeses. Justice Clarence Thomas will definitely want another shot at curbing eminent domain abuse. His *Kelo* dissent predicted exactly the sort of government malfeasance we're now witnessing in both the Columbia and Atlantic Yards cases in New York. Justice Antonin Scalia also dissented in *Kelo*, though it's possible his sense of judicial restraint will prompt him to let the 2005 precedent stand. Let's hope not.

Chief Justice John Roberts also has a selective respect for precedent, though he did hint at a critical view of *Kelo* during his Senate confirmation hearings. Justice Samuel Alito, on the other hand, is almost certainly a yes vote. When the Supreme Court declined to review the Atlantic Yards land grab in 2008, Alito took the unusual step of noting that he would

have granted review. No other member of the Court shared their vote, so Alito's eagerness to do so suggests a strong preference for correcting the *Kelo* mistake.

Finally we have Justice Anthony Kennedy. He of course joined the majority in *Kelo*. But he also wrote a concurring opinion that made it clear that *Kelo* was not a blank check. As Kennedy wrote, "Transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." As I've previously reported, Columbia University and New York's Empire State Development Corporation actively colluded in order to game the state's eminent domain system, making Columbia the exact sort of "favored private entity" that Kennedy warned about in *Kelo*. He now has the chance to prove that his concurrence was more than just empty words.

Stay tuned.