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**Tuesday, July 14, 2009**

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## Sotomayor Waffles on Property Rights

Posted by: [Townhall.com Staff](#) at 2:42 PM

Guest post from [Ilya Shapiro](#)

The hearing began after lunch with Senator Grassley probing Sotomayor's views on *Kelo v. New London* and the Fifth Amendment's protection of property right—one of the [questions I would ask her](#). The nominee apparently thought the senator (who's not a lawyer) needed a lesson in what went on in *Kelo* and how the Court ruled. Grassley, having been briefed by counsel, didn't seem to care for that, pushing Sotomayor on whether she thought *Kelo* was correctly decided and how she views constitutional property rights generally.

Sotomayor said *Kelo* was a judgment of the Court that she accepts, but that any future case she would have to judge on its own merits. Well, of course, but that wasn't the question on the table. Exasperated, Grassley asked Sotomayor whether a taking with *no* compensation would be constitutional. The "wise Latina" couldn't formulate a proper response, smiling and explaining that what constitutes a "taking" is subject to legal analysis. Well, yes, but that still doesn't answer the question. Finally, Sotomayor concluded that if a taking violated the Constitution, she would have to strike it down.

In short, according to Sotomayor, if something is unconstitutional, a judge can't allow it. The technical term we lawyers use for this kind of sophisticated reasoning is "circular"—with the judge here getting to decide based on no discernible criteria whether something is constitutional. For more on the outrageous takings Judge Sotomayor has allowed, see George Mason law professor Ilya Somin's [analysis](#) of the *Didden v. Port Chester* case. (Somin, also a Cato adjunct scholar, will be testifying at the hearings later this week.)

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