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Sotomayor's property-rights red flag

High-court nominee has upheld extortion by the politically connected.

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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, Conn.* But Judge Sonia Sotomayor, who is scheduled to begin Senate confirmation hearings today on her nomination to the high 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 federal appellate-court 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 *Didden* ruling extended the term beyond what Justice John Paul Stevens had in *Kelo*. 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 federal court ruling invalidating the condemnation and transfer of a 99 Cents Only store to Costco, rationalized on the ground that Costco might produce more tax revenue and economic growth.

Like the *Didden* property, the 99 Cents Only store was located in a redevelopment area. But, the rationale for the 99 Cents Only store

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condemnation and transfer was at least plausible, since the Costco store might have generated more economic activity and hence a public benefit. In Didden, by contrast, there was no plausible public benefit. 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. What is truly frightening is that Sotomayor's panel concluded that Didden and Bologna had no case even if their account of the facts was true.

Kelo was a 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 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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