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Issue of Property Rights Is Likely to Arise in Sotomayor's Confirmation Hearings

By [ADAM LIPTAK](#)

WASHINGTON — [Supreme Court](#) nominees almost never comment on recent decisions from the court they hope to join. But both Chief Justice [John G. Roberts Jr.](#) and Justice [Samuel A. Alito Jr.](#) broke with protocol and perhaps prudence at their confirmation hearings when it came to a decision that had been issued just months before, [Kelo v. City of New London](#).

Without quite saying Kelo had been incorrectly decided, both men, at the time federal appeals court judges, spoke at length about their doubts concerning its wisdom and consequences. The decision, a 5-to-4 ruling in 2005, allowed local governments to take private property for business development and [provoked outrage](#) across the political spectrum.

Judge [Sonia Sotomayor](#) will doubtless be questioned about Kelo at her confirmation hearings next month. But her answers will be complicated by her participation in a 2006 decision applying and extending Kelo.

Bart Didden, the property owner on the losing side of that decision, [Didden v. Village of Port Chester](#), said in an interview that he had been contacted by aides to Republicans on the Senate Judiciary Committee who seemed eager to explore Judge Sotomayor's views on property rights.

The ruling in Didden is not popular among some property rights and constitutional law professors. Eight of them filed a [brief](#) in 2006 unsuccessfully urging the Supreme Court to hear an appeal.

"This is the worst federal court takings decision since Kelo," said Ilya Somin, who teaches property law at George Mason University and helped write the brief. "It's very extreme, and it is significant as a window into Judge Sotomayor's attitudes toward private property."

But another author of the brief, Richard A. Epstein, said the decision in Mr. Didden's case was a rare misfire that provided no larger insights into Judge Sotomayor's thinking.

"It's a disappointment and it's wrong and it's ill thought out," Professor Epstein, a law professor at the [University of Chicago](#) and [New York University](#), said of the ruling. "But it's not one of six. It's one of two." (The other poorly handled decision, he said, was [Ricci v. DeStefano](#), which rejected employment discrimination claims from white firefighters in New Haven.)

The case arose from a meeting in 2003 between Mr. Didden, who owned property in Port Chester, N.Y., and an executive of a company that had been designated by the village to develop a 27-acre urban renewal area that included part of the property. What happened at that meeting, Mr. Didden said, amounted to

extortion.

Mr. Didden had made arrangements to put a CVS drug store on his lot. At the meeting, the executive, Gregg Wasser, demanded \$800,000 as the price for permission to proceed with that project, Mr. Didden said in court papers. The alternative, Mr. Wasser said, according to the papers, was to have the village condemn Mr. Didden's property so that Mr. Wasser's company could put a Walgreen's in the same place.

"Here is a private person standing in the shoes of the government with the power to condemn or not condemn," Mr. Didden said. "The \$800,000 wasn't going to rehabilitate a public park or build a soccer stadium. It was going into his pocket."

Mr. Didden refused. The next day the village condemned his property.

Mr. Wasser did not respond to a recent message seeking comment left with an assistant. In a sworn statement in 2004, he denied being "part of an 'extortion' plot" and said the accusation was "beyond my comprehension." The meeting, he said, was a settlement negotiation concerning competing claims to the same property. "An \$800,000 figure," he said, "was an appropriate buyout."

Mr. Didden and a business partner sued, and a federal judge dismissed their case in 2004. When the case reached Judge Sotomayor's court, the United States Court of Appeals for the Second Circuit, Mr. Didden said he had reason to be hopeful.

"She was highly engaged," Mr. Didden said of Judge Sotomayor's questioning at the argument in 2005. The other members of the panel were Judges [Reena Raggi](#) and Peter W. Hall.

"We felt like we got our day in court," Mr. Didden said. "We felt that she got the point."

But then more than a year passed. In the end, the decision was terse and unsigned, and it rejected Mr. Didden's claims.

"It took 54 weeks to issue those four paragraphs," Mr. Didden said. According to the Administrative Office of the United States Courts, the median interval between argument and decision in the Second Circuit, both then and now, is less than a month.

The brief decision in Didden made two points. First, it said Mr. Didden had filed his suit too late. The village had announced the redevelopment plan in 1999, and Mr. Didden did not sue until 2004. His claim, the court said, was therefore barred by a three-year statute of limitations.

That was a curious ruling, Professor Epstein said, because it required Mr. Didden to sue over his claim of extortion before it happened.

The court also rejected Mr. Didden's claim that Port Chester should not be allowed to take his property so that another company could build a different drug store. The takings clause of the Fifth Amendment — "nor shall private property be taken for public use without just compensation" — should not apply, he had argued, to such transfers.

Judge Roberts, at his confirmation hearings in 2005, seemed sympathetic to that kind of argument. The

takings clause is uncontroversial when it is used to take property for public purposes like roads and schools. But it is a “basic proposition,” Judge Roberts added, that “government can’t take property from A and give it to B.”

No one disputes that Mr. Didden and his partner are entitled to be compensated for his property. Mr. Didden said the final amount had not been determined.

But Judges Roberts and Alito, at their confirmation hearings, said larger issues are involved in government takings.

“It touches some very sensitive nerves,” Judge Alito said. “Taking their home away and giving them money in return, even if they get fair market value for the home, is still an enormous loss for people.”

Judge Roberts, who said he had been surprised by the Kelo decision, said he welcomed new state laws “saying we do not authorize the use of the power of eminent domain to take for a use that’s going to be from one private owner to another.” Such laws, he said, are “certainly an appropriate reaction to a court’s decision in this area.”

He added that the author of the majority opinion in Kelo, Justice [John Paul Stevens](#), had said at a bar association meeting that he would have voted against the takings plan had he been a legislator rather than a judge making a constitutional determination. “The free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials,” Justice Stevens said in the speech.

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