



Does the Takings Clause provide any limits on the power of the government to take private property?

Context: Sotomayor was one of three judges to join in a Summary Order affirming the trial court's dismissal of claims in *Didden v. Village of Port Chester*, 2006 U.S. App. LEXIS 8653 (2006). One of the claims dismissed was a Takings Claim in which the plaintiff challenged the condemnation of property located within a redevelopment district.

Republican Attacks: Senator Cornyn argues that in *Didden* "the Second Circuit panel that included Judge Sotomayor gave the merits of the Taking claim almost no attention. Inexplicably, the opinion issued by the panel simply concluded in a single sentence that no relief was available under [*Kelo v. New London*, 545 U.S. 469 (2005)]." He concluded that "Judge Sotomayor's record raises real questions about her commitment to enforcing the Takings Clause."

Judge Sotomayor's record: The issue in *Didden* was the timing of the plaintiff's complaint, not the substantive nature of the condemnation proceeding or the local government's determination that such a condemnation was for a public use. Both the trial court and the three-judge panel on which Judge Sotomayor unanimously agreed that the complaint was time-barred and that alone compelled its dismissal. Accordingly, it is difficult to draw any conclusions regarding Sotomayor's views of takings or the public use doctrine from *Didden*.

With respect to *Kelo*, Cornyn himself recognized that "the Supreme Court has adopted a very broad interpretation of "public use," and that courts are required to "defer to most claims that a taking was for public use without subjecting the claim to considerable scrutiny" – a circumstance which he terms "unfortunate." In *Didden*, the panel on which Sotomayor sat read *Kelo* to preclude it from "second-guess[ing]" the Village's determination regarding what land it needed for the redevelopment project. Deference to Supreme Court authority was not only required in this circumstance, it is also one of the hallmarks of Judge Sotomayor's long record on the bench. Even if Sotomayor disagreed with *Kelo*, as Cornyn apparently does, she had no authority to overrule or disregard it to reach a different result in *Didden*. Notably, the Supreme Court denied cert. *Didden v. Village of Port Chester*, 549 U.S. 1166 (2007).

Nor is *Didden* the only decision in which Judge Sotomayor has participated in this area. In *Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005) – which involved the same redevelopment project at issue in *Didden* – Judge Sotomayor joined an opinion written by Judge Wesley in which the court held for the property owner. The court rejected the local government's contention that a public use determination did not require due process protection because it was a purely legislative decision, and emphasized the "crucial" role courts play enforcing limitations on public use. *Brody*, 434 F.3d at 128-9.