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# JUDGE SONIA SOTOMAYOR'S RECORD ON CONSTITUTIONAL PROPERTY RIGHTS

## TESTIMONY BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

**JULY 16, 2009**

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## INTRODUCTION.

I am grateful for the opportunity to address the important issue of constitutional property rights before this Committee. I would like to thank Chairman Leahy, Ranking Member Sessions, and the other members.

As President Barack Obama has written, "[o]ur Constitution places the ownership of private property at the very heart of our system of liberty."[1] The protection of property rights was one of the main objectives motivating the establishment of the Constitution.[2] Unfortunately, the Supreme Court has often relegated property rights to second class status, giving them far less protection than that extended to other constitutional rights.[3] I hope that the Committee's interest in this issue will ultimately help change that.

The purpose of my testimony is to analyze Judge Sonia Sotomayor's two most important constitutional property rights decisions: *Didden v. Village of Port Chester*[4] and *Krimstock v.*

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[1] BARACK OBAMA, THE AUDACITY OF HOPE 149 (2006).

[2] *See, e.g.*, JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990) (emphasizing centrality of property rights for the Founders); Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136 (noting that Perhaps the most important value of the Founding Fathers of the American constitutional period, 'was their belief in the necessity of securing property rights."

[3] I have summarized the second class status of property rights in current Supreme Court jurisprudence in Ilya Somin, *Taking Property Rights Seriously? The Supreme Court and the "Poor Relation" of Constitutional Law, in* THE UNITED STATES SUPREME COURT: CONTESTED CONSTITUTIONAL DOCTRINES (Steven Kautz, Arthur Melzer, and Jerry Weinberger, eds., forthcoming) , available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1247854.

[4] 173 Fed. Appx. 931 (2d Cir. 2006).



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*Kelly*.[5] Part I briefly sets the stage for the discussion of Didden by summarizing the Supreme Court's controversial decision in *Kelo v. City of New London*,[6] and the political reaction it generated. In Part II, I consider the *Didden* case itself, which goes even further than *Kelo* in giving government a virtual blank check to undertake even the most abusive of condemnations.[7] *Didden* raises serious questions about Judge Sotomayor's willingness to protect property owners' constitutional rights under the Takings Clause.[8]

Finally, Part III briefly considers *Krimstock*, a case where Judge Sotomayor authored an opinion providing important protection for the property rights of suspects in criminal investigations. Although *Krimstock* was not a close case in my view, it is of some importance because the issue it addressed will be considered by the Supreme Court this fall in *Alvarez v. Smith*.[9]

In this testimony, I take no position on Judge Sotomayor's overall qualifications for a seat on the Supreme Court. Although I find some aspects of her judicial philosophy troubling, she is a capable jurist with an inspiring life story. My purpose here is to help ensure that proper consideration is given to property rights issues, including some disturbing aspects of Judge Sotomayor's record on these questions.

## I. THE *KELO* DECISION AND ECONOMIC DEVELOPMENT TAKINGS.

The Supreme Court's 2005 decision in *Kelo v. City of New London* and the controversy it generated are the essential background to Judge Sotomayor's ruling in *Didden*. The Takings Clause of the Fifth Amendment to the Constitution requires that property can only be condemned for a "public use." Traditional public uses include those where the condemned land is actually "used" by the public either by building a government-owned structure on it (such as a road or a bridge), or by constructing a privately owned facility that the owner is required to allow the general public to utilize, as a matter of law – such as a public utility.

In *Kelo*, the Supreme Court ruled that the condemnation of private property for transfer to another private party in order to promote "economic development" was a permissible "public use" under the amendment; indeed, it ruled that virtually any potential benefit to the public counts as a "public use."[10] The Court upheld the condemnation despite the fact that the condemned property would not be owned by the government, the general public would have no right of access to it, and there was no legal requirement that the new private owners

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[5] 306 F.3d 40 (2d Cir. 2002).
[6] 545 U.S. 469 (2005).
[7] Part of my analysis of Didden is based on an amicus brief I coauthored on behalf of seven prominent property law professors urging the Supreme Court to hear the case and reverse the Second Circuit's decision. *See Didden v. The Village of Port Chester*, 2006 WL (U.S. Dec. 8, 2006), Amicus Br. of Law Professors D. Benjamin Barros, Eric R. Claeys, Viet D. Dinh, Steven J. Eagle, James W. Ely, Jr., Richard A. Epstein, Adam Mossoff, and Ilya Somin in Support of Petitioners.
[8] Although *Didden* is an unsigned, unpublished summary order, my understanding is that, in the Second Circuit Court of Appeals, such orders are usually drafted by the senior active judge on the panel, which Judge Sotomayor was in this case. In any event, she clearly assented to the panel opinion.
[9] *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008), pet. cert. granted, *Alvarez v. Smith*, 129 S.Ct. 1401 (2009).
[10] *Kelo v. City of New London*, 545 U.S. 469, 473-78 (2005).



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actually produce the promised "economic development" that supposedly justified the takings in the first place. *Kelo* was arguably consistent with two previous Supreme Court decisions that defined "public use" very broadly.[11] But it was at odds with the text and original meaning of the Fifth Amendment, which do not conflate "public use" with potential "public benefit."[12] It also placed undue faith in the willingness of government officials to protect the constitutional property rights of poor and politically weak. As historian and law professor James W. Ely, Jr. has written, "among all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy [judicial] deference" to the very government officials whose abuses of power it is meant to constrain.[13]

Takings that transfer property to private owners pose greater risk of abuse than condemnations for traditional public uses, such as government-owned facilities. Private-to-private takings enable governments to condemn property for the benefit of politically influential interest groups. They are also far less likely to be needed to overcome "holdout" problems. Private developers who seek to assemble land for projects that provide genuine economic benefits can generally do so without using the power of government to force current owners to sell.[14]

**A. Dangers of Unconstrained Eminent Domain Power.**

Judge Sotomayor has said that she "strive[s] never to forget the real-world consequences of [her] decisions."[15] The real world consequences of judicial failure to enforce public use limitations on takings are bleak. Perhaps the most important shortcoming of economic development condemnations is that they are often used to transfer property from the politically weak to the politically powerful.[16] It is not accidental that the *Kelo* condemnations were in large part instigated by the influential Pfizer Corporation, which stood to benefit from them.[17] Similarly, the famous 1981 *Poletown* condemnations – in which some 4000 people were forcibly expelled from their homes in a Detroit neighborhood in order to transfer property to General Motors to build a new factory – also benefited locally powerful interests such as the United Auto Workers labor union and of course General Motors itself. In both cases, the people displaced were mostly poor or lower middle class residents and small

[11] *See* Hawaii Housing Auth. v. Midkiff 467 U.S. 229, 241 (1984) (ruling that takings are for a public use if they are "rationally related to a conceivable public purpose"); Berman v. Parker, 348 U.S. 26, 32 (1954) (holding that the legislature has well-nigh conclusive" power to define public use as it sees fit).

[12] *See* James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners,* 2005 CATO SUP. CT. REV. 39, 40-43 (describing early American jurists' rejection of the idea that eminent domain can be used to transfer property from one private party to another without giving the general public any right to use it).

[13] *Id.* at 62.

[14] For a compelling explanation of the reasons why eminent domain is not needed to overcome holdout problems that might impeded private development, see Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1 (2006); see also Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183, 203-209 (2007).

[15] Quoted in Peter Baker & Jeff Zeleny, *Obama Hails Judge as "Inspiring,"* N.Y. TIMES, May 26, 2009, at A1.

[16] For a more in-depth discussion of this issue, see Somin, *Controlling the Grasping Hand*, at 190-203.

[17] *See* Ted Mann, *Pfizer's Fingerprints on Fort Trumbull Plan,* THE DAY, Oct. 16, 2005. For a detailed recent account of Pfizer's role, see JEFF BENEDICT, LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE (2008).



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businesses with little political influence.[18] It is difficult to imagine an economic development condemnation that transfers property from a powerful interest such as Pfizer or GM to people with little political power, and there are few if any such cases on record. Since World War II, hundreds of thousands of Americans – most of them poor and lacking in political influence - have been forcibly displaced by economic development, urban renewal, and "blight" condemnations of the sort licensed by *Kelo* and previous Supreme Court decisions that allow government to condemn virtually any property.[19] As the National Association for the Advancement of Colored People and other civil rights groups pointed out in an amicus brief they filed in support of the property owners in *Kelo*, economic development takings continue to disproportionately victimize poor and ethnic minority property owners.[20]

Since economic development takings are often driven by political rather than economic considerations, it is not surprising that they generally fail to produce the economic development that supposedly justified them in the first place.[21] By destroying existing businesses, homes, churches, and schools, they often inflict economic damage on communities that outweighs whatever benefits they create. The problem is exacerbated by the fact that, in most cases, neither the condemning authority nor the new private owner of the condemned property is under any legal obligation to actually produce whatever economic benefits were promised as justification for the taking. Predictably, this state of affairs gives public officials and corporations an incentive to inflate claims of projected economic benefits, which are then used as justifications for condemnation.[22]

In theory, voters could potentially monitor economic development takings and punish public officials who approve abusive condemnations at the polls. In practice, such case-by-case public monitoring is often difficult or impossible.[23] Many condemnations are complex affairs that take place out of the public eye. Moreover, it rarely becomes clear whether an economic development has really produced any benefits until years after the fact. By that time, public attention is likely to have moved on to other issues, and the offending political leaders are unlikely to be punished at the polls as a result. For example, the 1981 *Poletown* condemnations mentioned above never produced more than a fraction of the 6000 jobs that were promised. But this fact did not become clear until the late 1980s, and the political leaders who approved the condemnations never suffered any significant political punishment.[24]

**B. The Public Reaction to *Kelo*.**

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[18] For details on the *Poletown* case, see Ilya Somin, *Overcoming Poletown:* County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use,* 2004 MICH. ST. L. REV.
[19] *See* Ilya Somin, *Blight Sweet Blight,* LEGAL TIMES, Aug. 14, 2006, at 42.
[20] *See Kelo v. City of New London*, Amicus Br. of NAACP, American Association of Retired Persons, & Southern Christian Leadership Conference, 2004 WL 2811057.
[21] This paragraph summarizes points made in greater detail in Somin, *Controlling the Grasping Hand*, at 192-204.
[22] *Id.*, at 197.
[23] *Id.* at 201-203.
[24] Somin, *Overcoming* Poletown, at 1022-23.



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*Kelo* led to a massive political backlash against eminent domain abuse, with over 80% of the public disapproving of the decision. The ruling was also denounced by many political leaders and activists from across the political spectrum, including Ralph Nader, Democratic Representative Maxine Waters, and former President Bill Clinton.[25] Since *Kelo*, forty-three states have enacted reforms that purport to constrain the use of eminent domain for "economic development."[26] Unfortunately, the majority of the new laws are likely to have little or no effect because they allow economic development condemnations to continue under other names, usually by means of blight condemnation statutes that define "blight" so broadly that virtually any area qualifies.[27] In these states, post-*Kelo* reform is likely to have little impact because the new laws don't actually impose any meaningful restraints on eminent domain. "Business as usual" will probably continue under another name. For that reason, judicial protection for property rights remains critical, especially with respect to the rights of poor and politically weak populations.

## II. THE *DIDDEN* CASE.

### A. Factual Background.

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 it. 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. Nevertheless, in a short, cursory opinion, Judge Sotomayor's panel upheld the condemnation.

To be sure, Wasser disputed part of Didden and Bologna's account of the facts. He claimed that in addition to offering Didden and Bologna the options of paying him $800,000 or giving him a 50% stake in their business, he also offered to buy the land from them in exchange for an $800,000 payment from him. Wasser's proposal was extortionate even if he was telling the truth. If Wasser's version of events is correct, he in effect gave Didden and Bologna two options: pay him $800,000 or 50% of the proceeds of their project for the right to proceed with the construction of a CVS on their land, or transfer the land to him in exchange for an $800,000 payment from Wasser, in addition to the fair market value of the property (ultimately estimated to be $975,000).

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[25] Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2108-13 (2009).
[26] *Id.* at 2101.
[27] *Id.* at 2114-37. Similarly broad definitions of blight have been used to condemn perfectly normal areas for years. For example, courts have ruled that such unlikely locations as Times Square and downtown Las Vegas are blighted. *See* Somin, *Blight, Sweet Blight.*



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If Wasser did make that additional offer, it was actually even less generous to Didden and Bologna than the demand for a payment of $800,000. Wasser himself had estimated the potential profits from the drug store project at $2 million. If the owners had accepted this third proposal, they would have given up a total of $2.975 million ($2 million from the drug store project and $975,000 in fair market value) in exchange for $1.775 million – a total loss of $1.2 million. Under Wasser's supposedly more generous alternative offer, he would have gained 50% *more* in extortion money than he would have obtained had Didden and Bologna given in to his alternative demand for a simple payment of $800,000.

If a Mafia don approaches a business owner says that he will break his legs unless the victim either 1) pays him $800,000, 2) gives him a 50% stake in his business or 3) sells him the land at a price $1.2 million below its value, that would surely be extortion. Wasser's offer was exactly the same, except that his leverage was based on the threat of condemnation rather than breaking the owner's legs. If this is not extortion using the threat of eminent domain as leverage, then nothing is.

In any event, Judge Sotomayor's panel was required to assume the truth of Didden and Bologna's version of events. The Second Circuit was reviewing the district court's ruling on the Village's motion to have the plaintiffs' case dismissed before going to a jury on the ground that they had no possible legal basis for their suit under the Federal Rule of Civil Procedure 12(b)(6). When considering such "a motion to dismiss, the facts in the complaint are presumed to be true, and all reasonable inferences are drawn in the plaintiff's favor."[28] What is most frightening about the panel's ruling is that it apparently concluded that Didden and Bologna had no case even if their account of the facts was true.

**B. Legal Implications for Property Rights.**

**1. *Didden* holds that even the most abusive "pretextual" takings are constitutional.**

*Didden* is probably the most extreme anti-property rights ruling by any federal court since *Kelo*. It goes beyond *Kelo* in gutting protections for property owners against abusive takings. It is also striking that Judge Sotomayor and her colleagues not saw fit to dispose of this important case in a brief, unpublished summary order.

Although based partly on *Kelo's* very broad definition of "public use,"[29] *Didden* actually exceeded it. Indeed, it validated precisely the sort of egregiously abusive pretextual condemnation that even the *Kelo* majority considered to be unconstitutional. A pretextual condemnation occurs when the official purpose of the taking is actually just a pretext for an effort to benefit a private party. Justice John Paul Stevens' opinion for the Court 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."[30] As an example of such an unconstitutional pretextual taking, he cited a case with far less extreme facts than *Didden*—a

[28] *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 148 (2d Cir. 2000).
[29] *See Kelo*, 545 U.S. at 473-78 (holding that any potential "public benefit" counts as a "public use").
[30] *Id.* at 478.



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California district court ruling invalidating the condemnation and transfer of a 99 Cents store to Costco.[31] The taking had been rationalized on the ground that Costco might produce more tax revenue and economic growth.[32]

Like the *Didden* property, the 99 Cents store was located in a redevelopment area subject to a development plan.[33] The rationale for the 99 Cents condemnation and transfer was at least plausible, since the upscale Costco store might have generated more economic activity than the 99 Cents store, and hence a public benefit. Nonetheless, the Supreme Court described the *99 Cents* condemnation as unconstitutional because it was "a one-to-one transfer of property, executed outside the confines of an integrated development plan."[34] In *Didden*, by contrast, there was no plausible public benefit. Wasser's plan for the condemned land was to build a Walgreens pharmacy—virtually identical to Didden and Bologna's plan to build a CVS pharmacy.[35] In any event, Didden and Bologna's land would not have been condemned but for their refusal to pay Wasser the money he demanded. As in *99 Cents*, the mere fact that a taking occurred in a redevelopment area should not have led the court to conclude that anything goes. Under *Kelo*, a taking within a redevelopment area can still be invalidated as pretextual.

Nearly all economic development takings occur in redevelopment areas of one type or another. If the mere existence of a redevelopment area licenses otherwise pretextual takings, then property owners are left completely unprotected against even the most abusive condemnations.[36]

For these reasons, *Didden* was a grave error that undermined even the modest protection for property owners mandated by *Kelo*. Since *Kelo* was decided, there has been considerable disagreement over the question of what sorts of condemnations are to be invalidated as "pretextual."[37] But if this case was not an unconstitutional pretextual condemnation, it is hard to see what would be. A judge unwilling to invalidate the condemnation of property for purposes of blatant extortion is unlikely to protect property owners in less extreme takings cases.

A final disappointing aspect of *Didden* is the way in which the panel disposed of this important constitutional issue in a single sentence that offered virtually no analysis:

> [E]ven if Appellants' claims were not time-barred, to the extent that they assert that the Takings Clause prevents the State from condemning their property for a private use within a redevelopment district, regardless of whether they have been provided with just compensation, the recent Supreme Court decision in *Kelo v. City of New*

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[31] *Id.* at 487 n. 17 (citing *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003).
[32] *99 Cents*, 237 F. Supp.2d at 1128-30.
[33] *Id.* at 1130 (noting that the condemnation was part of the "Amargosa Redevelopment Plan" in the "Amargosa Project Area").
[34] *Kelo*, 545 U.S. at 487 n. 17.
[35] *Didden v. Village of Port Chester*, 304 F. Supp. 2d 548, 552 (S.D.N.Y. 2004).
[36] *Cf.* Somin, *Controlling the Grasping Hand*, at 228-29.
[37] For a survey of the relevant cases, see Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173 (2009).



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> *London* . . . obliges us to conclude that they have articulated no basis upon which relief can be granted.[38]

Judge Sotomayor and her colleagues offer no defense of their constitutional ruling other than a misleading claim that it was required by *Kelo* – an unsupported assertion that simply ignores the *Kelo* Court's admonition that pretextual takings remain illegal.

**2. The statute of limitations issue.**

In addition to rejecting Didden and Bologna's constitutional argument, Judge Sotomayor's panel also ruled that their claim was time-barred because it exceeded the relevant three year statute of limitations. This, however, in no way vitiates the extreme nature of the decision.

First, it is essential to recognize that the panel clearly did rule on the substantive issue as well.[39] Thus, even if they were correct on the statute of limitations issue, they still committed a grave error in their ruling on the vastly more important constitutional question.

Second, the Second Circuit's conclusion that the property owners' claim was time-barred is completely dependent on their substantive ruling that a condemnation enacted within a redevelopment area cannot be invalidated as pretextual. The panel ruled that Didden and Bologna were required to challenge the condemnation of their property within three years after its inclusion in a redevelopment area in July 1999. But their property was not condemned at that time and Wasser did not make his extortionate threats until November 2003. Until then, it was impossible to file a pretextual taking claim because no pretextual taking had yet occurred or even been threatened. Judge Sotomayor's panel ruled that Didden and Bologna's case was time-barred because it assumed that there is no legal difference between the mere declaration of a redevelopment area and the use of condemnation for purposes of extortion. The panel's seemingly technical procedural ruling was actually based on a serious substantive error.

## III. *KRIMSTOCK V. KELLY.*

Judge Sotomayor's opinion in *Krimstock v. Kelly*,[40] her other significant property rights ruling, is much better than the summary order in *Didden.* In *Krimstock*, she wrote an opinion invalidating New York City's policy of seizing and holding vehicles owned by suspects accused of DUI and other offenses, and then retaining them for months or years at a time without allowing the defendants to challenge the seizures in any kind of legal proceeding.

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[38] *Didden*, 173 Fed Appx. at 933 (some citations omitted).
[39] *See id.* (stating that "even if Appellants' claims were not time-barred, to the extent that they assert that the Takings Clause prevents the State from condemning their property for a private use within a redevelopment district, regardless of whether they have been provided with just compensation, the recent Supreme Court decision in *Kelo v. City of New London* . . . obliges us to conclude that they have articulated no basis upon which relief can be granted").
[40] 306 F.3d 40 (2d Cir. 2002).



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Judge Sotomayor correctly ruled that this policy violates the Due Process Clause of the Fourteenth Amendment, which mandates that citizens cannot be deprived of life, liberty, or property without "due process of law." One can certainly argue about how much process is "due" in any given situation. But surely it is a violation of the Clause for the state to deprive citizens of valuable property for many months *without any judicial process whatsoever*. That is especially true if the deprivation imposes a substantial burden on the owner, as is often the case when the property seized is a car. Perhaps little or no process should be required for a very small deprivation of property; but surely more is "due" when the owner suffers serious harm as a result of the government's seizure of her possessions. For these reasons, it is hard to dispute Judge Sotomayor's conclusion:

> A car or truck is often central to a person's livelihood or daily activities. An individual must be permitted to challenge the City's continued possession of his or her vehicle during the pendency of legal proceedings where such possession may ultimately prove improper and where less drastic measures than deprivation pendente lite are available and appropriate.[41]

The *Krimstock* case is similar to the recent Seventh Circuit decision in *Alvarez v. Smith*,[42] which will heard by the Supreme Court this fall. *Krimstock* may actually have been a slightly less egregious case because three of the owners of the vehicles in *Alvarez* had not even been charged with a crime,[43] while the seven plaintiffs in *Krimstock* had pleaded guilty to the charge of driving while impaired (though forfeiture of property was not part of the legally mandated sentence for this offense).[44]

Judge Sotomayor also participated in another ruling that upholding minimal procedural Due Process Clause rights for property owners. In *Brody v. Village of Port Chester,* she was on a panel that held that property owners subjected to takings were entitled to individualized notice of the government's plan to condemn their property and the time limit for challenging it in court.[45]

In my view, *Krimstock* and *Brody* are relatively easy cases. Surely holding onto valuable property for years at a time with no legal process at all is not "due process" under any defensible definition. Similarly, even a minimalist interpretation of the Due Process Clause requires that property owners be given notice of a city's decision to condemn and the time period for challenging it; otherwise, they could easily be deprived of any opportunity to present their case whatsoever. However, the fact that the Supreme Court decided to hear *Alvarez* and may end up reversing it suggests that we cannot take anything for granted. Therefore, Judge Sotomayor does deserve some substantial credit for her opinion in *Krimstock.*

**CONCLUSION.**

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[41] *Krimstock*, 306 F.3d at 44.
[42] *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008), pet. cert. granted, *Alvarez v. Smith*, 129 S.Ct. 1401 (2009).
[43] *Smith v. City of Chicago*, Plaintiffs' Br.,2007 WL 1706653 at 10-12.
[44] *Krimstock*, 306 F.3d at 45-46.
[45] 434 F.3d 121 (2d Cir. 2005).



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*Krimstock* is a praiseworthy decision. But it does not fully offset Judge Sotomayor's deeply flawed ruling in *Didden.* For reasons described above, judicial enforcement of Public Use Clause limitations on takings is vital for protecting the rights of property owners, particularly the poor and politically weak. The procedural Due Process Clause protections Judge Sotomayor enforced in *Krimstock* and *Brody* have great value. But ultimately, they are less significant than the constitutional rules that prevent government from taking homes, businesses and other property without any legitimate public use. For property owners, there is only limited consolation in the fact that the government must provide notice and a hearing before it takes their land for the benefit of well-connected private interests.



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