

Federal Eminent Domain Power Prevails Over State Sovereign Immunity in Newest Supreme Court Case

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INTRODUCTION

Building energy-related infrastructure, assuring reliable sources of energy generation, and protecting the environment are not novel concerns. Since the Founding of the Republic, the federal government has not hesitated to exercise the power of eminent domain to address infrastructure priorities. Nor has the national sovereign done so singlehandedly; often times it has delegated its authority to private actors, who proceed under the federal government's aegis in acquiring both private property and state-owned lands.

Since the Founding of the Republic, the federal government has not hesitated to exercise the power of eminent domain to address infrastructure priorities.

A prime example is the interstate network of natural gas pipelines, much of it constructed by private actors who exercised the federal prerogative of eminent domain pursuant to a statutory scheme inaugurated in 1938 under

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then President Franklin Delano Roosevelt. To be certain, the operation and implementation of that legislative regime has worked well and without rancor for the better part of nearly 80 years. Until now.

In *PennEast Pipeline Co., LLC v. New Jersey*,¹ a decision issued at the very end of its most recent term, the US Supreme Court in a sweeping decision ruled in favor of the federal government's power of eminent domain. The Court's decision further confirmed that this right may be delegated to private actors, rejecting New Jersey's defense of sovereign immunity, declaring that the sovereign states are indeed susceptible to condemnation proceedings brought in federal court. Nonetheless, the fact that the Justices were sharply divided in reaching this outcome should give us pause, and counsels only the most careful consideration of this newest landmark ruling, and what it means for upcoming infrastructure and energy projects. But first, a brief preamble to provide context for legal analysis.

NATURAL GAS PIPELINES—A BRIEF HISTORY

While the use of natural gas as an energy source stretches as far back as the 1820s, its concomitant pipeline infrastructure did not begin to emerge until almost a century later. The modern network might not even exist but for the enactment of the Natural Gas Act ("NGA") in 1938 as part of FDR's

¹ 594 US ____ (no. 19-1039) (June 29, 2021).

New Deal. In addition to imposing a comprehensive scheme of federal regulation upon the interstate natural gas markets, the statutory regime requires all interstate pipeline routes and construction to be approved first by the Federal Energy Regulatory Commission (“FERC”).

The NGA directs any developer proposing to build a natural gas pipeline to obtain FERC approval in the form of a “certificate of convenience,” a document wherein the regulators concur that the project is or shall be required by the present or future public convenience or necessity.² Notice, public hearings, and comments must precede any certificate’s issuance. Yet the statute, as originally promulgated, did not go far enough; private parties needing to acquire land along their approved pipeline routes often found themselves mired in state court eminent domain proceedings, where the federal government’s ostensible imprimatur of approval did not amount to much more than a paper tiger.

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A scant decade after the legislative regime was initially passed, Congress amended the NGA to remove these local obstacles, by explicitly delegating the federal eminent domain power to any holder of a certificate of convenience, and further authorizing certificated parties to bring condemnation actions in the federal district courts.³ As PennEast itself observed, the revised statutory scheme permits FERC to “vest natural gas companies with the federal eminent domain power,...ensur[ing] that certificates of public convenience and necessity could be given effect.” With that past as prologue, we may now turn to the facts of the instant case.

THE PENNEAST PIPELINE

PennEast, a private entity owned by a number of energy companies, set out in 2015 to construct

a natural gas pipeline originating near Scranton, Pennsylvania, and extending a little less than 120 miles to the nearby Princeton/Trenton area of New Jersey. Following the process described above, PennEast applied to FERC for approval. Prior to issuing the certificate of convenience in early 2018, the regulators held the required public hearings, reviewed literally thousands of written comments, and eventually approved a compromise route for the pipeline.

When PennEast commenced condemnation proceedings in the Garden State’s federal district court, New Jersey objected to being named as a defendant, citing the defense of sovereign immunity.

Certificate in hand, the PennEast’s next step was to acquire certain necessary rights-of-way, encompassing not only private property, but also certain parcels in which the State of New Jersey claimed an interest. When PennEast commenced condemnation proceedings in the Garden State’s federal district court, New Jersey objected to being named as a defendant, citing the defense of sovereign immunity. Against that factual backdrop, the matter arrived at the Supreme Court.

THE CHIEF JUSTICE AND EMINENT DOMAIN

Given that this case set the federal government’s power of eminent domain in exquisite counterpoise to the defense of state sovereign immunity, Chief Justice Roberts opened with the following unequivocal observations regarding the former. First, the federal government has exercised the eminent domain power both by itself, and by delegating same to private parties. Second, the national sovereign has done so since the Founding of the Republic, routinely employing eminent domain to acquire land for the construction of roads, bridges, and the like. Third, the eminent domain prerogative has been used with equal facility to acquire the property of individuals and the States alike. Indeed, in a historical sidebar, Chief Justice Roberts notes that the power of government

² See 15 U.S.C. § 717f(e).

³ See 15 U.S.C. § 717f(h).

to take private property for public use may stretch back to biblical times. At the very least, the term “eminent domain” came into use no later than the Seventeenth Century and was woven into the very fabric of the laws of England and the American Colonies.

Chief Justice Roberts conceded that such precise language does not appear anywhere within the constitutional text. Nevertheless, the majority ruled that eminent domain is implicitly recognized by the Constitution’s guarantor of individual property rights, the Takings Clause of the Fifth Amendment.⁴

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Relying upon Reconstruction Era precedents, the Chief Justice Roberts deemed it well settled that the federal government’s eminent domain authority could neither be enlarged nor diminished by the States, nor was the consent of any state sovereign ever a condition precedent to the exercise of that federal prerogative. And, highly relevant to the matter at hand, high bench landmarks spanning well over a century confirmed “[t]he fact that land is owned by a state is no barrier to its condemnation by the United States.”⁵

DELEGATING THE EMINENT DOMAIN POWER

For the next part of its ruling, the Supreme Court majority confirmed that the federal government may delegate its power of eminent domain to private actors. To be sure, the supreme tribunal noted that delegation had been a “commonplace” for both the Colonies, and later the States, and its validity stands unaltered after more than two centuries.

Here, a different post-Civil War landmark confirmed that state sovereign immunity is no more

effective against a nongovernmental delegate than it is against the national authority. Interestingly, the holding referenced by the majority rejected an attempt by New Jersey over 130 years ago to thwart a past delegation of the federal eminent domain power to private actors. Chief Justice Roberts emphasized in that bygone controversy “Justice Bradley...presciently noted that New Jersey’s position, if accepted, would give rise to the ‘dilemma of requiring the consent of the state in almost every case... for hardly a case can arise in which some property belonging to a state will not be crossed’” in constructing interstate public facilities.⁶

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Now the PennEast majority declared that, since the Founding, the Supreme Court has looked on with approval, and without making distinctions, at the exercise of the eminent domain power by either the federal government or its authorized delegates. Nor does it matter that the subject property is owned by private citizens or state governments. Chief Justice Roberts then adds that the NGA was amended in 1947 “specifically to solve the problem of States impeding interstate pipeline development;” therefore, it has long been understood “that States’ property interests would be subject to condemnation” litigation in the federal trial court for the district where the subject property was located. Having disposed of the eminent domain aspect of the case at bar, the high Court now turned to adjudicate New Jersey’s defense of sovereign immunity.

STATE SOVEREIGN IMMUNITY MUST YIELD

The supreme tribunal commenced New Jersey’s defense of sovereign immunity portion of

⁴ U.S. CONST. amend. V.

⁵ See *Kohl v. United States*, 91 U.S. 367 (1876) (internal quotations from the original).

⁶ See *Stockton v. Baltimore & N.Y.R. Co.*, 32 F.9 (C.C. D. N.J. 1887). While not an actual Supreme Court opinion, the case was decided by Justice Bradley during an era when high Court members routinely “rode the circuit,” hearing intermediate appeals.

its analysis by declaring a fundamental truth: the States entered into the Union with their sovereignty intact, a point further confirmed by the passage of the Eleventh Amendment (prohibiting the federal courts from entertaining any lawsuit against one of the States). But it is equally true, held the Court majority, that such immunity can be abrogated, typically by a State's unequivocal permission.

Yet another way a sovereign jurisdiction can surrender its immunity is "if it has agreed to suit in the 'plan of the Convention,'" in other words, if the structure of the original Constitution itself made a state amenable to litigation in the federal courts. In the instant case, the Supreme Court found that was exactly what the States had done with regard to the federal power of eminent domain.

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Writing for the majority, Chief Justice Roberts catalogued the following in support of the conclusion that state sovereign immunity is subordinate to the federal government's power of eminent domain. One, the States consented to the federal eminent domain power in the plan of the Convention. Two, the federal government is invested with full and complete power to carry out its lawful purposes, and eminent domain is recognized as a means to that end. Three, when the States agreed to submit themselves to the federal power of eminent domain, their consent extended to its exercise by private actors, and the latter proceeding via condemnation suits.

As characterized by Chief Justice Roberts, "when the States entered the federal system, they renounced their right to the 'highest dominion in the lands comprised within their limits.'" The supreme tribunal ruled that it was clearly contemplated in the plan of the Convention that the sovereign immunity of the States "would yield to that of the Federal Government." Logically, how else could the federal government carry out its constitutional obligations unless it held

a power of eminent domain clearly superior to that of any individual jurisdiction, as well as the concomitant right to delegate such authority? In sum, Chief Justice Roberts pointedly concluded that PennEast's condemnation actions against New Jersey reside "comfortably within the class of suits to which the States consented under the plan of the Convention."

As characterized by Chief Justice Roberts, "when the States entered the federal system, they renounced their right to the 'highest dominion in the lands comprised within their limits.'"

The Court similarly refuted New Jersey's allegation that there was no historical evidence that when the States agreed to the plan of the Convention, they also consented to condemnation litigation initiated by private parties. The majority ruled such an argument is flawed, the reason being that "it attempts to divorce the eminent domain power from the power to bring condemnation actions." *PennEast* declared that the former "is inextricably intertwined with the ability to condemn."

Noting that the Supreme Court has at times "equated the eminent domain power with the power to bring condemnation proceedings," the majority established the following axiom: an eminent domain power that is incapable of being exercised would amount "to no eminent domain power at all." Therefore, contriving to segregate such authority from the means to enforce it would violate the basic principle that "a State may not diminish the eminent domain authority of the federal sovereign."

Speaking pragmatically, Chief Justice Roberts found it does no violence to state sovereignty for a jurisdiction to be amenable to suit by the same federal government which the people established for the common and equal benefit of all, regardless of state citizenship. Nor was nominal state immunity diminished by the possibility that condemnation proceedings might be commenced by the lawful delegates of the national sovereign.

New Jersey's final riposte was that the NGA could exalt such private actions above state sovereign immunity only if there was unequivocal textual evidence that such an outcome had, in fact, been intended by Congress. Restated simply, the Garden State argued the correct line of inquiry was to ask if a state had explicitly consented to being sued before a federal tribunal. While the Court majority agreed that sovereign immunity can only be waived by unmistakable clarity, that was not the right question to be asked here.

"The issue is instead whether the United States can delegate its eminent domain power to private parties." There is a distinction, opined Chief Justice Roberts, between the federal government delegating its general exemption from state sovereign immunity and assigning its eminent domain power to a private party. The *PennEast* Court emphasized that the national scope of eminent domain is complete and self-sufficient, and the States did, in fact, consent to it "in its entirety" in the plan of the Convention.

For its denouement, the Supreme Court melded the past with the present. At the Founding, the Framers intended to "create a cohesive national sovereign," and, "to give effect to that vision," imbued the federal government with the right of eminent domain. Whereas that power initially connected the nation via turnpikes and bridges and later railroads, it now unites the land with "pipelines, telecommunications infrastructure, and electric transmission facilities." And nearly since the Founding, the Supreme Court has repeatedly upheld exercises of this power of eminent domain, whether by the national sovereign or its private delegates, and whether it was employed against individual property or state-owned land.

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"The NGA fits well within this tradition," wrote Chief Justice Roberts, observing that the nation's

modern pipeline infrastructure, spanning hundreds of thousands of miles, largely owes its existence to the enabling provisos of that statutory regime. Moreover, the 1947 amendments to the NGA expressly authorize private actors to seek and obtain certificates of convenience, which in turn empowers them to condemn all property necessary to their approved plans, whether such property is owned by citizens or sovereign states.

And closing with a final, unequivocal declaration that "the States consented at the founding to the exercise of the federal eminent domain power, whether by public officials or private delegates," *PennEast* took its place in the respective pantheons of constitutional law and energy regulation.

AN IMPORTANT DISSENT

Yet the foregoing does not represent the last word regarding this most recent Supreme Court landmark. Notice must be taken of Justice Barrett's vigorous dissent, which straightforwardly catalogued what she believed to be various flaws in the majority's reasoning.

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First, the high Court's newest member argued that eminent domain is not to be found within the constitutional text as a "stand-alone" power. Worthy of note in this dissent is a telling parenthetical, which staunchly asserts that the Takings Clause is "a limitation on Government power, not a grant of it," an assertion clearly intended to turn back the majority's own statements regarding that portion of the Fifth Amendment.

Second, the dissent wholly rejected the majority's postulations that the States had surrendered their sovereign immunity to the federal eminent domain power in the plan of the Convention, calling that thesis "the wrong way to think about the problem." The relevant NGA statutes, Justice Barrett argued, are unconnected to eminent domain. Rather, they can only be rightly viewed as an exercise in

Congress' constitutional mandate to regulate interstate commerce.⁷

Properly considered in that light, the dissent contended that the Commerce Clause neither authorizes condemnation suits by private actors against the States, nor does the proviso have any power to diminish sovereign immunity. Therefore, Justice Barrett was most firm in claiming that "Congress cannot enable a private party like PennEast to institute a condemnation action against a nonconsenting State like New Jersey."

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Third, Justice Barrett was unyielding in her conclusion that the constitutional text is bereft of any explicit language which elevates the federal government's prerogatives of eminent domain above the States' sovereign privileges, especially with regard to private condemnation suits. Nor does history provide evidence supporting the majority's assertion that, in the plan of the Convention, the sovereign states consented to waiving their immunities. The dissent altogether declaimed the stark absence of the unequivocal, compelling evidence which the high Court had traditionally demanded as a precondition to abrogating state sovereign immunity.

To be sure, the newest Justice had no qualms about conceding that the Legislative Branch had long ago determined that condemnation suits were the preferred avenue for private parties to acquire the land necessary to complete interstate pipeline construction. With similar ease, the dissent acknowledged that, except for the case now at the bar, the States had generally gone along. Lastly, Justice Barrett admitted with all candor, sovereign immunity can be a cloak for local intransigence. But all this changes nothing, declared the dissent, for reason that "[t]he availability of the [sovereign immunity] defense does not depend on whether a court approves of the State's conduct."

⁷ US CONST. art. I, § 8, cl. 3.

For all these reasons, Justice Barrett argued that it was error to contemplate the instant case solely through the prism of the federal power of eminent domain, and it only compounded that mistake to narrowly focus upon the related issue of delegating that authority and enabling private actors to bring condemnation actions. Maintaining that the case at bar implicated only Congress' power to regulate interstate commerce, the learned dissent stood by its assertions that the Commerce Clause does not abrogate state sovereign immunity, and, therefore, PennEast's federal lawsuits were barred.

CONCLUSION

How are we to evaluate the implications of this latest pronouncement from the Supreme Court? One could remark that PennEast does nothing more than clear the way for the construction of a modest pipeline (less than 120 miles in length) from northeastern Pennsylvania to neighboring southwest New Jersey. Yet such a facile interpretation ignores the majority's solemnization of the laws of federal eminent domain and state sovereign immunity, which the federal government or its delegates shall now invoke whenever and wherever they seek to acquire private or state-owned land.

One could remark that PennEast does nothing more than clear the way for the construction of a modest pipeline (less than 120 miles in length) from northeastern Pennsylvania to neighboring southwest New Jersey.

Accordingly, our own *coda* strikes a cautionary note. While this latest proclamation by the high Court represents the controlling law—at least for now—the dissent's robust defense of state sovereignty remains a force to be reckoned with. This writer foresees the day when the fundamental controversy, clothed in a fresh iteration, reaches the supreme tribunal once more. Indeed, and given the Nation's ardent pursuit of revitalizing its infrastructure, coupled with the necessity of balancing environmental considerations against the always increasing need for reliable energy, we believe such a renewed confrontation is inevitable, and, in fact, welcome, for reason of the gravity of the constitutional axioms at stake. 