

Supreme Court Holds that Natural Gas Act Delegates Eminent Domain Power, Allowing FERC Certificate-Holders to Condemn State-Owned Property

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On June 29, in [*PennEast Pipeline Co., LLC v. New Jersey et al.*, No. 19-1039](#), the Supreme Court rejected New Jersey's sovereign immunity arguments and held that Section 717f(h) of the Natural Gas Act (NGA) authorizes Federal Energy Regulatory Commission (FERC) certificate-holders to condemn all necessary rights-of-way to construct pipelines, whether owned by private parties or by states. "Because the [NGA] delegates the federal eminent domain power to private parties, those parties can initiate condemnation proceedings, including against state-owned property."

Chief Justice Roberts authored the 5-4 opinion, joined by Justices Breyer, Alito, Sotomayor, and Kavanaugh. The Court reversed and remanded the Third Circuit's judgment. In a [prior post](#), we discussed the judgment and other factual and legal backgrounds of the case.

The Court's Opinion

At the outset, the Court rejected a threshold argument that was raised by the Solicitor General, but not by PennEast or New Jersey. The United States argued that the Third Circuit lacked jurisdiction because New Jersey's sovereign immunity argument was a challenge to the FERC certificate itself, and Section 717r(b) of the NGA limits jurisdiction for such challenges to the D.C. Circuit or the circuit in which the certificate-holder has its principal place of business. The Court disagreed. "New Jersey does not seek to modify FERC's order; it asserts a defense against the condemnation proceedings initiated by PennEast."

On the main issue, the Court first explained what was undisputed: "Since the founding, the Federal Government has exercised its eminent domain authority through both its own officers and private delegates[,], [a]nd it has used that power to take property interests held by both individuals and States." The Court held that "Section 717f(h) is an unexceptional instance of th[e] established practice" of the federal eminent domain power being exercised to take state-owned property interests. "For as long as the eminent domain power has been exercised by the United States, it has also been delegated to private parties," and the Court has "observed and approved of that practice."

The Court then turned to New Jersey’s sovereign immunity defense: that while the federal government might lawfully delegate its eminent domain power, it could not (and did not) delegate its power to sue nonconsenting states in condemnation actions. Rejecting this argument, the Court explained that an exception to sovereign immunity applies. By ratifying the Constitution, states consented to “the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegates.” And contrary to New Jersey’s arguments, “the eminent domain power is inextricably intertwined with the ability to condemn.” Separating those powers would “violate the basic principle” that a state cannot diminish the federal government’s eminent domain power.

From a practical standpoint, the Court noted that if private parties authorized by the federal government were unable to condemn state-owned property interests, their only “constitutionally permissible” way to exercise the federal eminent domain power would be to take property first, and require states to sue for compensation later. But, according to the Court, “[i]t is difficult to see how such an arrangement would vindicate the principles underlying state sovereign immunity.” The fact that Congress could authorize FERC to condemn the same state property interests and then transfer them to PennEast “further highlights the counterintuitive nature of the constitutional scheme envisioned” by New Jersey and the dissenting justices.

Lastly, the Court addressed the argument that Section 717f(h) does not use the “unmistakably clear” language necessary to delegate the federal government’s ability to sue nonconsenting states. The Court explained that while “a clear statement” is required to statutorily waive or abrogate sovereign immunity, that principle has no application here because there is no sovereign immunity to waive or abrogate. As the Court previously explained, states consented to “the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegates.” Thus, “[t]he issue is instead whether the United States can delegate its eminent domain power to private parties,” and no “clear statement” rule or similar requirement applies in that context.

Dissenting Opinions

The main dissent, authored by Justice Barrett and joined by Justices Thomas, Kagan, and Gorsuch, argued that the majority’s ruling framed PennEast’s suit as “something other than what it is: a private suit against a State that Congress has authorized pursuant to its commerce power.” “This Court has long held that States did not surrender their sovereign immunity to suits authorized pursuant to Congress’ power to regulate interstate commerce, and no historical evidence suggests a different result obtains for condemnation suits brought by private parties against nonconsenting States.”

Justice Gorsuch authored a separate dissenting opinion, joined by Justice Thomas, in which he distinguished structural immunity and Eleventh Amendment immunity, and argued that the majority conflated them. Justice Gorsuch argued that while the majority’s opinion was really rooted in structural immunity, Eleventh Amendment immunity “eliminates federal judicial power” over suits against states by diverse plaintiffs. Because PennEast is a citizen of Delaware and is suing New Jersey, Justice Gorsuch explained that “[t]he lower courts ... have an obligation to consider this issue on remand before proceeding to the merits.”

Implications

The Court’s ruling supports the general purpose of the NGA—allowing the pipeline industry to reliably supply the country with affordable natural gas. More specifically, the ruling removes a potential state

veto power over federally-approved pipelines, and also prevents private property owners from seeking to thwart pipeline construction by granting easements to states that share their opposition. States and private parties who oppose pipeline construction are not without recourse, though; they can participate in FERC proceedings and seek judicial review of FERC certificates as provided in the NGA. Indeed, the challenge to PennEast's FERC certificate is pending in the D.C. Circuit and had been stayed until this decision.

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