



PennEast Pipeline Company v. New Jersey: Can a Pipeline Company Bring a Condemnation Suit Against a State?

August 12, 2021

A foundational principle of the United States, as reflected in various portions of the U.S. Constitution, is the [notion](#) that states retain certain sovereign powers. One such power that has repeatedly been the subject of litigation before the Supreme Court for [more than 200 years](#) is the states' immunity from lawsuits brought by private citizens in federal court. The latest dispute over this power came before the Supreme Court in *PennEast Pipeline Company v. New Jersey*, which addressed a pipeline company's ability to condemn state lands using eminent domain power delegated to it by the Federal Energy Regulatory Commission (FERC) pursuant to [Section 7 of the Natural Gas Act \(NGA\)](#). In a 5-4 decision, the Supreme Court [held](#) that Section 7 permits pipeline companies to initiate such condemnation proceedings against states in federal court. The Court's decision provides clarity on the extent of the eminent domain power that is delegable under Section 7 and may also offer lessons to Congress should it wish to authorize private entities to exercise eminent domain in future legislation.

Background

The [Takings Clause](#) of the Fifth Amendment provides that private property may not be acquired for "public use" without "just compensation." Implicit in the Takings Clause is that the federal government [possesses the power to take private property for public use](#) through the exercise of eminent domain so long as the property owner receives "just compensation." One of the ways in which the government exercises this power is to bring a condemnation suit against the property owner in court, seeking a court order allowing the government to take possession of the property and calculating the just amount of compensation due to the property owner.

[Section 7](#) of the NGA establishes a federal framework for permitting the construction and abandonment of interstate natural gas transportation facilities such as pipelines, requiring natural gas companies to obtain a "certificate of public convenience and necessity" from FERC prior to taking any construction action. Among other things, Section 7 authorizes natural gas companies in possession of a certificate of public convenience and necessity to exercise eminent domain when they are unable to acquire necessary rights-of-way by contract or negotiation with the property owner.

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LSB10634

The PennEast Pipeline Company obtained a certificate of public convenience and necessity from FERC pursuant to Section 7 of the NGA authorizing PennEast to construct a pipeline from Pennsylvania to New Jersey. Exercising its delegated eminent domain power, PennEast sought to condemn lands along the approved pipeline route in which the State of New Jersey holds possessory and non-possessory interests. To that end, PennEast filed a condemnation proceeding in the U.S. District Court for the District of New Jersey. New Jersey moved to dismiss the action, [arguing](#) that it possesses [sovereign immunity](#) from lawsuits brought by private citizens in federal court. The district court rejected that argument. The court [reasoned](#) that because Section 7 of the NGA authorizes FERC to issue certificates of public convenience and necessity that delegate the federal government’s power of eminent domain to private entities, and because the United States has the power to sue states, certificate-holders “stand[] in the shoes of the sovereign” and may therefore exercise eminent domain power against states by means of condemnation actions in federal court.

The U.S. Court of Appeals for the Third Circuit [reversed](#) the district court’s judgment. The Third Circuit reasoned that the federal government’s power to condemn state-owned property implicates two distinct powers: the power to take property (the eminent domain power) and the power to sue non-consenting states as a means of obtaining possession of the condemned property. The Third Circuit did not dispute that the United States can delegate its eminent domain power to private parties, such as PennEast. However, it held that PennEast did not have the power to sue New Jersey in a condemnation action because (1) Section 7 of the NGA [lacks any language](#) suggesting an intent to delegate to certificate-holders the United States’ power to sue states, and (2) [no case law](#) supports the theory that the United States may delegate this power. For a more detailed discussion of the Third Circuit’s decision, see [this earlier Legal Sidebar](#).

The Supreme Court’s Decision

The Supreme Court [reversed](#) the Third Circuit’s judgment. Writing for the five-Justice majority, Chief Justice Roberts [opined](#) that the Third Circuit’s analysis was not consistent with the historic understanding of the eminent domain power or the Court’s interpretation of that power.

The Court explained that the federal government’s power of eminent domain is [embedded](#) in the Constitution and that the United States has [exercised](#) that power “[s]ince its inception,” including against state property. The Court emphasized that it had, in its prior decisions, “observed and approved” the federal government’s exercise of this power on its own and by “delegat[ing] that power to private parties.” The Court also has “stated, as a general matter,” that the United States and its delegates can exercise the eminent domain power either by taking “physical possession of property without authority of a court order,” or by means of a condemnation action in court. That left only the question of whether a state’s sovereign immunity bars a private delegate from filing a condemnation action against a state. The Court held that it does not, because the states had consented to suit for these purposes.

The Court explained that one of the “[limited circumstances](#)” in which a state may be sued is when it has consented to suit in the “plan of the Convention,” i.e., if “[the structure of the original Constitution itself](#)” authorizes the lawsuit against a state. Among the waivers of sovereign immunity that the Court has held to be implicit in the plan of the Convention are [suits by the federal government](#) against a state, including [condemnation proceedings](#). This circumstance occurs [because](#), “when the States entered the federal system, they renounced their right to the ‘highest dominion in the lands comprised within their limits.’” It thus follows, the Court held, that the delegation of eminent domain power to private parties [includes](#) a delegation of the power to sue states, making a separate statutory delegation of the power to sue states unnecessary. As the Court [emphasized](#): “[s]eparating the eminent domain power from the power to condemn—when exercised by a delegatee of the Federal Government—would violate the basic principle that a State may not diminish the eminent domain authority of the federal sovereign.” The Court [held](#) that “[t]he NGA fits well within this tradition.”

Justice Barrett [dissented in an opinion](#) joined by three other Justices. Justice Barrett [argued](#) that the federal government may only exercise eminent domain power to advance an enumerated constitutional power—such as the [power to regulate interstate commerce](#) in the case of the [NGA](#). Thus, Justice Barrett opined that the majority’s focus on whether states had consented to suits based on eminent domain was [improper](#), because the pertinent question is whether the federal government may use its Commerce Clause power to authorize suits against states. Given that [Supreme Court precedent](#) establishes that Congress may not use the Commerce Clause to abrogate state sovereign immunity, Justice Barrett concluded that Congress could not use the NGA to authorize private parties to sue states.

Considerations for Congress

Unlike the Third Circuit’s narrow, statute-focused decision, the Supreme Court grounded its decision in *PennEast* in the Constitution. The Third Circuit’s decision left open the possibility that Congress might amend Section 7 to delegate the power to sue states, but such an amendment could have been subject to future legal challenges. The Supreme Court has simplified the legal landscape: the NGA permits the private exercise of eminent domain against states, including the power to commence condemnation proceedings against states in federal court, with no additional clarification needed from Congress.

The Court’s decision in *PennEast* could also have impacts beyond Section 7 of the NGA. The breadth of *PennEast*’s holding likely means that any federally-delegated eminent domain power can be exercised against a state by means of condemnation proceedings in federal court absent limitations (such as those in the [Federal Power Act](#)) that restrict when state lands may be condemned. Based on the Court’s [holding](#) that no “clear statement” is required to allow private parties to bring condemnation actions against states pursuant to a federal delegation of eminent domain authority, courts may determine that a future federal law delegating eminent domain authority permits the exercise of that authority against states by means of federal lawsuits unless the law specifically says otherwise. Thus, if Congress wishes to forbid private entities from suing states to enforce the United States’ delegated eminent domain power, it may need to include explicit prohibitions against such lawsuits in legislation.

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