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Looking Beyond the Supreme Court's Eminent Domain Decision in PennEast

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On June 29, the United States Supreme Court issued its decision in *PennEast Pipeline Co., LLC v. New Jersey*. *PennEast* presented the question of whether a private company could condemn a pipeline right-of-way across state-owned property under the authority of a specific federal statute. The court ultimately upheld the company's right to condemn, but did so in a divided 5-4 opinion that is also characteristic of recent state court eminent domain decisions.

Background

The PennEast Pipeline Company applied to the Federal Energy Regulatory Commission (FERC) for a certificate of public convenience and necessity under the federal Natural Gas Act (NGA) to authorize construction of a 116-mile pipeline from Pennsylvania to New Jersey. FERC granted the certificate and effectively delegated a federal right of eminent domain to PennEast. PennEast then proceeded to file several federal lawsuits to condemn rights-of-way for its pipeline, including to take a right-of-way across land owned by the State of New Jersey. At the district court, New Jersey moved to dismiss the lawsuits arguing its state sovereign immunity prevented a private entity like PennEast from taking its property. The district court denied New Jersey's motion and found that PennEast could lawfully exercise a federally delegated condemnation power. The Third Circuit Court of Appeals later reversed, finding the NGA did not clearly delegate the federal power of condemnation against nonconsenting states.

Supreme Court's Decision

The Supreme Court upheld the district court's decision. Writing for the majority, Justice Roberts acknowledged that while "nonconsenting States are generally immune from suit, they surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution." Accordingly, the NGA "delegates the federal eminent domain power to private parties [and] those parties can initiate condemnation proceedings, including against state-owned property."

Justice Roberts was joined by an unlikely alliance of Justices Breyer, Alito, Sotomayor, and Kavanaugh. Justice Gorsuch authored a dissent, joined by Justice Thomas. Justice Barrett also wrote in dissent, joined by Justices Thomas, Kagan, and Gorsuch.

Eminent Domain

The deep divisions evident in *PennEast* bring to mind the Supreme Court's 2005 decision in *Kelo v. City of New London*, another 5-4 split decision. In

Kelo, the court considered the constitutional limitation that private property may only be taken for a public use—the property of A cannot be taken for the sole purpose of transferring it to B, even if A is paid just compensation. In upholding the City of New London's taking of private property to provide it to a private shopping center developer (the public use being job creation and increased tax revenues), the Court's conservative justices filed dissenting opinions arguing for a more limited power of eminent domain. Notably, the Court in *Kelo* held that its decision did not preclude any state from placing further restrictions on the exercise of its takings power.

Several state supreme court decisions issued over the last few years—especially in the context of oil and gas development¹—mirror the Supreme Court's division and reflect the disparate, strong opinions regarding the extent and scope of the government's power to take private property.

PennEast resolved a major constitutional question, but it was a narrow question under one particular federal law determined by one vote. With many pipelines, power lines, and infrastructure projects anticipated in the coming months and years, the takings power debate is far from over.

¹See *Marion Energy, Inc. v. KFJ Ranch Partnership*, 2011 UT 50, 267 P.3d 863 (4-1 decision denying right to condemn right-of-way for oil and gas development; now superseded by statute); *Larson v. Sinclair Transportation Company*, 284 P.3d 42 (Colo. 2012) (4-3 decision denying pipeline condemnation); see also *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192 (Tex. 2012); later modified by *Denbury Green Pipeline-Texas, LLC, v. Texas Rice Land Partners, Ltd.*, 510 S.W.3d 909 (Tex. 2017) (defining pipeline takings authority).