The Energy Pipeline Battle Reaches a Supreme Court Climax

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On Wednesday, April 28, a major component of the legal battle in the fight over interstate oil and gas pipelines will reach a climax. In Washington, D.C., the United States Supreme Court will hear oral argument in the case of *PennEast Pipeline Co., LLC v. New Jersey et al.*

As I have written before, the legal issue presented by this case can be very narrow. Specifically, the Supreme Court has been asked to decide whether the Natural Gas Act (NGA) "delegates the federal government's eminent domain power to Federal Energy Regulatory Commission (FERC) certificate holders and allows them to sue a state to condemn land in which the state claims an interest, or whether the Eleventh Amendment immunizes states from such lawsuits".

In truth, however, the issue in this case is extremely broad. The true issue is whether individual states have the power to supplant the judgment of the federal government and its administrative agencies and in effect set national policy on a state-by-state basis.

Article I, Section 8 of the United States Constitution, the Commerce Clause, gives to the United States Congress the power "to regulate Commerce with Foreign Nations, and among the several states...." Over the last decade, certain states have used energy as a way to push back against this power, utilizing gaps and loopholes in federal legislation to assert control over functions long thought to be purely federal in nature and jurisdiction.

While the PennEast case pertains directly to New Jersey's claim that it has interests in certain lands that preclude the FERC certificate holder, PennEast Pipeline Co., LLC, from taking those lands by eminent domain, if sustained, its real effect would be to give each state along an interstate pipeline route the right to dictate if that pipeline can move forward, even after approval has come from the very agency responsible for making these policy decisions – FERC. Indeed, this is not the first attempt by individual state governors to control American national energy policy.

For example, New York Governor Andrew Cuomo has famously used the Section 401 Clean Streams Certification process in the Federal Clean Water Act to block interstate oil and gas pipelines from being built – in effect blocking New England from receiving oil or gas from the rest of the country. Also, Michigan Governor Gretchen Whitmer last December claimed that Canada had violated a 1953 easement agreement and ordered Enbridge, the Canadian pipeline company, to cease operations on its long existing Line 5 Pipeline from Canada, infuriating the Canadians. There are other examples. Governors now seek to control American foreign policy as well as national energy policy.

It will not be a surprise if the Court reaffirms that it was precisely to guard against this very predictable state-versus-state battling that led the Founding Fathers to the adoption of Article I, Section 8 in the first place, throwing out New Jersey Governor Murphy's attempt to block the PennEast pipeline via the condemnation process. With the addition of Justice Amy Coney Barrett, the Supreme Court is now more conservative than it was in January 2020. That is when the Third Circuit Court of Appeals rejected PennEast's position and ruled that it did not accept Section 717f(h) of the NGA granting the FERC certificate holder the right to utilize eminent domain because it did not believe Congress could delegate to a private party the federal government's exemption from a state's Eleventh Amendment immunity that otherwise allows the federal government the right to sue states directly. On February 3, 2021, the Supreme Court agreed to hear the case and make the final decision.

Nevertheless, it bears mentioning that it is possible the Supreme Court will not make a decision resolving the matter at all. This is because the Supreme Court invited the U.S. Solicitor General to file a brief expressing the federal government's position, and the United States raised the argument that the case is actually a "collateral attack on [PennEast's] authority to execute the terms of the FERC-issued certificate." Based on that, the United States further claimed that the Third Circuit, based in Philadelphia, lacked jurisdiction even to hear the matter because Section 717r(b) of the NGA vests exclusive jurisdiction for direct review of a FERC certificate in the D.C. Circuit or the circuit in which the certificate-holder has its principal place of business. Ironically, both New Jersey and PennEast have argued that the lower courts did properly exercise jurisdiction – thus signaling that they each want the case heard on the merits and do not want the Supreme Court to avoid making a ruling on a technicality. However, there is nothing to stop the Supreme Court from agreeing with the United States, which could unfortunately mean that the main issue will not be resolved after all.

Whatever decision the Court makes will likely have major political and societal implications. If it rules for PennEast, the calls of those on the left who demand that the number of Supreme Court justices be increased to "balance" the Court's ideological tilt will grow exponentially, not to mention even stronger commitment to so-called "progressive" environmental and energy policies that may not all be in the country's best interests. If it rules for New Jersey, the anger of those who see state and local political overreach in everything from environmental policy to Coronavirus restrictions will increase the opposite way. And if it fails to reach any resolution based on a finding that the lower courts lacked jurisdiction, the result may be even more frustration and hostility against what is already perceived to be widespread governmental inaction and stalemate, albeit coming from all sides of the political spectrum at once.

In a larger sense, the PennEast story echoes that of 21st Century America and is representative of the increasing breakdown of our republican and federalist form of democracy, which above all else is built on the spirit of cooperation and compromise. The fact that the PennEast case is being heard at all is a clear expression of national failure. As with other unrelated but equally difficult issues such as immigration and police reform, much needed compromises and ways forward have been bypassed. The Supreme Court only is being called in because the energy battles have become so politicized and polarized. Whichever way the Court rules, we would all do better working out our energy policies collaboratively and not forcing them onto a Court whose makeup and indeed very existence in its current form have been shaped by and now are being called into question by those same politically extremist forces.

ATTORNEYS MENTIONED

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