

The Supreme Court's Pipeline Decision Shows DC Still Has Adults In The Room

Forbes.com

July 9, 2021

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On Wednesday, June 29, the United States Supreme Court handed down one of its most important decisions in years. In the case of PennEast Pipeline Company, LLC v. New Jersey, et al., by a narrow 5-4 margin, the Court affirmed the right of PennEast Pipeline Company, LLC (PennEast LLC), a private company, to take by eminent domain certain lands in which the State of New Jersey claimed it had an interest in order for that company to build a natural gas pipeline. In so holding, the Court brushed aside New Jersey's claim that such a taking violates the 11th Amendment to the United States Constitution. Chief Justice John Roberts wrote the majority decision.

The PennEast decision has enormous implications not only for fossil fuel pipeline construction, but for all infrastructure projects in this nation, including even potential green technology projects where there is, nevertheless, resistance by certain factions. But by far the greatest importance of the case on the nation will be more general – including how we repair our infrastructure and conduct our affairs overall.

The reason for the last statement is that the Court decided the PennEast case on the basis of a coalition that included conservatives Roberts, Samuel Alito, and Brett Kavanaugh, joined by liberals Stephen Breyer and Sonia Sotomayor. The four dissenters were conservatives Neil Gorsuch, Clarence Thomas, and Amy Coney Barrett, joined by liberal Elena Kagan. Clearly, those having expectations of preconceived ideologies by the members of the Court based on their assumed political parties will be well advised to rethink their positions.

Meanwhile, it appears that while both the Executive Branch and Legislative Branch remain hopelessly polarized by political positions that are stuck in concrete, the Judicial Branch in the name of the Supreme Court is showing that there still are adults in the room. They can, and will, decide cases based on their view of the law regardless of which party's platform or political ideology each justice favors.

The key holding in the case is that, under the United States Natural Gas Act of 1938, a properly delegated private company may exercise the federal power of eminent domain, even as to properties in which a State itself may hold an interest.

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New Jersey argued that the attempt by PennEast LLC to exercise this federal power violates the 11th Amendment to the United States Constitution. The 11th Amendment basically provides that federal courts cannot hear cases brought against States by citizens of other States, or by citizens or subjects of any foreign State. However, over the years the 11th Amendment has been interpreted very broadly by the Supreme Court. Effectively, it now means that, unless a State has consented to be sued, it basically enjoys sovereign immunity from being sued by anybody in federal court, except in actions brought by the United States itself, or in a few other situations not now relevant.

Pursuant to the Natural Gas Act, in order to construct an interstate gas pipeline it is necessary for a natural gas company to obtain a certificate from the Federal Energy Regulatory Commission (FERC) that such construction "is or will be required by the present or future public convenience and necessity." In 1947, Congress expanded on this power by adding Section 717f(h) to the Natural Gas Act allowing the certificate holder itself to enforce that certificate by exercising the federal power of eminent domain.

In the PennEast matter, FERC granted PennEast LLC, the private company, such a certificate for the construction of a 116 mile pipeline from the shale gas areas of northeast Pennsylvania across the Delaware River to central New Jersey. Using that certificate, PennEast LLC attempted to condemn parcels of land in New Jersey in which either the State itself or the New Jersey Conservation Foundation claimed an interest. New Jersey moved to stop the eminent domain proceeding based on the 11th Amendment.

Writing for the majority, Chief Justice Roberts wrote that Congress has delegated this eminent domain power to private companies innumerable times since Section 717f(h)'s passage in 1947. Indeed, the eminent domain power has been delegated by the sovereign to private companies to take land for public purposes since even before the founding of the United States itself. Justice Roberts noted that, as early as 1809, Congress authorized private parties to exercise federal eminent domain power within areas subject to federal jurisdiction.

Roberts also proclaimed that "State property was not immune from the exercise of delegated eminent domain power. In fact this is not the first time New Jersey has tried to thwart such a delegation." In the end, Justice Roberts and the Supreme Court ruled that the eminent domain proceeding may take place.

While the PennEast decision is hugely significant, it will likely not end matters for that pipeline, or others like it. There will no doubt continue to be many challenges and roadblocks thrown up by different groups opposed to PennEast and other natural gas pipelines, as well as by those who seem to fight anything at any time no matter what is being proposed. And that perhaps is the challenge of our time from an infrastructure perspective, especially now with at least one \$1T infrastructure package moving through Congress.

As nice as it sounds for Congress to appropriate the infrastructure money, we still have not answered the most important question: Can Americans actually build anything anymore in this country?

Our last new major airport opened nearly 30 years ago. It takes decades to plan and construct a major highway.

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While from a political perspective the Democratic Party has come out far stronger against the expansion of our interstate pipeline system, the naysaying on infrastructure projects is not limited to that political party: The Trump Administration famously refused to advance funding for the much needed new tunnel to join New Jersey and New York City in the Hudson River.

The PennEast decision, however, may help pave the way for the United States to begin rebuilding our crumbling infrastructure under a Democratic administration. The result of this may be that, like the curious construction of the Supreme Court's coalitions in this case, the politics underlying PennEast may look far different in a few years than they appear now.