Environmental Cases Pending at the Supreme Court

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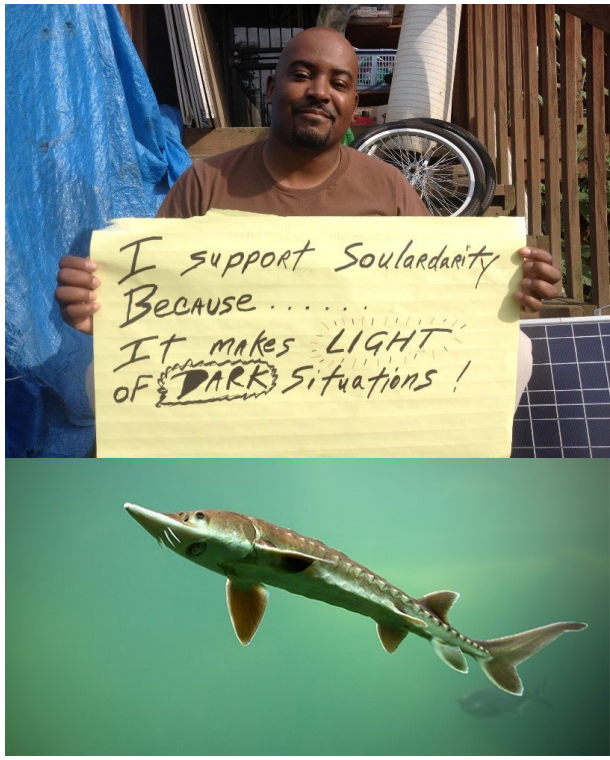
Introduction to the Abrams Environmental Law Clinic

- Students have an “In-Role” Experience
  - Two full-time faculty
  - ~18-22 students
- Diverse Legal Approaches
  - Litigation *and* policy
  - Local, regional *and* national
  - Wide range of clients

Introduction to the Abrams Environmental Law Clinic

Subject matters

- Clean Energy
- Clean Communities
- Clean Water
- Safe Species



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BP PLC v. Mayor and City Council of Baltimore

BP PLC v. Mayor and City Council of Baltimore

I. The Climate
II. The Complaint
III. The Removal
IV. The Issues
V. The Argument
VI. The Implications

BP v. Baltimore: The Climate

- Baltimore's Climate Damages:
  - Sea level rise
  - Flooding
  - Heat Waves
- Baltimore's core allegation: defendant Oil Companies have "engaged in a coordinated, multi-front effort to conceal and deny their own knowledge" of the connection between fossil fuels and climate change, all the while "promot[ing] and profit[ing]" from the burning of fossil fuels.

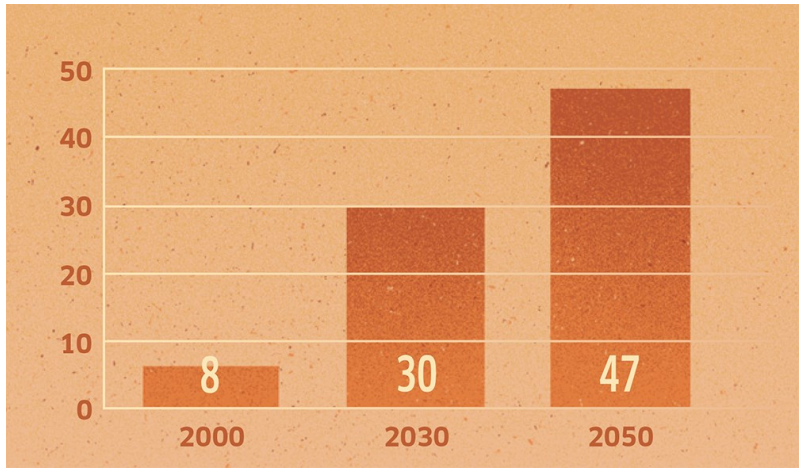


Photo Credits: Baltimore Magazine, *Hell or High Water,* *https://www.baltimoremagazine.com/section/historypolitics/climate-change-wreaking-havoc-baltimore-infrastructure-public-health/*

BP v. Baltimore: The Complaint

- Defendants: 26 oil and gas companies
- Exclusively state law causes of action related to statements made about fossil fuels and climate change
  - Nuisance (Public & Private)
  - Failure to Warn (Strict Liability & Negligence)
  - Design Defect (Strict Liability & Negligence)
  - Trespass
  - Maryland Consumer Protection Act
- Relief Requested
  - $$$
  - Equitable relief – abatement of nuisances
  - Penalties for violation MCPA

BP v. Baltimore: The Removal

- Defendants put forward 8 grounds for removal:
  - Federal Officer as defendant;
  - Federal common law displaces state law claims; and
  - 6 other grounds.
- 28 U.S.C. 1442(a):

"A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following [federal officials or entities] may be removed by them to the district court…"

- District Court: reviewed (and rejected) all 8 grounds for removal
- Fourth Circuit: reviewed (and rejected) only federal officer grounds for removal

BP v. Baltimore: The Issues

- **Question Presented:**

Whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court when the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442.

- **28 U.S.C. 1447(d):**

"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except [ ] an order remanding a case [that] was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise."

BP v. Baltimore: The Issues

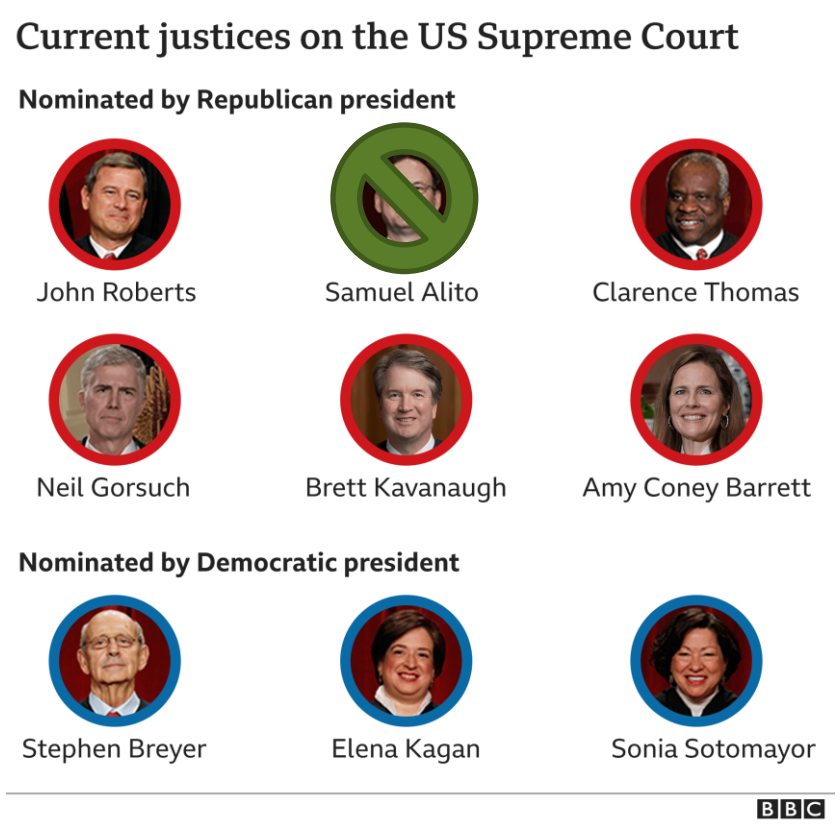
- **Baltimore's Position**: a "meritless" federal officer grounds for removal cannot be basis for appellate review of the entire district court remand order.
  - "pursuant to" means "in compliance/conformance with"
  - Prior interpretations limiting review of parallel civil rights exception
  - Default is limited federal appellate jurisdiction, particularly in removal context
  - Purpose of statute is to limit procedural litigation

- **Oil Companies' Position**: "order" refers to the whole order
  - "order" in Non-reviewablility Clause of 1447 refers to entire order, so it must also refer to entire order in Exceptions Clause
  - Purpose of statute is to protect federal interests
  - "pursuant to" refers to defendant's act of removal, so is done before a court would ever evaluate the propriety of that removal

BP v. Baltimore: The Bonus Issue

- **Do all of claims "based on the effects of global climate change" arise under federal common law, supporting removal?**
- Baltimore's Position:
  - Would adopt radical and novel theory that displaces state law.
  - Not litigated in the 4th Circuit or in the Question Presented for Cert: waived.
  - Claims here are about representations and omissions about GHGs, not about pollution harms themselves.
  - *AEP* held the CAA displaces federal common law here, not that it preempts state consumer protection laws.
- Oil Companies' Position:
  - Court can reach the 'next' question when resolving question presented.
  - This will spare courts around the country from same issues.
  - State or city cannot "impose it's regulatory policies on the entire Nation."
  - *AEP* held that climate change is uniquely federal; within that exclusive federal sphere, the CAA displaces all common law claims.

BP v. Baltimore: The Argument



- Recusal(s?)
- Tea Leaves:
  - Justice Kavanaugh: "Close call"
  - Justice Thomas: "Smuggling … other issues"
  - Justice Breyer: "appeal on everything"
  - Chief Justice Roberts: "tack on one of these federal officer …. grounds"
  - Justice Barrett: Bonus Issue is "fairly aggressive"

LEGAL ANALYSIS

A Review of Judge Brett Kavanaugh's Environmental Jurisprudence

Abrams Environmental Law Clinic

University of Chicago Law School

September 2018

THE UNIVERSITY OF CHICAGO THE LAW SCHOOL

https://www.law.uchicago.edu/news/abrams-environmental-law-clinic-publishes-review-judge-brett-kavanaughs-environmental

BP v. Baltimore: The Implications

- Oil Companies can't lose
  - Big win on the "Bonus Issue"
  - Procedural win on appellate review
  - Losing on limited appellate review still slows the litigation by years
- Baltimore can't lose
  - (Except for that Big Win for Oil Companies on the "Bonus Issue.")
  - Procedural loss on appellate review sends all grounds for removal to the Fourth Circuit
  - Winning on limited appellate review kicks off the state court litigation (finally)
- Eyes of a nation:
  - Two dozen similar cases and counting…
  - Federal regulatory and state legislative responses
  - Complicating litigation of any state law case where there's a colorable reason that a federal official is a relevant party

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Guam v. United States

Case Background

- U.S. Navy began disposing of military and municipal waste at the Ordot Dump on Guam in the 1940s.
  - Ordot Dump received DDT and Agent Orange waste during the Korean and Vietnam Wars
  - Ordot Dump was the only landfill in Guam until the 1970s and continued to receive municipal waste until its closure in 2011.
  - Over time, the Ordot Dump grew until what was once a valley became a 280-foot mountain of waste.
- EPA added the Ordot Dump to the National Priorities List in 1983.
  - In 1988, EPA determined remedial action under CERCLA was “inappropriate” and “unnecessary,” and that Ordot Dump would be better addressed “through enforcement of the Clean Water Act.”

Enforcement History

- EPA issued a series of administrative complaints to Guam under the CWA in the 1990s and later filed a CWA enforcement action against Guam in 2002.
  - Guam and the United States entered into a judicially-approved consent decree in 2004.
  - The consent decree required Guam to pay a civil penalty, close the Ordot Dump, design and install a dump cover system, and build a new municipal landfill to replace the dump.
    - Remediation of the Ordot Dump began in December 2013 and remains ongoing, with total costs expected to exceed $160 million.
- Guam brought suit against the United States under CERCLA in 2017.
  - Claims included a cost recovery action under CERCLA § 107(a), and in the alternative, a contribution action under CERCLA § 113(f).

CERCLA § 113

- § 113(f)(2):
  - "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement."
- § 113(f)(3)(B):
  - "A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in [§ 113(f)(2)]."

Litigation History

- The United States moved to dismiss the complaint, arguing that Guam could not avail itself of § 107(a) because § 113(f)(3)(B) is its exclusive CERCLA remedy following issuance of the 2004 consent decree.
  - United States argued Guam's claim was time-barred by the three-year limitations period in § 113(g)(3)(B).
- The District Court denied the motion to dismiss on the basis that the 2004 consent decree did not resolve Guam's liability for the Ordot Dump cleanup.
  - Therefore, the District Court allowed Guam's § 107(a) claim to proceed.
- On an interlocutory appeal, the D.C. Circuit reversed, holding that the 2004 consent decree triggered a contribution claim under § 113(f)(3)(B), and that Guam's claim was time-barred.

Questions Presented

- SCOTUS granted *cert* on January 28, 2021.
- Whether a non-CERCLA settlement can trigger a contribution claim under CERCLA Section 113(f)(3)(B).
- Whether a settlement that expressly disclaims any liability determination and leaves the settling party exposed to future liability can trigger a contribution claim under CERCLA Section 113(f)(3)(B).

Does §113(f)(3)(B) reach non-CERCLA settlements?

- Guam's position is that a settlement must resolve liability under CERCLA to trigger § 113(f)(3)(B).
  - Traditional principles of contribution require that two or more parties share a common liability, and a non-CERCLA settlement lacks the discharge of a common liability necessary to support the contribution remedy.
  - Liability for response actions must arise independent of the settlement itself; the settlement cannot create the very liability it purportedly resolves.
- The United States has taken the position that § 113(f)(3)(B) does not require the settlement to have involved a CERCLA claim.
  - Rather, the potential availability of a contribution remedy depends on whether a particular settlement with the United States or a State requires a settling party to incur the costs of a CERCLA "response action."

Did the 2004 consent decree trigger a § 113 contribution claim?

- Guam's position is that the 2004 consent decree did not trigger § 113(f)(3)(B) because it did not resolve any liability imposed by CERCLA.
  - The settlement resolves permitting claims under CWA § 309.
  - Guam argues that the possibility for future exposure to liability left open in the consent decree, coupled with the lack of an admission of liability, and conditional release based on completion of the work under the consent decree confirm that the parties left the issue of liability unresolved.
  - The consent decree did not resolve *common* liability of Guam and the United States.
- The United States has taken the position that the 2004 consent decree required Guam to take response actions related to the Ordot Dump.
  - Because the consent decree determines Guam's legal obligation to undertake response actions, it gives rise to a potential contribution claim under Section 113(f)(3)(B).

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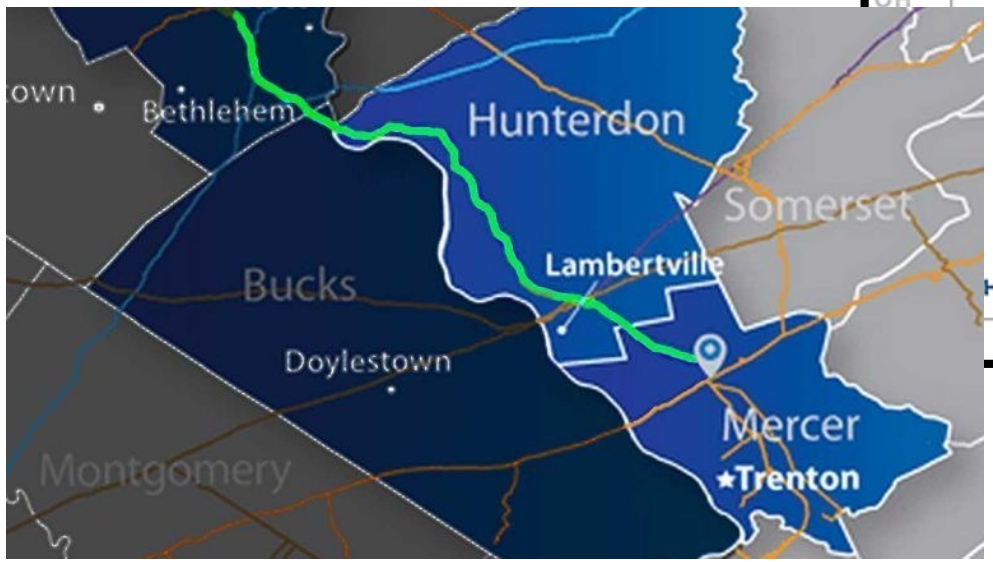
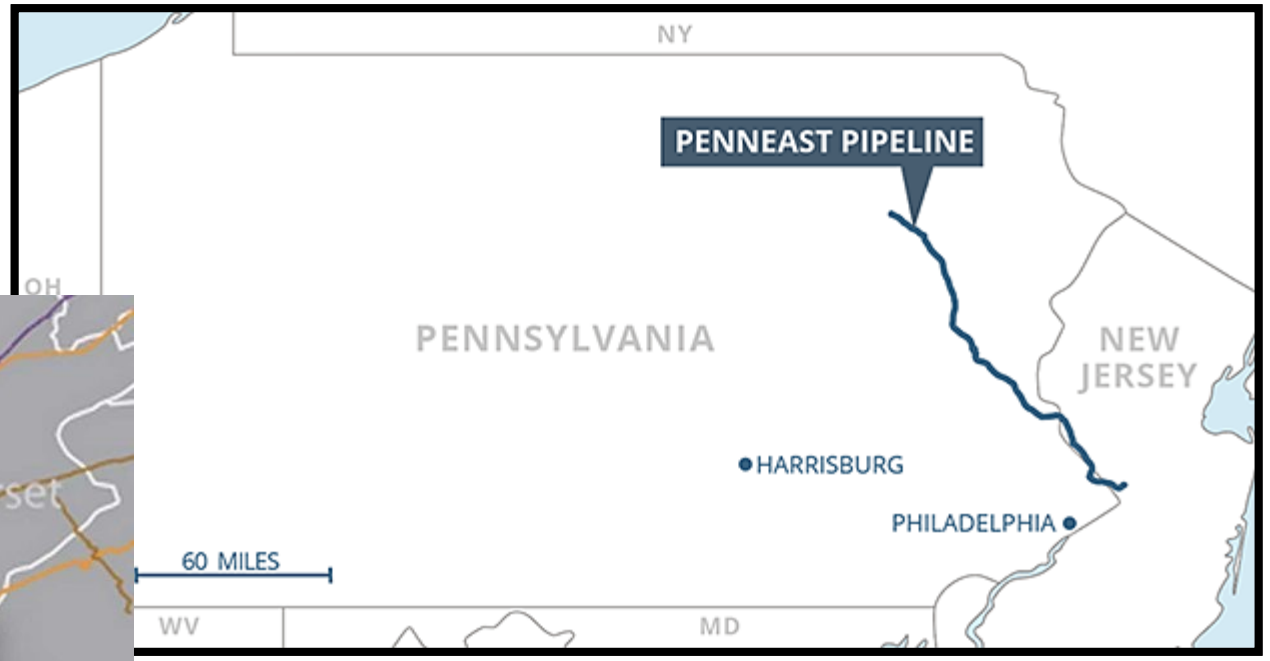
PennEast Pipeline Co. v. New Jersey

PennEast Pipeline Co. v. New Jersey

1. The Issues
2. The Decision Below
3. The Coming Briefs
4. The Implications





PennEast Pipeline: The Issues

- **Key Facts:**
  - PennEast proposes to build pipeline to transport Marcellus Shale gas along a determined route.
  - PennEast obtains FERC Certificate of Convenience through contested proceeding in which New Jersey participated.
  - Without much (or any) pre-condemnation negotiation, PennEast brings in rem actions to condemn various properties.
  - New Jersey (or its agencies) owns 2 properties and has property interests in 40 others (largely conservation easements); moves to dismiss condemnations.
- **Question Presented:** Whether the Natural Gas Act delegates to FERC certificate holders the authority to exercise the federal government's eminent domain power to condemn land in which a state claims an interest.

PennEast Pipeline: The Decision Below

- **Holding:** NGA delegated eminent domain power but did not delegate the federal government's exemption from state sovereign immunity under the Eleventh Amendment.
  - Even if Congress could delegate that exemption, it must do so explicitly. The NGA does not do so (i.e., "clear statement" rule).
  - If NGA attempted to delegate that exemption explicitly, the court would then have to decide whether Congress is empowered to delegate the exemption from state sovereign immunity.
    - Cannon of constitutional avoidance supports holding to evade this question;
    - States waived sovereign immunity in the Constitution as to suits by federal government—federal actor condemning state property is very different than private actor doing so.
  - Acknowledged holding would "disrupt" the pipeline industry and suggested that federal government could bring condemnation proceedings and transfer land to pipeline companies.
- **Cert granted on Feb. 3, 2021**

PennEast Pipeline: The Coming Briefs

- PennEast:
  - There is no state sovereign immunity as to the federal government and it is that "inherently governmental" federal power that the NGA delegates.
  - Text of NGA has no exception for state property interests and other statutes (i.e. FPA) do carve-out states in delegating eminent domain power.
  - Purpose of NGA (and amendments) was to overcome effective state veto of routes.
  - 80 years of practice & practical disruption to industry.
- New Jersey
  - States ceded sovereign immunity for suits by federal government, not by private parties; determining whether there is a claim (eminent domain) is separate from who may bring it (waiver of sovereign immunity).
  - Delegating exemption from state sovereign immunity would undermine constitutional balance of state-federal relationship; cannot be done via statute.
  - Even if possible, default rule is that ambiguous statutes exclude States as defendants unless explicitly included, so NGA cannot be read to abrogate state sovereign immunity.
- Whither the U.S. Government?
  - FERC declaratory order & amicus in support of Cert. filed in December 2020
  - But now…

PennEast Pipeline: The Implications

- If affirmed:
  - Every state east of the Mississippi has property interests in river beds along boundaries
  - Dramatic increase in states' bargaining power at particular pipeline routes
  - Legislative and/or administrative effort toward federal condemnation practice
  - PennEast will build its already-proposed modified pipeline route
- If reversed:
  - Certificates of Convenience from FERC will be even more hotly contested (including this one – appeal of which is stayed at the D.C. Circuit) and there will be pressure to modernize that process
  - Other state means to impede pipelines will be emphasized (i.e. Clean Water Act permits and Section 401 certifications, etc.)

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