

Why Energy Companies Must Use the Power of Eminent Domain

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James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 **Minn. L. Rev.** __ (forthcoming, 2019), available at [SSRN](https://ssrn.com/abstract=3444444).

Energy and Eminent Domain, by [James Coleman](#) and [Alexandra Klass](#), is a must read for anyone who is interested in administrative law, government regulation, constitutional law, property law, energy law, environmental law, or climate change. I hope that I have not left anyone out, because I think that anyone who has any interest in law or public policy should read this article. Its substance is important and timely, and its narrative style makes it an easy and pleasant read.

The topic of the article is the use of eminent domain by privately-owned companies that construct oil and gas pipelines and electricity transmission lines. I suspect that many legal academics are not even aware of the routine use of eminent domain by private energy companies. I know that the Justices of the Supreme Court are not aware of that longstanding and ubiquitous practice. In its unanimous April 29, 2019 opinion in [Thacker v. TVA](#), the Court held that TVA is immune from tort suits only when it performs a governmental function and not when it “acts like any other company producing and supplying electric power.”¹ The Court referred to use of the eminent domain power as an illustration of a uniquely governmental function that cannot be performed by a private company: “When the TVA exercises the power of eminent domain, taking landowners’ property for public purposes, no one would confuse it for a private company.”²

Coleman and Klass begin the article by describing the “*Kelo* Revolution”—the major changes in state laws governing the exercise of the eminent domain power by government that took place after the Supreme Court issued its 2005 opinion in [Kelo v. City of New London](#). (P. 1.) Many people reacted with anger to what they perceived as judicial tolerance of government overreach by allowing government to take private property for purposes that they considered illegitimate. State legislatures and courts responded by narrowing the circumstances in which government can exercise eminent domain power.

The authors contrast government uses of eminent domain with use of eminent domain by private companies:

These examples make it clear that the public, legislative, and judicial eminent domain reform at the time of the *Kelo* decision were focused squarely on government-initiated economic development takings and that energy, utility, and transportation takings were not perceived as a problem. To the contrary, such takings were used as illustrative examples of acceptable “public uses” even though the property at issue would be placed in private ownership.

(P. 10.) Coleman and Klass then discuss in detail the ways in which takings by private energy companies have increased over the past decade and the recent backlash that those takings have produced. The authors include references to the many federal and state statutes that authorize virtually any private company that wants to construct an oil or gas pipeline or electric transmission line to use eminent domain to obtain the property rights required for the construction.

The authors explain why there has been a dramatic increase in the need to construct new pipelines and transmission lines in the last decade. In the case of oil and gas pipelines, the increased need is tied to the increased use of fracking. The fracking revolution has massively increased the quantity of cheap oil and gas produced in locations that were not previously served by pipeline capacity that is sufficient to transport the oil and gas to markets. In the case of electricity transmission lines, the increased need is tied to the enormous increase in the quantity of electricity that can be generated at low cost through the use of wind farms that are in locations that are a long distance from the major markets for electricity.

Both the increased availability of cheap gas and the increased availability of cheap wind power have been critical to the successful U.S. efforts to mitigate climate change. A decade ago, electric generating plants accounted for 38% of U.S. emissions of carbon dioxide—the most important cause of climate change. Over the last decade the U.S. has reduced its emissions of carbon dioxide by much more than any other nation. The International Energy Agency described the U.S. role well in 2017: “The decline was driven by a surge in shale gas supplies and more attractive renewable power that displaced coal. Emissions in the United States [in 2016] ... were at their lowest level since 1992.”³

Coleman and Klass then describe the opposition to the use of eminent domain by private companies to construct pipelines and transmission lines that has emerged in reaction to the increase in proposals to construct new pipelines and transmission lines. The opposition comes primarily from landowners and environmental advocacy groups. As the authors describe it:

Notably, the advocacy groups partnering with affected landowners in these eminent domain challenges to oil and gas pipelines have a very different mission than the advocacy groups that represented Suzette Kelo and drove the post-*Kelo* reforms in the states. The opponents in *Kelo* were libertarians attempting to limit government power that needs to be limited by defining public use narrowly. For them, eminent domain represents government intrusion into individual rights that needs to be limited by defining public use narrowly. By contrast, the primary advocacy groups opposing fossil fuel energy projects come from the other end of the political spectrum. They advocate broad government intervention in the energy economy to protect the environment by (among other things) limiting the ability to burn fossil fuels. The energy project opponents generally favor government action on behalf of the public interest over private rights. As illustrated below, the environmental advocacy groups have strategically adopted many of the arguments of their libertarian predecessors despite the differences between their philosophies and ultimate objectives.

(Pp. 17-18.) Coleman and Klass attribute similar motives to the parties that oppose the use of eminent domain to construct electric transmission lines: “Despite the renewable energy benefits associated with these new electric transmission lines, states, counties, and landowners often continue to oppose such lines because of their impact on local land values and aesthetics.” (P. 34.) Given the critical role that new gas pipelines and electric transmission lines have played, and will continue to play, in mitigating climate change, it is ironic that the opposition to gas pipelines and transmission lines comes primarily from parties that are trying to protect the environment.

The authors then describe well the powerful arguments that support the use of eminent domain to take property for public purposes, including for purposes of implementing critical infrastructure projects like pipelines and transmission lines. Notwithstanding those justifications for use of eminent domain for energy transportation projects, they express concern that the opposition to use of eminent domain for energy projects is so vocal and widespread that it “may spur the courts or Congress to adopt further restrictions on eminent domain. Perhaps a challenge to a pipeline could be a vehicle for overturning the

Kelo case outright.” (P. 25.)

Coleman and Klass conclude their excellent article by suggesting ways in which proponents of the use of eminent domain for energy transportation projects might be able to blunt the attacks on that use of eminent domain and head off a potentially catastrophic defeat in court or in Congress. They place their proposals in three categories: (1) redefinition of public use in ways that might render the use of eminent domain for energy projects acceptable to more segments of the public; (2) use of the dormant Commerce Clause by states that would benefit from a project as an argument against a state that opposes the project; and, (3) experiments with the use of different methods of compensating landowners or changing the procedures for use of eminent domain for energy projects.

I cannot imagine a better use of time than to read this well-written and important article.

1. Thacker v. TVA, 139 S. Ct. 1435, 1443 (2019).
2. *id.*
3. Press Release, Int’l Energy Agency [IEA], [IEA Finds CO2 Emissions Flat for Third Straight Year Even as Global Economy Grew in 2016](#) (Mar. 17, 2017) (summarizing IEA, [World Energy Outlook 2017](#) (Nov. 16, 2017)).

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