

5-31-2013

Abrogate the Acquiescence: Why Congress Should Take On the President over Keystone XL Pipeline

Jackson S. Kern

Follow this and additional works at: <http://digitalcommons.law.seattleu.edu/sjel>

Recommended Citation

Kern, Jackson S. (2013) "Abrogate the Acquiescence: Why Congress Should Take On the President over Keystone XL Pipeline," *Seattle Journal of Environmental Law*: Vol. 3: Iss. 1, Article 5.
Available at: <http://digitalcommons.law.seattleu.edu/sjel/vol3/iss1/5>

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal of Environmental Law by an authorized administrator of Seattle University School of Law Digital Commons.

Abrogate the Acquiescence: Why Congress Should Take On the President Over the Keystone XL Pipeline

Jackson S. Kern[†]

TABLE OF CONTENTS

I. Introduction	124
A. History of the Keystone Pipeline Project	124
B. The Cross-Border Pipeline Permitting Process	126
II. The National Environmental Policy Act and the Scope of Judicial Review	129
A. The Lesson of the Trans-Alaska Pipeline Authorization Act.....	130
B. Congressional Action to Limit the Scope of Environmental and Judicial Review is Constitutionally Permissible	131
III. The “Inherent Foreign Affairs Powers” of the President.....	133
A. Executive Order No. 13,337 and the Presidential Permit.....	139
B. The Current Scope of the Presidential Permit Process, While Constitutionally Uncertain, Probably Extends to the Case of the Keystone XL Pipeline	143
1. The Foreign Affairs Powers Do Not Confer in the President the Power to Legally Bind the United States in an Agreement with a Private Foreign Party.....	143
2. The Foreign Affairs Powers Do Not Confer in the President the Power to Approve a Cross-Border Facility’s Extension Beyond the Border Crossing Itself	147
3. A President’s Decision to Grant a Permit and an Environmental Impact Statement Commissioned by the Department of State Might Be Immune from Judicial Review.....	148
C. Congress is Constitutionally Authorized to Unilaterally Regulate Cross-Border Facilities	150
IV. Congress Should Act Within its Constitutional Power to Establish a Transparent Permit Processing Regime and to Ensure Adequate Environmental and Judicial Review of All Cross-Border Facilities.....	151
V. Conclusion	153

[†] Jackson S. Kern is a member of the Class of 2013 of the Seattle University School of Law.

I. INTRODUCTION

In the realm of large scale infrastructure projects that span the international boundaries of the United States, the law presently fails to openly designate a body of government that bears the approval power. In the absence of definitive legislation in the area, the executive exercise of this approval power at the presidential level likely falls within the bounds of constitutional permissibility that is established by congressional acquiescence. However, Congress retains the unimpeachable power to dictate change by legislation, and indeed it should do so in order to establish a consistent and transparent approval regime, while also ensuring adequate environmental review.

The permissibility of the current executive exercise of the approval power and the desirability of legislative intervention in this area are evidenced in the proposed Keystone XL pipeline.

A. History of the Keystone Pipeline Project

Before determining whether to provide a permit for construction of the Keystone pipeline, on November 10, 2011, the Obama administration announced that it would undertake further environmental review of the proposed project in light of unified environmental opposition. The fate of the proposed pipeline will likely define President Obama's legacy on environmental policy and stewardship.

The practical effect of this announcement was to defer the permitting decision beyond the 2012 presidential election and therefore to place the issue outside the immediate political consciousness of Americans. In short, President Obama punted on the most important environmental decision yet to come across his desk. The Republican congressional leadership responded by attaching a provision to a payroll tax cut and unemployment benefits extension bill that required the President to issue a decision on the Keystone XL permit application within sixty days of the bill's passage. President Obama signed that bill into law as Congress went into holiday recess on December 23, 2011.¹ He then obliged by denying the permit application on January 18, 2012, stating that the law's restriction did not allow the necessary time to complete further environmental review.² On February 27, 2012, the pipeline builder announced its intention to submit a revised application for a presidential permit to authorize the construction of the Keystone

1. Temporary Payroll Tax Cut Continuation Act, Pub. L. No. 112-78, Title V, 125 Stat. 1279, 1289-91 (2011).

2. Statement by the President on the Keystone XL Pipeline, Office of the Press Secretary, The White House (Jan. 18, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/01/18/statement-president-keystone-xl-pipeline>.

XL pipeline.³ With President Obama's re-election now secured and John Kerry likely to be confirmed by his Senate colleagues to the Cabinet post soon to be vacated by Hillary Rodham Clinton, the renewed matter of the Keystone XL pipeline appears poised to come before Mr. Kerry's State Department and Mr. Obama's White House in 2013.

The Keystone Pipeline System is a network of pipelines designed for the delivery of heavy synthetic crude oil from the tar sands of northeastern Alberta into the United States. While the tar sands hold hydrocarbon resources of enormous value, so-called "tar sands oil" has been decried by environmentalists because of the large-scale surface destruction that its extraction entails and because this extraction is energy intensive and therefore generates high levels of greenhouse gas emissions.⁴ This source consequently yields a lower net energy return than conventional sources of crude oil.

After a series of corporate acquisitions, the project is now solely owned by the TransCanada Corporation. TransCanada has designated the development of the Keystone Pipeline System into four phases, two of which are now operational and two of which are currently in progress. Phase I comprises the original Keystone Pipeline, which stretches 2,147 miles from Hardisty, Alberta, through the Canadian provinces of Saskatchewan and Manitoba before entering the United States and traversing the Dakotas to arrive at Steele City, Nebraska.⁵ From there the pipeline cuts through the northeast corner of Kansas and crosses the breadth of Missouri to reach refineries at Wood River and Patoka, Illinois. Because this pipeline crosses the international frontier with Canada to enter the United States, it requires, under Executive Order No. 13,337, the grant of a presidential permit.⁶ Such a permit was granted on March 17, 2008,⁷ and the pipeline commenced operation in June 2010.⁸ Phase II of the Keystone Pipeline System, the so-called "Cushing Extension," entails a simple three-hundred-mile extension from Steele

3. John M. Broder, *TransCanada Renewing Request to Build Keystone Pipeline*, N.Y. TIMES, Feb. 28, 2012, at A13.

4. See Robert Kunzig, *The Canadian Oil Boom*, NAT'L GEOG. MAG., Mar. 2009, available at <http://ngm.nationalgeographic.com/2009/03/canadian-oil-sands/kunzig-text>.

5. See *Keystone XL Pipeline – Overall Route Map*, TRANSCANADA CORP., <http://keystone-xl.com/keystone-xl-pipeline-overall-route-map/> (last visited Apr. 9, 2013).

6. Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004).

7. *State Department Grants Keystone Permit; Work to Start in Q2*, DOWNSTREAM TODAY, Mar. 17, 2008, available at http://www.downstreamtoday.com/news/article.aspx?a_id=9385.

8. Press Release, TransCanada Corporation, *Keystone Pipeline Starts Deliveries to U.S. Midwest* (Jun. 30, 2010), available at <http://www.transcanada.com/5407.html>.

City, Nebraska, to the oil transit juncture at Cushing, Oklahoma. This extension became operational in February 2011.⁹

Phases III and IV constitute the ambitious “Gulf Coast Expansion,” which is the subject of the current Keystone XL controversy. Phase III will include an extension of the pipeline from Cushing, Oklahoma, to America’s greatest concentration of refining capacity on the Gulf Coast, near Houston and Port Arthur, Texas.¹⁰ On March 22, 2012, Barack Obama stood in the Stillwater Pipe Yard at Cushing and stated the intention of his administration to “fast-track” the construction of this segment of the Keystone pipeline network.¹¹ Phase IV includes a doubling of TransCanada’s cross-border capacity by the construction of another pipeline from the source at Hardisty, Alberta, to the terminal at Steele City, Nebraska.¹² This pipeline would, as currently proposed, enter the state of Montana from the Canadian province of Saskatchewan and cross into the northwestern corner of South Dakota. The pipeline would proceed in a southeastern direction across South Dakota and through Nebraska’s sensitive Sand Hills region and the massive Ogallala Aquifer en route to Steele City.¹³ Phase IV of the pipeline system, with its proposed border crossing from Saskatchewan into Montana, is the subject of the current controversy.

B. The Cross-Border Pipeline Permitting Process

Executive Order 13,337 does not require the preparation of an environmental impact statement (EIS). However the State Department’s implementing policies indicate that, in the event of a presidential permit, the department will undertake to perform an EIS in conformity with the National Environmental Policy Act of 1969 (NEPA).¹⁴ The State Department favored the granting of a presidential permit for the Keystone XL pipeline in its final environmental impact statement (FEIS)

9. Press Release, TransCanada Corporation, Keystone’s Cushing Extension Begins Deliveries to Oklahoma (Feb. 8, 2011), *available at* <http://www.transcanada.com/5641.html>.

10. Press Release, TransCanada Corporation, Keystone Gulf Coast Expansion Approved (Mar. 11, 2010), *available at* <http://www.transcanada.com/5109.html>.

11. *Obama Fast-Tracks Part of Keystone XL Pipeline*, CHRISTIAN SCIENCE MONITOR, <http://www.csmonitor.com/USA/Politics/2012/0322/Obama-fast-tracks-part-of-Keystone-XL-pipeline-video> (last visited Mar. 29, 2013).

12. Art Hovey, *TransCanada Proposes Second Oil Pipeline*, LINCOLN J. STAR, Jun. 12, 2008, http://www.downstreamtoday.com/news/article.aspx?a_id=11336&AspxAutoDetectCookieSupport=1; *see Keystone XL Pipeline – Overall Route Map*, *supra* note 5.

13. *Keystone XL Pipeline – Overall Route Map*, *supra* note 5.

14. *Fact Sheet: Applying for Presidential Permits for Border Crossing Facilities (Canada)*, U.S. DEPT OF STATE, BUREAU OF W. HEMISPHERE AFFAIRS, <http://www.state.gov/p/wha/rls/fs/2009/114990.htm> (last visited Mar. 29, 2013).

of August 26, 2011.¹⁵ However it was in response to allegations of inadequacy of the FEIS that the Obama administration gave the order for further environmental review in November of 2011.¹⁶ This action prompted the Republican-controlled Congress to attach the sixty-day requirement to the then-pending legislation, which in turn prompted the Obama administration to deny the permit application in January 2012.¹⁷

Under the authority of Executive Order 13,337 dating from the presidency of Lyndon Johnson and under color of the “inherent foreign affairs powers” that have long been settled to vest in the presidency, the executive has delegated to the State Department the duty of granting or refusing permits for certain infrastructure projects that would traverse the international boundaries of the United States.¹⁸ Amongst these are proposals for oil pipelines.¹⁹ The Supreme Court of the United States recognizes the privilege of the President to enter into “executive agreements” or “executive settlements” with foreign sovereign powers whose terms may alter the rights and remedies of American citizens by simple virtue of presidential supremacy in the realm of foreign affairs. However, the “inherent foreign affairs powers” do not appear to contemplate an executive privilege to enter into similarly binding arrangements with private foreign parties. Furthermore, insofar as the presidential permit power has historically been exercised over certain facilities entering into the United States, the presidential power is limited to the approval or disapproval of the physical border crossing itself. Finally, federal courts are divided as to whether an FEIS issued in the course of a presidential permitting constitutes a final agency action or is a presidential action immune from judicial review as within the “inherent foreign affairs powers” of the President.

The Keystone XL pipeline and the Obama administration’s denial of a presidential permit prompted a flurry of legislative activity on Capitol Hill. Senator Hoeven of North Dakota introduced Senate Bill 2041 on January 31, 2012 with bi-partisan support.²⁰ This bill allows

15. U.S. DEPT. OF STATE, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED KEYSTONE XL PROJECT 3.15 (Aug. 26, 2011), *available at* <http://keystonepipeline-xl.state.gov/documents/organization/182070.pdf> [hereinafter Proposed Keystone XL Project FEIS]; *see also* Final Environmental Impact Statement for the Proposed Keystone XL Project; Public Meetings, 76 Fed. Reg. 53,525 (Aug. 26, 2011).

16. John M. Broder & Dan Frosch, *U.S. Delays Decision on Pipeline Until After Election*, N.Y. TIMES, Nov. 11, 2011, at A1.

17. Temporary Payroll Tax Cut Continuation Act, Pub. L. No. 112-78, Title V, 125 Stat. 1279, 1289-91 (2011); Statement by the President on the Keystone XL Pipeline, *supra* note 2.

18. Exec. Order No. 13,337, *supra* note 6.

19. Pub. L. No. 112-78 at § 2(a)(i).

20. S. 2041, 112th Cong. (2012).

Congress to declare that the State Department's FEIS of August 2011,²¹ which analyzes the proposed pipeline, shall be accepted,²² thereby superseding and effectively terminating the Obama administration's renewed environmental inquiry. Furthermore, this bill explicitly authorizes TransCanada to proceed in its construction of the pipeline,²³ thereby superseding the presidential permitting process of Executive Order 13,337. The bill also proposes to severely restrict the scope of any judicial review of legal questions relating to the authorization or construction of the pipeline.²⁴ The GovTrack archive reveals that the bill died in Committee before the close of the previous session of Congress.²⁵

Regardless of the fate of Senate Bill 2041, the bill is useful in framing a constitutional question as to the proper roles of the executive and the legislative branches. To begin, this article will evaluate a similar instance of congressional intervention into the authorization of a different oil pipeline project during an earlier age of energy anxiety. In examining the Trans-Alaska Pipeline Authorization Act of 1973, it emerges that Congress may intervene at its pleasure to alter the course of environmental review of a particular project. Congress may also elect to limit the scope of judicial review of such projects without offending the due process and equal protection rights of affected citizens.

However, the Trans-Alaska Pipeline Authorization Act and its treatment in the courts only begins the inquiry. Because the Keystone XL pipeline would enter the United States across an international boundary, this pipeline implicates the "inherent foreign affairs powers" of the President and thereby the venerated separation of powers principles that are deeply embedded in our Constitution. The text of Executive Order No. 13,337, the instrument that delegates permit-granting power to the State Department, must be briefly examined, along with the most recent judicial treatment of such process as an executive privilege in the field of foreign affairs. The history and evolution of the "inherent foreign affairs powers" of the President will then be considered in order to discern their outermost boundaries. The jurisprudence of the "inherent foreign affairs powers" will then be applied to the exercise of such power under Executive Order No. 13,337 in the case of the Keystone XL permit application. This application shows that while the precise contours of the "inherent foreign affairs powers" remain nebulous, the exercise of the

21. Proposed Keystone XL Project FEIS, *supra* note 15.

22. S. 2041 at § 1(a)(2).

23. *Id.*

24. *Id.* at § 1(f).

25. Overview, S. 2041 (112th): A bill to approve the Keystone XL pipeline project and provide for environmental protection and government oversight, GOVTRACK, <http://www.govtrack.us/congress/bills/112/s2041#overview> (last visited Mar. 31, 2013).

presidential permit authority as to the Keystone XL pipeline likely falls within the bounds established by precedent and previously acquiesced in by Congress.

Even where Congress has previously acquiesced in the power of the President, Congress remains free to abrogate that earlier acquiescence. Congress is vested of the power to “regulate Commerce with foreign nations” and this clause grants to Congress a free hand in the area of cross-border infrastructure permitting.²⁶ After establishing that Congress is largely at will to do as it pleases, this article will conclude with a call for modest legislative action by which Congress might exercise its power to ensure a consistent and transparent permit processing regime for cross-border facilities. This action would end legal uncertainty in this area and ensure proper environmental and judicial review of proposed cross-border facilities moving forward into the future.

II. THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE SCOPE OF JUDICIAL REVIEW

Senate Bill 2041 contains provisions that demand an inquiry into the proper roles of the Executive and of Congress in granting permits for cross-border infrastructure projects such as the Keystone XL pipeline. The bill directs that “[t]he final environmental impact statement issued by the Department of State on August 26, 2011, shall be considered to satisfy all requirements of the National Environmental Policy Act of 1969”²⁷ and that “any action taken [to implement the purpose of the Bill] shall not constitute a major Federal action under the National Environmental Policy Act of 1969.”²⁸ In its final portion, the Bill provides that actions taken to effectuate the purpose of the Bill “shall only be subject to judicial review on direct appeal to the United States Court of Appeals for the District of Columbia Circuit.”²⁹ Senate Bill 2041 therefore raises two important threshold legal questions: first, is it within the power of Congress to mandate approval of a particular infrastructure project and in so doing to supersede the prior requirements of NEPA as to that project, and second, is it within the power of Congress to so severely restrict the scope of judicial review?

In answering these questions, it is useful to consider the legal wrangling that surrounded an equally controversial pipeline project of similarly vast proportions in an earlier time of energy insecurity.

26. U.S. CONST. art. I, § 8.

27. S. 2041 at § 1(b)(1).

28. *Id.* at § 1(e)(1).

29. *Id.* at § 1(f).

A. The Lesson of the Trans-Alaska Pipeline Authorization Act

Large reserves of crude oil were discovered on Alaska's North Slope near Prudhoe Bay in 1969. In one of history's ironies, the National Environmental Policy Act³⁰ of that same year was signed into law on January 1, 1970, imposing rigorous requirements of environmental review upon such large-scale infrastructure projects as the proposed Trans-Alaska Pipeline. The Trans-Alaska Pipeline was to be built from the North Slope to the ice-free port at Valdez with crude oil then be delivered via tanker ship to terminals on the western coast of the United States.³¹

While environmental groups and others brought legal actions alleging inadequate environmental review, only one lawsuit threatened to halt the mighty pipeline. That lawsuit simply alleged that the Secretary of Interior overstepped his statutory grant of authority in issuing certain right-of-way permits for the construction of the pipeline.³² On February 9, 1972, engaging in a strict exercise of statutory interpretation, the United States Circuit Court of Appeals for the District of Columbia reversed a district court ruling and issued an injunction against the issuance of such permits.³³

Congress reacted with force. After the brief Yom Kippur War of October 1973 and the attendant reductions in oil output by Middle Eastern producers drove energy prices to staggering levels, Congress acted on November 16, 1973, to enact the Trans-Alaska Pipeline Authorization Act (TAPAA).³⁴ In the legislation, Congress unabashedly declared its goal to "authorize[] and direct[]" that "the trans-Alaska oil pipeline be constructed promptly without further administrative or judicial delay or impediment."³⁵ The Act approved of and accepted the FEIS that the Department of the Interior issued the previous year and offered that "[t]he route of the pipeline may be modified by the Secretary to provide during construction greater environmental protection."³⁶ The Act further provided that authorizations for the pipeline system "shall not be subject to judicial review under any law except that claims alleging the invalidity [of the Act] may be brought within sixty days following its

30. 42 U.S.C. §§ 4321-4370h (2012).

31. For an excellent overview of the economic, political, social, and environmental context in which the contentious debate regarding the Trans-Alaska Pipeline transpired, see JAMES P. ROSCOW, 800 MILES TO VALDEZ: THE BUILDING OF THE ALASKA PIPELINE (1977).

32. *Wilderness Soc. v. Morton*, 4 ERC 1467 (D.D.C. 1972).

33. *Wilderness Soc. v. Morton*, 479 F.2d 842 (D.C. Cir. 1973).

34. Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, §§ 201-206, 87 Stat. 576 (1973).

35. *Id.* at § 203(a).

36. *Id.* at § 203(b).

enactment,” and that “claims alleging that an action will deny rights under the Constitution . . . may be brought within sixty days following the date of such action.”³⁷ Lastly, the Act declared that review of any order of a district court as to such a claim “may be had only upon direct appeal to the Supreme Court of the United States.”³⁸

B. Congressional Action to Limit the Scope of Environmental and Judicial Review is Constitutionally Permissible

At the time Congress enacted TAPAA, President Nixon had recently signed NEPA into law, and the true impact it would bear on the environmental policy of the United States government remained highly uncertain. Environmental advocates were concerned at the frontal assault to the new legislation posed by TAPAA. Many perceived TAPAA to be nothing less than an existential threat to the legislation they had strived to secure.³⁹ Nonetheless, as a simple matter of constitutionally vested legislative power, it is well settled that Congress is within its right to exempt a particular project from NEPA’s safeguards of environmental review by tailored and targeted legislation. While this issue was not directly presented, the Supreme Court acknowledged this right in *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*.⁴⁰ The Court noted TAPAA’s declaration—that no further action under NEPA was necessary for the construction of the pipeline—and found “the merits of the litigation effectively terminated by this legislation.”⁴¹ While it may seem offensive that a politically driven Congress may intervene to determine the applicability of environmental safeguards that might ideally be applied uniformly and dispassionately, this is the inevitable result. Because NEPA, and all federal environmental controls, ultimately stem from Congress, it necessarily follows that Congress may alter or amend the applicability of such laws and regulations by subsequent legislation.

Similarly, the Supreme Court has long recognized the power of Congress to limit the jurisdiction of the federal courts. This power is generally accepted to derive from Article III of the Constitution, which provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.”⁴² It logically follows that if Congress is vested of the power to “ordain and establish” the trial and intermediate

37. *Id.* at § 203(d).

38. *Id.*

39. See ROSCOW, *supra* note 31, at 10.

40. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975).

41. *Id.* at 245.

42. U.S. CONST. art. III, § 1.

appellate courts, then it is necessarily vested of the power to designate their subject matter jurisdiction. As early as 1856, the Supreme Court wrote that “there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.”⁴³

Because of the accepted congressional power to override NEPA requirements and to limit the scope of federal court jurisdiction, where the legislature authorizes a particular project, such authorization is likely to withstand a constitutional challenge unless it can be shown that the legislation’s restrictions offend fundamental notions of due process or equal protection. The limited case law associated with the TAPAA’s restriction of judicial review reveals that such is likely not the case. In *Izaak Walton League v. Marsh*, the United States Court of Appeals for the District of Columbia Circuit noted that “[t]he protections of the Due Process Clause are extended only when a ‘property’ or ‘liberty’ interest has been threatened. But generalized environmental concerns do not constitute a property or liberty interest.”⁴⁴ The Supreme Court denied a petition for certiorari in the *Izaak Walton* case.⁴⁵ In *Stop H-3 Ass’n v. Dole*, a citizens’ group brought an equal protection challenge to a congressional authorization of a federal highway project in Hawaii.⁴⁶ In rejecting the challenge, the Ninth Circuit Court of Appeals wrote “it is simply not true that Congress may not create exemptions from generally applicable statutes in order to authorize state-specific projects.”⁴⁷

In the case of the Keystone XL pipeline and the proposed authorization of that project in Senate Bill 2041, the case for an equal protection challenge is weaker still. Unlike the Trans-Alaska Pipeline and the Hawaii highway authorization, the Keystone XL pipeline is not a “state-specific project,” and as such there is no argument that the authorization would present a form of discrimination against the citizens of a particular state.

Senate Bill 2041 is distinct from TAPAA because it limits review of the project not to any “United States district court”⁴⁸ but rather to “direct appeal to the United States Court of Appeals for the District of Columbia

43. *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856).

44. *Izaak Walton League v. Marsh*, 655 F.2d 346, 361 (D.C. Cir. 1981).

45. *Atchison, Topeka & Santa Fe Ry. Co. v. Marsh*, 454 U.S. 1092 (1981).

46. *Stop H-3 Ass’n v. Dole*, 870 F.2d 1419 (9th Cir. 1989).

47. *Id.* at 1431 (citing the Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, §§ 201-206, 87 Stat. 576 (1973)).

48. 43 U.S.C. § 1652(d) (2012).

Circuit.”⁴⁹ It is possible to argue that, because judicial review may only be had in the District of Columbia, this restriction poses a procedural due process issue of inadequate access to the courts or an equal protection concern of disparate impact upon those who reside at great distances from our nation’s capital. However, such arguments seem unlikely to prevail.

III. THE “INHERENT FOREIGN AFFAIRS POWERS” OF THE PRESIDENT

Unlike the Trans-Alaska Pipeline, the Keystone XL pipeline proposes to cross an international boundary. Under color and force of Executive Order No. 13,337, this crossing implicates the “inherent foreign affairs powers” of the President. Though there is little textual support for this principle to be found in the Constitution itself, a certain degree of power in the arena of foreign affairs has long been settled to vest in the executive in what are known as the “inherent foreign affairs powers” of the President.⁵⁰ Perhaps the earliest, and certainly the best-known, expression of sentiment in favor of this power was voiced by then-Representative John Marshall. In the House of Representatives on March 7, 1800, he referred to the President as “the sole organ of the nation in its external relations, and its sole representative with foreign nations.”⁵¹

Certain scholars consider that these powers derive from the “Recognition Power” by which the President “shall receive Ambassadors and other public Ministers.”⁵² Others simply point to the “Executive Power” clause of the opening section of Article II⁵³ as supportive of a presidential power to enter into executive agreements and settlements. While the textual origin of the “Recognition Power” may serve to enhance the President’s authority in executive dealings to establish or re-establish relations with a foreign nation, there is no uniformly agreed upon textual source of the inherent foreign affairs powers. Notwithstanding the explicit provision in Article II for the involvement of the Senate in treaty negotiations,⁵⁴ courts have held that, where the

49. S. 2041, 112th Cong. § 1(f) (2012).

50. See generally LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 34-45 (2d ed. 1996).

51. 10 ANNALS OF CONG. 613 (1800) (cited in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936)).

52. U.S. CONST. art. II, § 3.

53. U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

54. U.S. CONST. art. II, § 2 (Stating that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”).

foreign affairs powers are properly exercised, executive agreements entered into by the President carry the same force of law as a treaty obligation consented to by the Senate and are to be accorded the full force and protection of the Supremacy Clause of the Constitution.⁵⁵

For the purposes of this inquiry, it is important to trace the judicial trajectory of the foreign affairs powers over a fifty-year period beginning in the 1930s. The seminal Supreme Court case recognizing the foreign affairs powers came in 1936 in the case of *United States v. Curtiss-Wright Export Corp.*⁵⁶ In that case, an arms manufacturer challenged an order issued by President Roosevelt who, acting within a clear statutory grant of power from Congress, had banned the export of arms to certain South American nations involved in a border and natural resources dispute. Justice Sutherland wrote for the majority and enthusiastically upheld the presidential order. In an opinion weighed heavily by his political theory of international relations, Justice Sutherland wrote that the Constitution governed only the power differential between states and the federal government. He opined that foreign affairs powers could not have been conveyed to the President by states that never possessed them but rather that the foreign affairs powers vested directly in the federal executive from the Crown at the time of the Declaration of Independence.⁵⁷ In his view, there was therefore nothing offensive to the Constitution in the President's broad exercise of foreign affairs powers; the opinion suggests, without so stating, that the President might have acted properly even in the absence of the statutory grant.⁵⁸ *Curtiss-Wright* has never been overruled and continues to be cited by those who favor the robust presidential exercise of foreign affairs powers. However its precise *stare decisis* effect remains somewhat uncertain.

Three years prior to the *Curtiss-Wright* decision, in 1933, President Roosevelt entered into the Litvinov Agreement (or Litvinov Assignment) with the leadership of the Soviet Union. The agreement called for the prominent Soviet diplomat Maxim Litvinov to be involved in negotiations.⁵⁹ Under the terms of this agreement, the United States formally recognized the Soviet Union while the Soviet Union transferred to the United States its interest in a Russian insurance company, which was situated in New York and had been nationalized in 1918 and 1919.⁶⁰

55. *United States v. Pink*, 315 U.S. 203, 230 (1942).

56. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

57. *Id.*

58. *Id.*

59. See DONALD G. BISHOP, *THE ROOSEVELT LITVINOV AGREEMENTS: THE AMERICAN VIEW* 17-22 (1965).

60. *Id.*

The assets of the insurance company were to be used to pay claims of the United States and its citizens against the Soviet Union.⁶¹

In a pair of cases that reached the Supreme Court after the *Curtiss-Wright* decision, the Court upheld the executive agreement and wrote that because it was not a treaty, Senate approval was not required. While New York's courts had refused to enforce the Litvinov Agreement, the Court wrote in *United States v. Belmont* that "in the case of all international compacts and agreements . . . complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."⁶² Justice Douglas wrote for the Court in *United States v. Pink* that "[a] treaty is a 'Law of the Land' under the supremacy clause [of Article VI] of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity."⁶³ During the 1940s and 1950s, Senator Bricker proposed a constitutional amendment that would have eliminated the use of executive agreements.⁶⁴ No such amendment was ever enacted by Congress.

There are two cases of particular implication in the "inherent foreign affairs power" inquiry as to the presidential permitting power of Executive Order 13,337, which surfaced in the decades after the close of the Second World War. These cases are significant because of the direct manner in which the courts addressed the relative constitutional powers of the executive and Congress vis-à-vis various foreign commercial interests. These two cases are *United States v. Guy W. Capps, Inc.*⁶⁵, and *Consumers Union of U.S., Inc. v. Henry Kissinger, Sec'y of State*.⁶⁶

In *Guy W. Capps*, the federal government brought suit against a private businessman for breach of a contract. The businessman had entered into the contract in order to comply with the terms of an executive agreement previously reached between the United States and Canada.⁶⁷ Alarmed by several years of record potato crops in the United States, the government pledged itself to a system of price supports in the Agricultural Adjustment Act as amended by the Agricultural Act of 1948,⁶⁸ under which it would purchase from eligible potato growers all table stock and seed potatoes that could not be sold commercially at a

61. *Id.*

62. *United States v. Belmont*, 301 U.S. 324, 331 (1937).

63. *United States v. Pink*, 315 U.S. 203, 230 (1942).

64. See generally DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* (1988).

65. *United States v. Guy W. Capps, Inc.*, 100 F. Supp. 30 (E.D. Va. 1951).

66. *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974).

67. *Guy W. Capps*, 100 F. Supp. at 30.

68. 7 U.S.C. § 624 (2012).

parity price. In furtherance of this policy the United States, through the Acting Secretary of State, entered into an executive agreement with the Canadian Ambassador whereby the Canadian government would only grant licenses for the export of potatoes to the United States, where the exporter could give firm evidence of orders for seed potatoes and where the importer gave an assurance that the potatoes would not be diverted for table stock purposes. The district court entered judgment for the defendant, finding insufficient evidence that a breach of his assurance not to divert potatoes had in fact occurred.⁶⁹

The Fourth Circuit Court of Appeals affirmed the judgment on different grounds, looking rather to the validity of the executive agreement itself.⁷⁰ Within the Agricultural Act of 1948, Congress had created a procedure by which the President could impose limitations on imports where it was thought that such imports would render ineffective or materially interfere with the price support program.⁷¹ Specifically, the statute empowered the President to “cause an immediate investigation” and to “impose such . . . quantitative limitations . . . as he finds and declares shown by such investigation to be necessary.”⁷² The Fourth Circuit found that the President had caused no such investigation, and that “[t]here was no pretense of complying with the requirements of this statute.”⁷³ The court quoted the famous concurring opinion of Justice Jackson in the case of *Youngstown Sheet & Tube Co. v. Sawyer*: “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers.”⁷⁴ The court then opined that “[i]mports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone.”⁷⁵

The Supreme Court affirmed, but it did so by reinstating the judgment of the district court and declining to address the validity of the executive agreement.⁷⁶ In its opinion, the Supreme Court wrote that “there is no occasion for us to consider the other questions discussed by

69. *Guy W. Capps*, 100 F. Supp. at 32.

70. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955).

71. 7 U.S.C. § 624.

72. *Id.*

73. *Guy W. Capps*, 204 F.2d at 658.

74. *Id.* at 659 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

75. *Id.* at 660.

76. *United States v. Guy W. Capps*, 348 U.S. 296 (1955).

the Court of Appeals. The decision in this case does not rest upon them.”⁷⁷

Consumers Union also concerned the federal government’s efforts to control commodity prices.⁷⁸ As Japanese and European steel producers were reborn from the ash of the Second World War and increased their production capacities through the 1950s and 1960s, low-cost imports into the United States threatened the viability of the American steel industry. Officials of President Johnson’s State Department entered into direct discussions with the private foreign producer associations from June to December 1968. These discussions resulted in the communication of voluntary export restraints by which “the Japanese and European producer associations stated their intentions to limit steel shipments to the United States to specified maximum tonnages for each of the years 1969, 1970, and 1971.”⁷⁹

The Consumers Union brought suit against the Secretary of State in the District Court for the District of Columbia, which entered an order declaring that the Executive had no authority to exempt the voluntary restraint agreements from the anti-trust laws. The court did however find that the Executive could enter into agreements or diplomatic arrangements so long as those undertakings did not violate legislation regulating foreign commerce. On appeal, the Court of Appeals for the District of Columbia Circuit found that the actions of the executive in securing instant voluntary agreements were not a regulation of foreign commerce and as such were not foreclosed to the executive by the Constitution.⁸⁰

As in *Guy W. Capps*, the court dedicated considerable attention to the statutory law by which Congress had delegated to the President considerable lawmaking power in the area. With the Trade Expansion Act of 1962, Congress granted to the President for a period of five years considerable power over the imposition of import restrictions such as tariffs and quotas as he deemed necessary to the expansion of America’s trading activities.⁸¹ This privilege expired in 1967, before the State Department entered into negotiations with the foreign steel producer associations. However the Court of Appeals for the District of Columbia Circuit found that the export restrictions were entirely voluntary in nature and did not carry the force of law of a tariff or quota. As such, the Court

77. *Id.* at 305. The Fourth Circuit opinion invalidating the executive agreement was followed in a U.S. District Court as recently as 1983. *Swearingen v. United States*, 565 F. Supp. 1019 (D. Colo. 1983).

78. *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974).

79. *Id.* at 138.

80. *Id.* at 143.

81. 19 U.S.C. § 1821 (2012).

found that the restrictions fell outside the purview of the legislation and were not prohibited to the executive.⁸² The Supreme Court denied the Consumers Union petition for a writ of certiorari.⁸³

Finally, no overview of the “inherent foreign affairs powers” is complete without visiting *Dames & Moore v. Regan, Sec’y of the Treasury*.⁸⁴ In that case the Supreme Court upheld an executive agreement entered into by President Carter with the government of the Islamic Republic of Iran. After the seizure of the American Embassy in Tehran and the holding of diplomatic personnel as hostages for more than one year, the hostages were finally released in the waning hours of the Carter presidency on January 20, 1981, pursuant to an agreement entered into on the previous day. Under the terms of the agreement, “[i]t is the purpose of [the United States and Iran]. . . to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration.”⁸⁵ On April 28, 1981, the petitioner filed an action, alleging that “the actions of the President and the Secretary of the Treasury in implementing the Agreement with Iran were beyond their statutory and constitutional powers and . . . were unconstitutional to the extent they adversely affect petitioner’s final judgment against the Government of Iran . . . and its ability to continue to litigate against the Iranian banks.”⁸⁶ The Supreme Court looked to the International Claims Settlement Act of 1949, which was promulgated with the dual purposes of facilitating a pending executive claims settlement with Yugoslavia and providing a procedure for the facilitation of such future settlements.⁸⁷ Emphasizing the narrowness of its decision, the Court wrote that “where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President’s action, we are not prepared to say that the President lacks the power to settle such claims.”⁸⁸

82. *Consumers Union*, 506 F.2d at 143-44.

83. *Id.*; *Consumers Union of U.S., Inc. v. Kissinger*, 421 U.S. 1004 (1975).

84. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

85. *Id.* at 665 (citing the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, *reprinted in* 75 AM. J. INT’L. L. 422 (1981)).

86. *Id.* at 655.

87. *Id.*

88. *Id.* at 658.

The Iran-United States Claims Tribunal, established pursuant to the agreement entered into by President Carter, continues to adjudicate claims to this day.

A. Executive Order No. 13,337 and the Presidential Permit

The history and evolution of the presidential permitting power must be examined in order to discern its outermost boundaries. Presidential permits are a legal and historical peculiarity that originates in a nineteenth-century practice. That practice began when the President issued a permit for the landing of a submarine telegraphic cable upon the shores of the United States.

The first cable from a foreign country arrived from Cuba in 1867 under the “supposed authority” of an act of Congress of May 5, 1866.⁸⁹ The act granted a New York operator a monopoly license for fourteen years to lay and operate cables between Florida and the West Indian islands.⁹⁰ The first direct exercise of presidential power came in 1869 when President Grant refused to allow the landing of a French cable by a company to whom the French government had granted a period of exclusivity over telegraphic communications by submarine cable between France and the United States. After that restriction was lifted, “the President’s objection was withdrawn,” and the cable was laid in July 1869.⁹¹

From this first grant in 1869, and during the terms of Presidents Grant, Hayes, Garfield, Arthur, Cleveland, and Harrison, “it was held by the Presidents and their Secretaries of State that the Executive has the power, in the absence of legislation by Congress, to control the landing, and, incidentally, regulate the operation of foreign submarine cables in the protection of the interests of this Government and its citizens.”⁹² In August of 1893, then-Secretary of State Gresham briefly reversed this trend by declining to consider permit applications and wrote in a letter that “[t]here is no federal legislation conferring authority upon the President to grant such permission, and in the absence of such legislation, Executive action of the character desired would have no binding force.”⁹³ However in 1896, after an injunction suit was brought

89. JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW*, VOL. II 453-54 (1906) (citing Letter from Mr. Freylinghuysen to the President (Jan. 27, 1885), Senate Doc. No. 122, 49th Cong., 2nd Sess. (1885)).

90. *Id.*

91. *Id.*

92. *Id.* at 461 (citing Letter of Mr. Richards, Acting Attorney-General, to Mr. Sherman, Sec’y of State (Jan. 18, 1898), 22 Op. 13; For. Rel. 1987, 166)).

93. *Id.* at 460 (citing Letter of Mr. Gresham, Sec’y of State (Aug. 15, 1893), Senate Doc. No. 14, 53rd Cong., 2nd Sess. (1893)).

by the then-Attorney General against the landing of a cable without federal permission, Judge Lacombe wrote that the consent of the “General Government” is required, and that “whether [such consent] shall be granted or refused is a political question, and in the absence of Congressional action would seem to fall within the province of the Executive to decide.”⁹⁴ In 1898 Acting Attorney General Richards wrote to Secretary of State Sherman to express his opinion that “the President has the power, in the absence of legislative enactment, to control the landing of foreign submarine cables.”⁹⁵

A dispatch to the American Ambassador to Great Britain in 1919 described the procedure for the granting of permits to land telegraphic cables in the United States at that time as follows:

As there is no legislation of Congress at the present time governing the subject, permits to land cables in the United States are granted by the President, by virtue of his power as director of the relations of the Government with foreign powers, and as Commander in Chief of the Army and the Navy. The permit for license is granted by the President through the Department of State, after negotiations conducted by the Department of State with the diplomatic agents of the country of the cable company desiring the permit to land; or in case the cable company is an American company, with the officers of the company directly.⁹⁶

In 1920, the American Western Union Telegraph Company brought a lawsuit against the Secretaries of State, War, and the Navy to enjoin them from alleged interference, under the guise of the Executive’s power to control cable landings in the United States, in its collaborative actions with the British Western Telegraph Company. Judge A.N. Hand acknowledged the opinion of Judge Lacombe of twenty-five years earlier but wrote that:

[I]n respect to the Western Union, which by the Act of July 24, 1866 “(supra [14 Stat. 44])” possesses a federal franchise covering a business with foreign countries and regulated as to rates by an agency of the government created by Congress, it seems unreasonable to hold that Congress has not occupied the field and legislated so generally in regard to this defendant that it has withdrawn it from the

94. *Id.* at 461 (citing *United States v. La Compagnie Française des Câbles Télégraphiques*, 77 F. 495 (C.C.S.D.N.Y. 1896)).

95. *Id.* at 463 (citing Letter of Mr. Richards, Acting Attorney-General, to Mr. Sherman, Sec’y of State (Jan. 18, 1898), 22 Op. 13; For. Rel. 1897, 166).

96. GREEN HAYWOOD HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, VOL. IV 247-248 (Garland Publishing 1973) (1940) (citing Letter from Long, The Third Assistant Secretary of State (Long) to Davis, the Ambassador in London (Davis) (Jul. 31, 1919), no. 324, MS. Department of State, file 841.73/10).

exercise of executive power in respect to foreign cable connections.⁹⁷

The Circuit Court of Appeals affirmed this judgment for Western Union on March 10, 1921, and on May 27, 1921, Congress enacted the so-called “Kellogg Act” to require a written license from the President for the landing or operation in the United States of any cable that directly or indirectly links the United States to any foreign country. Section 2 of the Act provides:

That the President may withhold or revoke such license when he shall be satisfied after due notice and hearing that such action will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States, or may grant such license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so license[d]; *Provided*, That the license shall not contain terms or conditions granting to the licensee exclusive rights of landing or of operation in the United States⁹⁸

Section 3 of the Act confers jurisdiction upon the District Courts of the United States to enjoin the landing or operation of a cable in violation of its provisions or to compel by injunction the removal thereof.⁹⁹ By executive order issued July 9, 1921, President Warren G. Harding “directed that the Secretary of State should receive all applications for licenses for the landing or operation of cables and, after obtaining from any department of the Government such assistance as he might require, should inform the President with regard to the granting or revocation of such licenses.”¹⁰⁰

By executive order issued July 13, 1939, President Roosevelt authorized and requested the Federal Power Commission to “receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the transmission of electric energy between the United States and foreign countries, and for the exportation or importation of natural gas to or from foreign countries,” and to obtain the recommendations of the Secretaries

97. *Id.* at 251 (citing *United States v. W. Union Telegraph Co.*, 272 F. 311 (S.D.N.Y. 1921), *aff’d*, 272 F. 893 (C.C.A. 2d, 1921)).

98. *Id.* (citing 42 Stat. 8 § 2 (1921)).

99. *Id.* at 251-52 (citing 42 Stat. 8 § 3).

100. *Id.* at 252 (citing Exec. Order No. 3,513, MS. Department of State, file 811.73/709 (Jul. 9, 1921)).

of State and War before submitting a recommendation to the President.¹⁰¹ On August 16, 1968, President Johnson delegated similar duties for the issuance of oil pipeline permits at our national borders to the State Department in Executive Order No. 11,423.

Executive Order No. 13,337 was signed by President George W. Bush on April 30, 2004, and is the current permutation of the claim to executive authority that was first staked by President Lyndon B. Johnson in the issuance of August 16, 1968.¹⁰² Under Executive Order No. 13,337:

the Secretary of State is hereby designated and empowered [as the President's delegate] to receive all applications for Presidential permits, as referred to in Executive Order 11,423, as amended, for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country.¹⁰³

The Order further provides that the Secretary shall “[r]efer the application and pertinent information to, and request the views of, the Secretary of Defense, the Attorney General, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Energy, the Secretary of Homeland Security, [and] the Administrator of the Environmental Protection Agency.”¹⁰⁴ While the Executive Order itself does not refer to any environmental legislation or require any impact statements, the State Department provides, on its website for permit applicants, that “[i]n processing permit applications, the Department reviews compliance with the National Environmental Policy Act (NEPA) of 1969.”¹⁰⁵

After review, the Secretary of State is authorized to grant or deny a presidential permit based upon her determination of whether or not the proposed project is in the “national interest.”¹⁰⁶ Upon notification, should any of the government officials listed above formally lodge a disagreement with the Secretary’s determination, the Secretary “shall refer the application, together with statements of the views of any official involved, to the President for consideration and a final decision.”¹⁰⁷

101. Exec. Order No. 8,202, 4 Fed. Reg. 3,243 (Jul. 15, 1939).

102. Exec. Order No. 11,423, 33 Fed. Reg. 11,741 (Aug. 16, 1968).

103. Exec. Order No. 13,337, *supra*, note 6.

104. *Id.*

105. *Fact Sheet: Applying for Presidential Permits for Border Crossing Facilities (Canada)*, *supra*, note 14.

106. Exec. Order No. 13,337, *supra*, note 6.

107. *Id.*

Executive Order No. 13,337 opens with an invocation of the “authority vested in [President Bush] as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code.”¹⁰⁸ That statutory provision does not confer any substantive power to the President from Congress, but only permits the President to “designate and empower” the heads of executive departments or agencies to perform “any function which is vested in the President by law”¹⁰⁹ or “which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President.”¹¹⁰ The source of power to which President Bush reaches with this Order is the same to which President Johnson turned in 1968 when he opened Executive Order 11,423: “WHEREAS *the proper conduct of the foreign relations of the United States* requires that executive permission be obtained”¹¹¹ The source to which President Bush reaches is the “inherent foreign affairs powers” of the President.

B. The Current Scope of the Presidential Permit Process, While Constitutionally Uncertain, Probably Extends to the Case of the Keystone XL Pipeline

The outermost boundaries of the “inherent foreign affairs powers” in general, and of the presidential permitting power in particular, are difficult to discern. In evaluating these powers as to the Keystone XL pipeline, three issues rise to the forefront. The first issue concerns whether or not the issuance of such a presidential permit is constitutionally permissible. The second issue concerns the scope of the protections afforded. The third issue concerns the availability of judicial review of presidential permit grants and of the attendant environmental safeguards.

1. The Foreign Affairs Powers Do Not Confer in the President the Power to Legally Bind the United States in an Agreement with a Private Foreign Party

At first glance, the entirety of the presidential permitting process as exercised toward the Keystone XL pipeline appears to be on constitutionally tenuous ground. This is not for the simple reason that it might permit an executive action to alter or extinguish rights and remedies of American citizens. Such a reading of the law has been

108. *Id.*

109. 3 U.S.C. § 301(1) (2012).

110. *Id.* at § 301(2).

111. Exec. Order No. 11,423, *supra* note 104 (emphasis added).

conclusively foreclosed by the Supreme Court in the cases that arose out of the Litvinov Agreement with the Soviet Union and in the case of *Dames & Moore v. Regan* that arose out of President Carter's executive settlement with the Government of Iran. During the course of the Litvinov Agreement litigation, the Supreme Court specifically rejected the due process claims of a petitioner, writing that the executive had not extinguished the claims of private creditors against the Soviet government but had only subordinated such claims to those of the United States.¹¹² The *Dames & Moore* court similarly suggested the petitioner's recourse to the Iran-United States Claims Tribunal.¹¹³ These sentiments are reflected in recent opinions in lawsuits brought by holders of Argentina's defaulted debt where judges have reminded petitioners that as against sovereignties, while they may have a right, they may not have a remedy.¹¹⁴

Rather, the presidential permit power as exercised toward the Keystone XL pipeline appears constitutionally tenuous because the President is not empowered to enter directly into legally binding agreements with a private foreign party. The Roosevelt administration entered into the Litvinov Agreement in direct negotiation with a senior diplomat of the Soviet government in the establishment of formal relations with that country and therefore may have enjoyed the textual cover of the President's Recognition Power. Similarly, the Carter administration entered into its agreement with a branch of the Iranian government in order to secure the release of American hostages in Tehran in a time of high crisis in our relations with that country. Such affairs of state fall within the state-to-state form of traditional conduct of foreign relations and therefore enjoy robust claims to legitimacy under the "inherent foreign affairs powers" as recognized by the Supreme Court.

In contrast, the presidential permit, while ultimately formalized via diplomatic channels, is the result of direct communications and negotiations between the executive branch and a private foreign party. As such, the presidential permit process is highly factually analogous to the *Consumers Union* case, which remains the law of the Court of Appeals for the District of Columbia Circuit and which the Supreme Court declined to review at that time.¹¹⁵ In the *Consumers Union* case,

112. *United States v. Belmont*, 301 U.S. 324, 331 (1937).

113. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

114. See *Gauchos and Gadflies: Creditors' Decade-Long Battle with Argentina Shows Just how Tangled Sovereign Defaults Can Be*, THE ECONOMIST, Oct. 22, 2011, available at <http://www.economist.com/node/21533453>.

115. *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974); *Consumers Union of U.S., Inc. v. Kissinger*, 421 U.S. 1004 (1975).

the court upheld the export restrictions agreed to by foreign steel producers with the clear admonition that the agreements survived only because they were voluntarily reached in good faith and were revocable at will. In other words, the court upheld the agreements because they did not carry the force of law. The necessary legal implication is that it does not fall within the President's foreign affairs powers to enter into legally binding executive agreements with private foreign parties. This finding is in stark contrast to the cases of executive agreements with foreign sovereignties to which the Supreme Court has accorded the same dignity and legal force, under the Supremacy Clause of the Constitution, as treaties entered into "with the advice and consent of the Senate."

In the case of the presidential permit issued for Phase I of the Keystone Pipeline System and the application currently under review for Phase IV, neither the State Department nor the TransCanada Corporation has acted under any pretense that the permit is not intended to carry the full force and enjoy the full protections of the law in the courts of the United States. To be assured of this, one need look no further than the case of *Nat'l Res. Def. Council v. U.S. Dep't of State*.¹¹⁶ In that case, after the National Resources Defense Council brought suit against the Department of State to challenge the adequacy of the EIS prepared during the permitting process for Keystone Phase I, TransCanada intervened to defend its legal interest in its presidential permit. When the judge ruled, he accorded TransCanada's presidential permit the same protections as executive agreements entered into with the Soviet Union, Iran, and many other sovereign nations. He ruled the presidential permit to be immune from judicial review; he accorded to the presidential permit the super-heightened protections of the privileges of the "inherent foreign affairs powers" of the President.

In the *Consumers Union* case, Judge Leventhal wrote a spirited dissent in which he disagreed with the majority's factual premise that the export restraints agreed to by the foreign steel producers were not intended to carry the force of law.¹¹⁷ Judge Leventhal expressed some general support for the President's ability to negotiate with private actors: "Presumably, diplomacy ordinarily comprehends negotiation with officials of foreign governments, rather than direct negotiations with foreign firms as here, but I hesitate to suggest that this constitutes an absolute limitation on the President's authority."¹¹⁸ The Judge noted what the scholar Louis Henkin has referred to as the foreign relations

116. *Nat'l Res. Def. Council v. U.S. Dep't of State*, 658 F. Supp. 2d 105 (D.D.C. 2009).

117. *Consumers Union*, 506 F.2d at 146 (Leventhal, J., dissenting).

118. *Id.* at 148.

“apparatus,”¹¹⁹ which “gathers a variety of commercial information in foreign countries,”¹²⁰ and continued that “this function inevitably involves contact with foreign firms, whether or not their governments are a conduit for communication.”¹²¹ Nonetheless, he rested his dissent on his differences with the majority’s factual premise, necessarily acquiescing in its legal findings that the executive cannot legally bind the United States in agreements with private actors.

While the legal dichotomy that distinguishes the executive’s negotiations with state and non-state actors as illustrated in these cases seems to demonstrate the impropriety of a presidential grant directly to a private entity, to peremptorily reach a conclusion on this basis would disregard the particular legal and historical sources of the presidential permit power.

The earlier practice of the executive conducting negotiations with the diplomatic representatives of foreign sovereignties for the permitting of submarine telegraphic cables seems a far departure from at least one recognized source of the “inherent foreign affairs powers” in the Recognition Power of the Constitution. The practice of the executive conducting negotiations for the permitting of cross-border pipelines with both a foreign nation’s diplomatic representatives and also its captains of industry is a further departure still. Nonetheless, the State Department permit application materials provide that “[c]onstruction generally cannot begin until the U.S. and Canadian governments exchange diplomatic notes specifically authorizing the construction.”¹²² Because of this exchange of diplomatic notes, the permit application process is distinguishable from the *Consumers Union* case in which foreign industries negotiated directly with the executive without any participation of their government whatsoever. This practice of negotiation with private foreign parties under the auspices of their diplomatic representatives appears to be of the same vein as the earliest negotiations for the permitting of submarine telegraphic wires. For this reason, the presidential permit process as exercised toward the Keystone XL pipeline probably falls within the bounds of the “inherent foreign affairs powers” as established by precedent and previously acquiesced in by Congress.

119. HENKIN, *supra* note 50, at 46.

120. *Consumers Union*, 506 F.2d at 148.

121. *Id.*

122. *Fact Sheet: Applying for Presidential Permits for Border Crossing Facilities (Canada)*, *supra* note 14.

2. The Foreign Affairs Powers Do Not Confer in the President the Power to Approve a Cross-Border Facility's Extension Beyond the Border Crossing Itself

Under the terms of the Executive Order, “the Secretary of State is hereby designated and empowered to receive all applications for Presidential permits, as referred to in Executive Order 11,423, as amended, for the construction, connection, operation, or maintenance, *at the borders of the United States*, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country.”¹²³ Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, Kerri-Ann Jones, is on the record as stating, during a visit to Nebraska, that “[w]e just really are responsible for the part that comes over the border and goes to the first valve.”¹²⁴ This statement is consistent with the language of a different presidential permit, cited in *Sierra Club v. Clinton*, in which a permit was granted for “[a] 36-inch diameter pipeline extending from the United States-Canada border . . . up to and including the first mainline shut-off valve or pumping station in the United States.”¹²⁵

In light of the cross-border context, the language of the permit and the statement of Assistant Secretary of State Jones are consistent with the history of the presidential permitting process in which permits were granted for the landing of submarine telegraphic cables. Such “landing permits” are, by definition, restricted to the utility’s point of entry into the United States. In the case of such telegraphic cable landing permits, it appears that the permitting power extended at most over the territorial waters of the United States through which the cable passed. In one early instance a permit was granted for a Canadian cable to traverse approximately eighty miles of U.S. territory before re-entering Canada, but that permit was expressly understood to be revocable at will.¹²⁶

The presidential permitting power therefore appears to be restricted to the approval or disapproval of the physical border crossing itself. This limitation is in line with the considerable deference that has been granted to individual states in determining the route that the pipeline will take across their territory. This deference explains, to an extent, the particular

123. Executive Order No. 13,337, *supra* note 6 (emphasis added).

124. Kevin Abourezk, *State Department Official: States Govern Pipeline Routes*, LINCOLN J. STAR, Sept. 27, 2011, http://journalstar.com/news/local/article_daeff415-640c-5101-a7bf-0b74d1901c4a.html.

125. *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1157 (D. Minn. 2010).

126. MOORE, *supra* note 89, at 464 (citing Letter of Mr. Sherman, Sec’y of State, For. Rel. 1897, 327-29 (Sep. 14, 1897)).

solicitude for the concerns of Nebraska contained within Senate Bill 2041 as to its sensitive Sand Hills and Ogallala Aquifer.¹²⁷

Despite this clear limitation on the scope of the permit, the State Department has begun to prepare an EIS for the entire proposed route of the pipeline. This raises constitutional questions of the judicial reviewability of such an EIS, and the federal courts do not speak with one voice on this issue.

3. A President's Decision to Grant a Permit and an Environmental Impact Statement Commissioned by the Department of State Might Be Immune from Judicial Review

In 2009, the National Resources Defense Council (NRDC) filed a lawsuit against the Department of State in the United States District Court for the District of Columbia to challenge the Department's grant of a presidential permit for the construction of Phase I of the Keystone Pipeline System. In *Nat'l Res. Def. Council v. U.S. Dep't of State*, in which TransCanada Keystone Pipeline, LP, intervened as a defendant, the NRDC alleged that the State Department had violated NEPA by issuing a presidential permit on the basis of an inadequate assessment of environmental impacts.¹²⁸ Upon motion by the defendants, the claim was dismissed on the pleadings for the plaintiffs' failure to state a claim upon which relief could be granted.¹²⁹

In the complaint, the plaintiffs did not challenge the inherent constitutional power of the President to grant permits for trans-border facilities. Rather, the plaintiffs alleged that because in that case the final decision was rendered by the Secretary of State without the President's involvement, it was not an executive decision but was rather an administrative one and was, as such, subject to judicial review under the Administrative Procedure Act. Judge Richard J. Leon dismissed this argument, finding that the Secretary of State acted as the President's delegate under Executive Order No. 13,337 and that the decision therefore enjoyed the deference of one made by the President himself. Judge Leon wrote that "Defendants have amply documented the long history of Presidents exercising their inherent foreign affairs power to issue cross-border permits, even in the absence of any congressional authorization," and continued to find that "[w]here, as here, the President ... delegates his inherent constitutional authority to a subordinate agency and that authority is not limited or otherwise governed by statute, the

127. S. 2041, 112th Cong. § 1(d) (2012) (permitting the State of Nebraska to determine, in large part, the route of the Keystone XL pipeline through that state).

128. *Nat'l Res. Def. Council v. U.S. Dep't of State*, 658 F. Supp. 2d 105 (D.D.C. 2009).

129. *Id.*

agency's exercise of that discretionary authority on behalf of the President is tantamount to presidential action and cannot be reviewed for abuse of discretion."¹³⁰ Though there is no higher court authority as to challenges of presidential permits issued under Executive Order No. 13,337, Judge Leon did take note of the case of *Tulare County v. Bush*, where the court dismissed a NEPA claim "because NEPA requires agency action, and the action in question is an extension of the President's action."¹³¹ In a companion opinion handed down the same day, the District Court for the District of South Dakota reached substantially the same result;¹³² it appears that the South Dakota court awaited the ruling on this constitutionally charged issue from the District of Columbia court before handing down its own ruling.

Similarly, in the District of Minnesota, the court upheld the grant of a presidential permit against a constitutional challenge.¹³³ However, the deference accorded to the presidential permitting power in that court was less than absolute. Departing from the rulings of the District of Columbia and South Dakota Districts, Judge Frank of the District of Minnesota ruled that a State Department issuance of an FEIS is not an executive or presidential action, but rather is a final agency action subject to judicial review under the Administrative Procedure Act.¹³⁴ In deciding this case, Judge Frank made note of an Eighth Circuit case,¹³⁵ which in turn cited the Supreme Court for the proposition that "an agency's decision to issue. . . an [EIS] is a 'final agency action' permitting immediate judicial review under NEPA" and the APA.¹³⁶ Judge Frank wrote of the South Dakota and District of Columbia opinions that "the Court respectfully disagrees with those decisions insofar as they hold that any action taken by the State Department pursuant to an executive order, and in particular the preparation of an EIS for a major federal action, is not subject to judicial review under the APA."¹³⁷ This division of authority remains unresolved. Executive Order No. 13,337 does not mention NEPA or an

130. *Id.* at 113.

131. *Tulare County v. Bush*, 185 F. Supp. 2d 18, 29 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002).

132. *Sisseton v. U.S. Dep't of State*, 659 F. Supp. 2d 1071 (D.S.D. 2009) (holding that the grant of the permit is a presidential action not subject to judicial review under the Administrative Procedure Act).

133. *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147 (D. Minn. 2010).

134. *Id.* at 1157.

135. *Id.* at 1156 (citing *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808 (8th Cir. 2006)).

136. *Ohio Forestry Ass'n. v. Sierra Club*, 523 U.S. 726, 733 (1998).

137. *Sierra Club*, 689 F. Supp. 2d at 1157 n. 3.

EIS.¹³⁸ It is only in the State Department's implementing practices and regulations that the Department elects to perform an EIS for projects for where a presidential permit application is submitted.¹³⁹ It is not clear how the *Sierra Club* court would have ruled if the State Department instead performed no EIS at all.

As noted, the State Department's requirement of an "exchange of diplomatic notes" likely satisfies the prohibition against binding agreements entered into directly with private foreign parties. However the exact scope of the protections afforded by a presidential permit to facilities that reach beyond the border crossing and the judicial reviewability of attendant NEPA safeguards remain highly unsettled.

C. Congress is Constitutionally Authorized to Unilaterally Regulate Cross-Border Facilities

Though difficult to evaluate in light of the uncertain contours of the "inherent foreign affairs powers" as to the presidential permitting process, it appears that the exercise of the power as to the Keystone XL pipeline falls within the bounds established by precedent and previously acquiesced in by Congress. However, the "inherent foreign affairs powers" of the President are not the only implication of the Keystone XL pipeline's crossing of an international boundary that set it apart from the earlier Trans-Alaska Pipeline. In TAPAA itself Congress does not clearly establish the constitutionally enumerated power under which the Act is brought, writing only that "it is the intent of the Congress to exercise its constitutional powers to the fullest extent in the authorizations and directions herein made."¹⁴⁰ At least one observer has suggested that Congress acted under color of its Article IV power to control public lands.¹⁴¹

Legislation brought to authorize or otherwise control the cross-border facilities contemplated by Executive Order 13,337 could be brought under the broad congressional power "to regulate Commerce with foreign nations,"¹⁴² and this is indeed the source to which Senator

138. Exec. Order 11,423, *supra* note 102, from which Exec. Order No. 13,337, *supra* note 6, derives, was issued in 1968 before the enactment of NEPA.

139. *Fact Sheet: Applying for Presidential Permits for Border Crossing Facilities (Canada)*, *supra* note 14.

140. Pub. L. No. 93-153, § 203(a), 87 Stat. 576 (1973).

141. The Hon. Peter H. Dominick & David E. Brody, *The Alaska Pipeline: Wilderness Society v. Morton and the Trans-Alaska Pipeline Authorization Act*, 23 AM. U. L. REV. 337, 364 (1973) (citing U.S. CONST. art. IV, § 3) ("The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

142. U.S. CONST. art. I, § 8.

Hoeven reached in introducing Senate Bill 2041.¹⁴³ When Executive Order 13,337 was signed into force by President George W. Bush in 2004, the earlier language empowering the President to grant permits only “to the extent that congressional authorization is not required”¹⁴⁴ had been removed.¹⁴⁵ While this removal may be an accurate reflection of the entrenchment of the presidential permitting power by congressional inaction and acquiescence, the constitutional power of Congress, where properly exercised, cannot be waived or amended in time.

The jurisprudence of the Supreme Court reveals the Commerce Clause to be perhaps the most expansive of the enumerated powers conferred upon Congress by the Constitution. The Court has written that “[t]he power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution.”¹⁴⁶ In referring to the power as “exclusive and plenary,”¹⁴⁷ the Court expounded that “[a]s an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action.”¹⁴⁸ In a 2006 opinion by the Court of Appeals for the Ninth Circuit, that court wrote that the Supreme Court has “never struck down an act of Congress as exceeding its powers to regulate foreign commerce.”¹⁴⁹

There may be some areas which are uniquely and exclusively within the constitutional purview of the presidency so as to make them impervious to a congressional wresting of control. In light of the expansive reach that the courts have attached to the Foreign Commerce Clause, the control of cross-border facilities embodied in the presidential permitting power is not among them.

IV. CONGRESS SHOULD ACT WITHIN ITS CONSTITUTIONAL POWER TO ESTABLISH A TRANSPARENT PERMIT PROCESSING REGIME AND TO ENSURE ADEQUATE ENVIRONMENTAL AND JUDICIAL REVIEW OF ALL CROSS-BORDER FACILITIES

The purpose of the inquiry thus far is to firmly establish that Congress is at will to do as it pleases with regard to cross-border facilities such as the Keystone XL pipeline. As demonstrated by the

143. 158 CONG. REC. S165 (daily ed. Jan. 30, 2012) (statement of Sen. Hoeven).

144. Exec. Order No. 11,423, *supra* note 102.

145. Exec. Order No. 13,337, *supra* note 6.

146. *Buttfield v. Stranahan*, 192 U.S. 470, 492-493 (1904).

147. *Bd. of Trs. of Univ. of Ill. v. United States*, 289 U.S. 48, 56 (1933).

148. *Id.* at 56-57.

149. *United States v. Clark*, 435 F.3d 1100, 1113 (9th Cir. 2006).

treatment of the Trans-Alaska Pipeline Authorization Act in the courts, Congress is free to exempt a particular project from previously enacted environmental safeguards and to limit the scope of judicial review. The jurisprudence of the Foreign Commerce Clause abundantly confirms that, regardless of past exercises of presidential permitting power under color of the “inherent foreign affairs powers” of the President, Congress may legislate in the field, even to the point of occupying it entirely, at will. Simply in the name of efficiency, there is great value to be had in the elimination of the legal uncertainty that currently envelops the permitting process. At present, Congress has not spoken as to the precise outer limit of the executive’s power in the granting of presidential permits for trans-border oil pipelines. As Napoleon is believed to have said, where the law is not conclusively settled the tools belong to the man that can use them.

Legislation targeted to entirely remove the consideration of the Keystone XL pipeline from the purview of the presidency stands to worsen rather than to improve the quality of environmental protection. This is the case with the now-dormant Senate Bill 2041. Because the Bill would mandate acceptance of a potentially flawed EIS and would restrict the scope of judicial review, the bill would diminish the public’s faith in the ability of Congress to ensure adequate environmental protection and to keep the doors of our courts open to citizens who seek redress. Additionally, by targeting a specific project, Senate Bill 2041 makes for poor environmental and public policy. Rather than reducing the uncertainty that presently characterizes the presidential permit process, the bill would increase uncertainty by introducing the possibility that any permits pending in the future may be co-opted by a fickle Congress. Senate Bill 2041 would not abolish the presidential permit process but rather leave it intact, thereby subjecting future projects to confusing ad hoc decision making from two branches of government giving multiple answers to the same question.

To prevent this confusion and increase efficiency, Congress should enact legislation to establish a transparent and consistent permit-processing regime for cross-border infrastructure projects. To accomplish this goal, Congress should eliminate the uncertainty that currently envelops the presidential permit process by either abolishing it entirely or by affirming that the presidential permit power is restricted to the physical border crossing. Additionally, Congress should remove grants of permits that extend deep into the interior of the United States and also the appropriate attendant environmental safeguards from a space in which they might presently enjoy immunity from court scrutiny as within the scope of “presidential” actions. Congress should include in such

legislation robust provisions for the application of NEPA standards to all permit applications and for the ability of affected citizens to challenge the adequacy of such environmental safeguards in an open court of the United States.

Currently, Congress remains free to override otherwise uniform procedures in legislation targeted to a specific project. Some might argue that even if Congress were to establish uniform and consistent procedures for the evaluation of cross-border permit applications, these procedures may have limited effect given that Congress remains, as it is, perpetually free to disregard its own rules. Nonetheless, the establishment of a permit-processing regime is an essential first step.

V. CONCLUSION

The presidential permit power and the “inherent foreign affairs powers” of the President are enveloped in legal uncertainty. The lessons of the Trans-Alaska Pipeline tell us that Congress has the power to act with force in the authorization and regulation of certain infrastructure projects. In the case of the Keystone XL pipeline, Congress, should it choose to act, is supreme over the presidency. Here, Congress can avail itself of the expansive grant of power that is the Foreign Commerce Clause of the Constitution.

However this unbounded power of Congress must be exercised judiciously. Congress should enact legislation either to clarify the historical truth that the President’s permit-granting power is constrained to the border crossing itself or to do away with the presidential permit process entirely. Such legislation should clearly establish that pipelines, including those that arrive via the international boundaries of the United States, are subject to the full force of the NEPA regulatory regime, and should expressly provide for the judicial reviewability of the adequacy of all environmental impact statements prepared within the permitting process. In this way, Congress can reduce legal confusion in this area. Most importantly, Congress can do away with a peculiarity of legal history that has paradoxically afforded a foreign energy infrastructure company immunity from certain domestic environmental protection laws.

By abrogating its earlier acquiescence in the power of the President, Congress will ensure adequate and proper environmental and judicial review of cross-border projects moving forward into the future.