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# Proposed Keystone XL Pipeline: Legal Issues

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# Proposed Keystone XL Pipeline: Legal Issues

## **Abstract**

[Excerpt] In 2008, TransCanada Corp. applied for a presidential permit from the State Department to construct and operate an oil pipeline across the U.S.-Canada border in a project known as Keystone XL. The Keystone XL pipeline would transport oil produced from oil sands in Alberta, Canada, to Gulf Coast refineries. The permit application was subjected to review by the State Department pursuant to executive branch authority over cross-border pipeline facilities as articulated in Executive Order 13337.

After several phases of review, on November 10, 2011, the State Department announced that it would seek additional information about alternative pipeline routes before it could move forward with a national interest determination. In response, several pieces of legislation were introduced, including Title V of the Temporary Payroll Tax Cut Continuation Act of 2011. Title V dictated that President must grant the Keystone XL pipeline permit within 60 days of the law's enactment, unless the President determined that the pipeline is not in the national interest. If the President did not make a national interest determination and took no action to grant the permit, then the law provided that the permit "shall be in effect by operation of law." The Temporary Payroll Tax Cut Continuation Act of 2011 (P.L. 112-78), including Title V addressing the Keystone XL permit, was enacted on December 23, 2011.

Pursuant to the requirements of Title V, on January 18, 2012, the State Department recommended that "the presidential permit for the proposed Keystone XL pipeline be denied and, that at this time, the TransCanada Keystone XL Pipeline be determined not to serve the national interest." The same day, the President stated his determination that the Keystone XL pipeline project "would not serve the national interest."

"New legislative activity with respect to the permitting of border-crossing facilities, a subject previously handled exclusively by the executive branch, has triggered inquiries as to whether this raises constitutional issues related to the jurisdiction of the two branches over such facilities. Additionally, as states have begun to contemplate taking action with respect to the pipeline siting, some have questioned whether state siting of a pipeline is preempted by federal law. Others argue that states dictating the route of the pipeline violates the dormant Commerce Clause of the Constitution which, among other things, prohibits one state from acting to protect its own interests to the detriment of other states.

This report reviews those legal issues. First, it suggests that legislation related to cross-border facility permitting is unlikely to raise significant constitutional questions, despite the fact that such permits have traditionally been handled by the executive branch alone pursuant to its constitutional "foreign affairs" authority. Next, it observes generally that state oversight of pipeline siting decisions does not appear to violate existing federal law or the Constitution. Finally, the report suggests that State Department's implementation of the existing authority to issue presidential permits appears to allow for judicial review of its National Environmental Policy Act determinations.

## **Keywords**

Keystone XL pipeline, approval, development, environment, constitutionality, State Department, legality

## **Comments**

## **Suggested Citation**

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# Proposed Keystone XL Pipeline: Legal Issues

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## Summary

In 2008, TransCanada Corp. applied for a presidential permit from the State Department to construct and operate an oil pipeline across the U.S.-Canada border in a project known as Keystone XL. The Keystone XL pipeline would transport oil produced from oil sands in Alberta, Canada, to Gulf Coast refineries. The permit application was subjected to review by the State Department pursuant to executive branch authority over cross-border pipeline facilities as articulated in Executive Order 13337.

After several phases of review, on November 10, 2011, the State Department announced that it would seek additional information about alternative pipeline routes before it could move forward with a national interest determination. In response, several pieces of legislation were introduced, including Title V of the Temporary Payroll Tax Cut Continuation Act of 2011. Title V dictated that President must grant the Keystone XL pipeline permit within 60 days of the law's enactment, unless the President determined that the pipeline is not in the national interest. If the President did not make a national interest determination and took no action to grant the permit, then the law provided that the permit "shall be in effect by operation of law." The Temporary Payroll Tax Cut Continuation Act of 2011 (P.L. 112-78), including Title V addressing the Keystone XL permit, was enacted on December 23, 2011.

Pursuant to the requirements of Title V, on January 18, 2012, the State Department recommended that "the presidential permit for the proposed Keystone XL pipeline be denied and, that at this time, the TransCanada Keystone XL Pipeline be determined not to serve the national interest." The same day, the President stated his determination that the Keystone XL pipeline project "would not serve the national interest."

New legislative activity with respect to the permitting of border-crossing facilities, a subject previously handled exclusively by the executive branch, has triggered inquiries as to whether this raises constitutional issues related to the jurisdiction of the two branches over such facilities. Additionally, as states have begun to contemplate taking action with respect to the pipeline siting, some have questioned whether state siting of a pipeline is preempted by federal law. Others argue that states dictating the route of the pipeline violates the dormant Commerce Clause of the Constitution which, among other things, prohibits one state from acting to protect its own interests to the detriment of other states.

This report reviews those legal issues. First, it suggests that legislation related to cross-border facility permitting is unlikely to raise significant constitutional questions, despite the fact that such permits have traditionally been handled by the executive branch alone pursuant to its constitutional "foreign affairs" authority. Next, it observes generally that state oversight of pipeline siting decisions does not appear to violate existing federal law or the Constitution. Finally, the report suggests that State Department's implementation of the existing authority to issue presidential permits appears to allow for judicial review of its National Environmental Policy Act determinations.

A companion report from CRS focusing on policy issues associated with the proposal, CRS Report R41668, *Keystone XL Pipeline Project: Key Issues*, by Paul W. Parfomak et al., is also available.

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## Background

In September 2008, TransCanada Corp. (a Canadian company) applied to the U.S. Department of State for a permit to cross the U.S.-Canada international border with the Keystone XL pipeline project.<sup>1</sup> If constructed, the pipeline would carry crude oil produced from the oil sands region of Alberta, Canada, to U.S. Gulf Coast refineries. The U.S. portion of the Keystone XL pipeline project, as proposed, would pass through Montana, South Dakota, Nebraska, Oklahoma, and Texas. The pipeline would consist of approximately 1,380 miles of 36-inch-diameter pipe and have the capacity to transport 830,000 barrels per day of crude oil to the United States. The pipeline would deliver up to roughly 200,000 barrels per day to an existing oil terminal in Oklahoma, with the remainder sent further to points in Texas.<sup>2</sup>

In most instances, decisions about the siting of oil pipelines, even interstate oil pipelines like the proposed Keystone XL pipeline, are made by state governments if the state governments choose to exercise a pipeline siting authority.<sup>3</sup> The federal government generally does not regulate the siting of oil pipelines, although it does oversee oil pipeline safety<sup>4</sup> and pricing issues.<sup>5</sup> However, the construction, connection, operation, and maintenance of a pipeline that connects the United States with a foreign country requires the permission of the U.S. Department of State, conveyed through a presidential permit.<sup>6</sup> Accordingly, the proposed Keystone XL pipeline would require a permit. Executive Order 13337 delegates to the Secretary of State the President's authority to issue such a permit upon a determination that the project is in the national interest.<sup>7</sup>

Prior to making the national interest determination, the State Department conducts a review under the National Environmental Policy Act (NEPA).<sup>8</sup> For Keystone XL, a draft environmental impact statement (EIS) was issued April 16, 2010,<sup>9</sup> but the Environmental Protection Agency (EPA) found the draft was inadequate.<sup>10</sup> A supplemental draft was available in April 2011,<sup>11</sup> and again

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<sup>1</sup> This is an abbreviated discussion of the physical characteristics of the proposed Keystone XL pipeline for the purposes of introducing the legal issues related to the pipeline. More information is available at CRS Report R41668, *Keystone XL Pipeline Project: Key Issues*, by Paul W. Parfomak, et al.

<sup>2</sup> U.S. Department of State, *Supplemental Draft Environmental Impact Statement for the Keystone XL Oil Pipeline Project*, p. 1-4 (April 15, 2011).

<sup>3</sup> See, e.g., S.D. Codified Laws §49-41B-4.1 (requiring a state permit and the approval of the state legislature prior to construction of a "trans-state" transmission facility, defined to include pipelines).

<sup>4</sup> Pipeline safety is governed by the federal Office of Pipeline Safety, an agency within the Department of Transportation, which exercises authority pursuant to the Hazardous Liquid Pipeline Safety Act of 1979, as amended (49 U.S.C. §60101 *et seq.*).

<sup>5</sup> The Federal Energy Regulatory Commission (FERC) regulates oil pipeline rates pursuant to the authority transferred to it by Title XVIII of the National Energy Policy Act of 1992 (P.L. 102-486, 42 U.S.C. §7172 note).

<sup>6</sup> The State Department was delegated authority to issue a permit for cross-boundary pipelines by the President under Executive Order 11423 of 1968, as revised in 2004 by Executive Order 13337.

<sup>7</sup> Exec. Order No. 13337, §1(g), *Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States*, 69 *Federal Register* 25299 (May 5, 2004).

<sup>8</sup> 42 U.S.C. §§4321 *et seq.* This report assumes some familiarity with the NEPA process. To learn details about that process, see CRS Report RS20621, *Overview of National Environmental Policy Act (NEPA) Requirements*, by Kristina Alexander, or see the discussion of NEPA in CRS Report R41668, *Keystone XL Pipeline Project: Key Issues*, by Paul W. Parfomak et al.

<sup>9</sup> 75 *Fed. Reg.* 20653 (April 20, 2010).

<sup>10</sup> Letter from Assistant Administrator, U.S. Environmental Protection Agency, to Assistant Secretary of State, U.S. (continued...)

EPA found flaws.<sup>12</sup> A final EIS was announced in August of that year.<sup>13</sup> Under NEPA practice, the final EIS would be reviewed by EPA and other interested agencies prior to issuance of a record of decision.<sup>14</sup> However, a proposed route change through Nebraska put those final actions on hold.

On November 10, 2011, the State Department announced a decision to seek additional information about alternative pipeline routes before it could move forward with a national interest determination. Specifically, concerns regarding potential environmental impacts of constructing and operating the pipeline along the proposed route through the Sand Hills region of Nebraska led the State Department to decide that an assessment of potential alternative routes that would avoid that area was necessary.

On December 23, 2011, Congress passed and the President signed into law the Temporary Payroll Tax Cut Continuation Act of 2011. Title V of the act addressed the Keystone XL presidential permitting process.<sup>15</sup> Under that provision, the President was required to grant the Keystone XL pipeline permit within 60 days of the law's enactment, unless the President determined that the pipeline was not in the national interest.<sup>16</sup> If the President did not make a national interest determination and took no action to grant the permit, then the law provided that the permit "shall be in effect by operation of law."<sup>17</sup> Title V of the act appears to be the first legislative foray into the permitting of the border crossing facilities as contemplated in Executive Orders 11423 and 13337.

As required by Title V of the act, on January 18, 2012, the State Department recommended that "the presidential permit for the proposed Keystone XL pipeline be denied and, that at this time, the TransCanada Keystone XL Pipeline be determined not to serve the national interest."<sup>18</sup> The State Department asserted that its recommendation "was predicated on the fact that the Department does not have sufficient time to obtain the information necessary to assess whether the project, in its current state, is in the national interest."<sup>19</sup> The State Department press release also indicated that the 60-day time period provided for in the act "is insufficient" for a determination as to whether the pipeline is in the national interest.<sup>20</sup> The State Department said

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(...continued)

Department of State (July 16, 2010) ("we think that the Draft EIS does not provide the scope or detail of analysis necessary to fully inform decision makers and the public, and recommend that additional information and analysis be provided"), available at [http://yosemite.epa.gov/oeca/webeis.nsf/%28PDFView%29/20100126/\\$file/20100126.PDF](http://yosemite.epa.gov/oeca/webeis.nsf/%28PDFView%29/20100126/$file/20100126.PDF).

<sup>11</sup> 76 Fed. Reg. 22744 (April 22, 2011).

<sup>12</sup> Letter from Assistant Administrator, EPA, to Assistant Secretaries of State, State Department (June 6, 2011) ("additional analysis is necessary... [including] improv[ing] the analysis of oil spill risks and alternative pipeline routes"), available at <http://environblog.jenner.com/files/here-6.pdf>.

<sup>13</sup> 76 Fed. Reg. 53525 (August 26, 2011).

<sup>14</sup> 40 C.F.R. §1502.19 (circulation of EIS); 40 C.F.R. §1505.2 (record of decision).

<sup>15</sup> P.L. 112-78.

<sup>16</sup> P.L. 112-78, § 501.

<sup>17</sup> P.L. 112-78, § 501(b)(3).

<sup>18</sup> Press Release, The White House, Office of the Press Secretary, Statement by the President on the Keystone XL Pipeline (January 18, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/18/statement-president-keystone-xl-pipeline>; Media Note, U.S. Department of State, Office of the Spokesperson, Denial of Keystone XL Pipeline Application (January 18, 2012), <http://www.cq.com/pdf/govdoc-4012555>.

<sup>19</sup> Media Note, U.S. Department of State, Office of the Spokesperson, Denial of Keystone XL Pipeline Application (January 18, 2012), <http://www.cq.com/pdf/govdoc-4012555>.

<sup>20</sup> *Id.*



that “subsequent permit applications” and “applications for similar projects” were not precluded by the denial of this particular permit application.<sup>21</sup> The same day, the President stated his determination that the Keystone XL pipeline project “would not serve the national interest.”<sup>22</sup> He made this determination, as required by Title V of the act, in a memorandum to the Secretary of State.<sup>23</sup>

In addition to Title V of the Temporary Payroll Tax Cut Continuation Act of 2011, several other pieces of legislation have been introduced in Congress to compel expedited review of the Keystone XL application. The North American Energy Security Act (S. 1932), the American Energy Security Act (H.R. 3537), and the Middle Class Tax Relief and Job Creation Act of 2011 (H.R. 3630) also would require the Secretary of State to issue a permit for the project within 60 days of enactment, unless the President publicly determines the project to be not in the national interest. The January 18, 2012, determination that the project was not in the national interest may have superseded this proposed legislation. The North American Energy Access Act (H.R. 3548) would transfer permitting authority over the Keystone XL pipeline project from the State Department to the Federal Energy Regulatory Commission (FERC), and would require the commission to issue a permit for the project within 30 days of enactment. Also, other legislation may be introduced in the near future in response to the January 18, 2012, national interest determinations of the Secretary of State and the President.

The recent legislative activity appears to represent the first congressional efforts to amend the established executive branch procedure for the permitting of cross-border pipeline facilities, and there is some question as to whether this raises constitutional issues related to the jurisdiction of the two branches over such facilities. Additionally, as states consider taking action with respect to the pipeline siting, some have questioned whether state siting of a pipeline is preempted by federal law. Others have argued that states dictating the route of the pipeline violates the dormant Commerce Clause of the Constitution, which prohibits one state from acting to protect its own interests to the detriment of other states. Finally, some environmental groups have raised questions about the adequacy of government review of the proposed pipeline under the National Environmental Policy Act (NEPA), the routing of the pipeline near key aquifers, and the emissions caused by the oil production. This report reviews those legal issues, observing generally that legislation altering the pipeline border crossing approval process appears likely to be a legitimate exercise of Congress’s constitutional authority to regulate foreign commerce and that state oversight of pipeline siting decisions does not appear to violate existing federal law or the Constitution. The report also suggests that the State Department’s implementation of its authority to issue presidential permits appears to allow for judicial review of its NEPA determinations. A companion report from CRS focusing on policy issues associated with the proposal, CRS Report R41668, *Keystone XL Pipeline Project: Key Issues*, by Paul W. Parfomak et al., is also available.

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<sup>21</sup> *Id.*

<sup>22</sup> Memorandum from President Barack Obama to the Secretary of State on Implementing Provisions of the Temporary Payroll Tax Cut Continuation Act of 2011 Relating to the Keystone XL Pipeline Permit, <http://www.whitehouse.gov/the-press-office/2012/01/18/presidential-memorandum-implementing-provisions-temporary-payroll-tax-cu>.

<sup>23</sup> *Id.*

# Authority to Issue Permits for Border Crossing Facilities: Balancing Executive and Legislative Roles

## Source of Presidential Authority to Regulate Foreign Commerce

The Constitution does not expressly accord the President any authority to regulate foreign commerce. However, the President's recognized authority in the area of foreign affairs permits him to take action in matters of foreign commerce such as border crossing facilities, as discussed below. There has been some judicial recognition of the President's ability to exercise authority over matters implicating foreign commerce, even in the absence of an express delegation of authority by Congress,<sup>24</sup> but the Supreme Court has not definitively opined on the circumstances in which any such authority may be exercised.

## Source of Executive/State Department Permitting Authority

The executive branch exercises permitting authority over the construction and operation of "pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum, petroleum products" and other products pursuant to a series of executive orders. This authority has been vested in the U.S. State Department since the promulgation of Executive Order 11423 in 1968.<sup>25</sup> Executive Order 13337 amended this authority and the procedures associated with the review, but did not substantially alter the exercise of authority or the delegation to the Secretary of State in Executive Order 11423.<sup>26</sup>

Executive Order 11423 provided that, except with respect to cross-border permits for electric energy facilities, natural gas facilities, and submarine facilities,

The Secretary of State is hereby designated and empowered to receive all applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of: (i) pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum, petroleum products, coal, minerals, or other products to or from a foreign country; (ii) facilities for the exportation or importation of water or sewage to or from a foreign country; (iii) monorails, aerial cable cars, aerial tramways and similar facilities for the transportation of persons or things, or both, to or from a foreign country; and (iv) bridges, to the extent that congressional authorization is not required.<sup>27</sup>

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<sup>24</sup> See *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4<sup>th</sup> Cir. 1953), *affirmed on other grounds* by 348 U.S. 296 (1955) ("We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress. Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone.").

<sup>25</sup> Exec. Order No. 11423, *Providing for the performance of certain functions heretofore performed by the President with respect to certain facilities constructed and maintained on the borders of the United States*, 33 Fed. Reg. 11741 (August 16, 1968).

<sup>26</sup> Exec. Order No. 13337, *Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States*, 69 Fed. Reg. 25299 (May 5, 2004).

<sup>27</sup> Exec. Order No. 11423, 33 Fed. Reg. at 11741.

Executive Order 13337 designates and empowers the Secretary of State to “receive all applications for Presidential permits, as referred to in Executive Order 11423, 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.”<sup>28</sup> Executive Order 13337 further provides that after consideration of the application and comments received thereon: “[I]f the Secretary of State finds that issuance of a permit to the applicant would serve the national interest, the Secretary shall prepare a permit, in such form and with such terms and conditions as the national interest may in the Secretary’s judgment require, and shall notify the officials required to be consulted ... that a permit be issued.”<sup>29</sup> Thus, the Secretary of State is directed by the President to authorize all border crossing facilities that the Secretary has determined would “serve the national interest.”

However, the source of the executive branch’s permitting authority is not explicitly stated within the executive orders. Powers exercised by the executive branch are authorized by legislation or are inherent presidential powers based in the Constitution. Executive Order 11423 does not reference any statute or constitutional provision as the source of its authority, although it does state that “the proper conduct of foreign relations of the United States requires that executive permission be obtained for the construction and maintenance” of border crossing facilities.<sup>30</sup> Executive Order 13337 refers only to the “Constitution and the Laws of the United States of America, including Section 301 of title 3, United States Code.”<sup>31</sup> However, 3 U.S.C. Section 301 simply provides that the President is empowered to delegate authority to the head of any department or agency of the executive branch.

Federal courts have addressed the legitimacy of this permitting authority. In *Sisseton-Wahpeton Oyate v. U.S. Department of State*, the plaintiff Tribes asked the court to suspend or revoke a presidential permit issued under Executive Order 13337 for the TransCanada Keystone Pipeline.<sup>32</sup> The plaintiffs claimed that the issuance of the national interest determination and the border crossing permit for the project violated NEPA and the Administrative Procedure Act (APA). The U.S. District Court for the District of South Dakota determined that even if the plaintiffs’ injury could be redressed, “the President would be free to disregard the court’s judgment,” as the case concerned the President’s “inherent constitutional authority to conduct foreign policy,” as opposed to statutory authority granted to the President by Congress.<sup>33</sup> The court further found that even if the Tribes had standing, the issuance of the presidential permit was a presidential action, not an agency action subject to judicial review under APA.<sup>34</sup>

The court stated that the authority to regulate the cross-border pipeline lies with either Congress or the President.<sup>35</sup> The court found that “Congress has failed to create a federal regulatory scheme for the construction of oil pipelines, and has delegated this authority to the states. Therefore, the

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<sup>28</sup> Exec. Order No. 13337, 69 Fed. Reg. at 25299.

<sup>29</sup> *Id.* at 25230.

<sup>30</sup> 33 Fed. Reg. at 11741.

<sup>31</sup> 69 Fed. Reg. at 25299.

<sup>32</sup> 659 F. Supp. 2d 1071, 1078 (D.S.D. 2009). This Keystone pipeline project preceded the Keystone XL pipeline.

<sup>33</sup> *Id.* at 1078, 1078 n.5.

<sup>34</sup> *Id.* at 1081-82.

<sup>35</sup> *Id.* at 1081.

President has the sole authority to allow oil pipeline border crossings under his inherent constitutional authority to conduct foreign affairs.”<sup>36</sup>

In *Sierra Club v. Clinton*,<sup>37</sup> the plaintiff Sierra Club challenged the Secretary of State’s 2009 decision to issue a permit authorizing a pipeline from Alberta, Canada, to Superior, Wisconsin. The plaintiff claimed that issuance of the permit was unconstitutional because the President had no authority to issue the permits referenced in Executive Order 13337.<sup>38</sup> The defendant responded that the authority to issue permits for these border-crossing facilities “does not derive from a delegation of congressional authority ... but rather from the President’s constitutional authority over foreign affairs and his authority as Commander in Chief.”<sup>39</sup> The U.S. District Court for the District of Minnesota agreed, noting that the defendant’s assertion regarding the source of the President’s authority has been “well recognized” in a series of Attorney General opinions, as well as a 2009 judicial opinion.<sup>40</sup> The court also noted that these permits had been issued many times before and that “Congress has not attempted to exercise any exclusive authority over the permitting process. Congress’s inaction suggests that Congress has accepted the authority of the President to issue cross-border permits.”<sup>41</sup> Based on the historical recognition of the President’s authority to issue those permits and Congress’s implied approval through inaction, the court found the permit requirement for border facilities constitutional.

As these cases show, courts that have analyzed the President’s exercise of permitting authority as articulated in Executive Order 13337 have held that it is a legitimate exercise of the President’s constitutional authority, and therefore does not require legislative authorization.

## Source of Congressional Authority to Regulate Foreign Commerce

Article I, Section 8 of the Constitution authorizes Congress to “regulate Commerce with foreign Nations.” Whereas any independent presidential authority in matters affecting foreign commerce derives from the President’s more general foreign affairs authority, Congress’s power over foreign commerce is plainly enumerated by the Constitution, suggesting that its authority in this field is preeminent. In a review of the origins of the Constitution’s Foreign Commerce Clause, the former Special Counsel of the Department of Justice’s Office of Legal Counsel emphasized the placement of the foreign commerce power with Congress, stating that

the power to regulate foreign commerce at the national level was to be vested in Congress. ... The debate at the Philadelphia Convention over whether a bare majority or a supermajority of each House was required to enact foreign commerce regulations demonstrates that the Framers intended such regulation to be made by a legislative body, rather than an executive or judicial one.<sup>42</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> 689 F. Supp. 2d 1147 (D. Minn. 2010).

<sup>38</sup> *Id.* at 1162.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1163 (citing 38 U.S. Att’y Gen. 163 (1935); 30 U.S. Op. Att’y Gen. 217 (1913); 24 U.S. Op. Att’y Gen. 100 (1902); 22 Op. Att’y Gen. 408 (1899); and *Natural Resources Defense Council (NRDC) v. U.S. Department of State*, 658 F. Supp. 2d 105, 109 (D.D.C. 2009)).

<sup>41</sup> *Id.*

<sup>42</sup> Robert J. Delahunt, *Federalism Beyond the Water’s Edge: State Procurement Sanctions and Foreign Affairs*, 37 (continued...)

## Reconciling the Executive and Legislative Roles Related to Foreign Commerce and Border Crossing Facilities

Each of the three branches of the federal government has opined on the nature of the executive and legislative powers related to matters related to foreign affairs and foreign commerce, in many cases addressing border crossing facilities specifically.

### Executive Branch Deference to Congress on Cross-Border Facilities

Until recently, Presidents have indicated that executive permission for cables, pipelines, and other border crossing facilities may be granted or refused only to the extent that Congress has not acted to institute terms and conditions on such facilities. For example, in 1869, President Grant resisted the landing of a transatlantic cable from France for which the French government had granted a monopoly.<sup>43</sup> President Grant recounted his unwillingness to act “[i]n the absence of legislation by Congress,” but stated that he dropped his resistance to the cable once the monopolistic condition was removed.<sup>44</sup> Letters indicate that he understood that Congress could impose “limitations and conditions” upon the laying of cables within U.S. waters.<sup>45</sup> He then proposed legislation to Congress with conditions “for the protection of the public” from monopolies with the right to operate cable telegrams.<sup>46</sup> He also indicated that “unless Congress otherwise direct[ed],” he would not oppose the landing of any other cable that complied with the conditions he had outlined and presented to Congress.

As another example, in 1897, President McKinley declined to act on request for an application from a French company to the State Department, requesting permission to land a supplementary cable under the “same terms and conditions as those which were imposed by the President in 1879 when the original cable was landed.”<sup>47</sup> The State Department’s letter to the French Ambassador stated that the President did “not regard himself as clothed, in the absence of legislative enactment, with the requisite authority to take any action upon the application.”<sup>48</sup> President McKinley’s position stemmed from the congressional introduction of a bill to grant the President “express authority to authorize the landing of submarine cable ... subject to conditions therein specified,” which “failed to become law.”<sup>49</sup>

A series of Attorney General opinions dating back to the 19<sup>th</sup> century also suggest that the executive branch has taken an expansive view of Congress’s authority in the area of cross-border commercial activity. These Attorney General opinions conditioned the President’s authority to prohibit or permit cross-border cables, telegraphs, and electrical power on the absence of congressional action. The Department of Justice has cited these Attorney General opinions as

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(...continued)

STAN. J. INT’L L. 1, 25 (2001).

<sup>43</sup>22 Op. Att’y Gen. 13 (1898).

<sup>44</sup> *Id.* (citing Senate Doc. 122, at 70).

<sup>45</sup> *Id.* (citing Senate Doc. 122, at 70).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (reciting from a May 11, 1897 letter from the State Department).

<sup>49</sup> *Id.* (reciting from a May 11, 1897 letter from the State Department).

“indicat[ing] that the President or his delegates for over a century have exercised the inherent executive authority to issue such permits without action by Congress.”<sup>50</sup> These opinions assert that the President may permit or prohibit the landing of a foreign cable, subject to legislation by Congress; recognize that cross-border cables are “instrument[s] of commerce”; and indicate that the President’s power to act in the absence of legislation on point derives from his “power to prohibit [the landing of a foreign cable] should he deem it an encroachment on our rights or prejudicial to our interests.”<sup>51</sup>

The first of these Attorney General opinions, dating to 1898, formed the basis for future Attorney General opinions on submarine cables, wireless telegraphy, and gas pipelines. The Solicitor General, acting as the Attorney General, addressed the Secretary of State’s questions as to “the power of the President, in the absence of legislative enactment, to control the landing of foreign telegraphic cables.”<sup>52</sup> The acting Attorney General reviewed presidential actions and related communications regarding the landing of submarine cables dating back to the landing of the first foreign cable from Cuba to Florida in 1867.<sup>53</sup> The first cable to the United States landed “under the supposed authority” of a 1866 congressional act granting a monopoly to one company, but reserving to Congress “the power to alter and determine the rates.”<sup>54</sup> However, Congress had not always enacted legislation imposing terms and conditions on subsequent cables that came to the shores of the United States. Presidents in the latter half of the 19<sup>th</sup> century granted permission for the landing of several cables, while indicating that the executive branch’s permission in such matters was “subject to future action by Congress.”<sup>55</sup>

In this 1898 opinion, the Attorney General stated that the President was charged with the “preservation of our territorial integrity and the protection of our foreign interests.”<sup>56</sup> The Attorney General found that the President’s ability to act was not limited to enforcing particular congressional acts, but that he was under oath to “preserve, protect, and defend the Constitution.”<sup>57</sup> The opinion relied on the President’s position as “head of the diplomatic service” and Commander-in-Chief to find that the President could impose conditions upon foreign cables, in absence of congressional legislation, and either prevent or permit the landing of such cables “on conditions which will protect the interests of this Government and its citizens.”<sup>58</sup>

Subsequent Attorney General opinions reached a similar conclusion. For example, 19<sup>th</sup> century legislation directed that the United States not direct any “franchises, or concessions of any kind whatever” in Cuba while the United States occupied the island.<sup>59</sup> In an 1899 opinion, the Attorney General indicated that the executive branch had regulated the matter of cables, “revocable either

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<sup>50</sup> Memorandum in Support of Defendant’s Motion to Dismiss Plaintiff’s First Amended Complaint, at 12 (October 20, 2008), *Natural Resources Defense Council, Inc. v. United States Department of State*, 658 F. Supp. 2d 105 (D.D.C. 2009) (No. 08-CV-01363).

<sup>51</sup> *Foreign Cables*, 22 Op. Att’y Gen. 13 (January 18, 1898).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (citing Forty-ninth Congress, second session, Senate Doc. 122, at 63).

<sup>55</sup> *Id.* (citing Senate Doc. 122, at 76).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Cuba-Cables*, 22 Op. Att’y Gen. 408 (1899).

at the will of the President or by subsequent legislation by Congress.”<sup>60</sup> The general in charge of U.S. forces in Cuba had forbidden “grants and concessions of franchises” in Cuba, unless the Secretary of War approved.<sup>61</sup> Although the Attorney General did not “concede that Congress, by legislative act, has the power to restrain or control the proper exercise of the powers of the Commander in Chief of the Army and Navy of the United States, occupying, ... a foreign territory,” the Attorney General found that the expressed congressional will conformed to the executive branch’s previous policies and was “entitled to the respect of the Executive Departments, and ought to be followed.”<sup>62</sup> The Attorney General thus advised the Secretary of War “that it would be inexpedient ... to grant permission to the applicant in this case to land its cable upon the soil of Cuba.”<sup>63</sup>

Similarly, a 1913 Attorney General opinion interpreting a 1910 treaty between the United States and Great Britain concerning the diversion of water from the Niagara River for power purposes, as well as a statute on a similar subject, suggests that both the President and Congress have authority to regulate such international commercial transactions.<sup>64</sup> The opinion found that it was the President’s “duty to interfere with any diversion within the State of New York of the waters of the Niagara River ... for power purposes, exceeding a daily maximum” established in the treaty.<sup>65</sup> The Attorney General said that the treaty’s stipulation that “the United States may authorize and permit” the diversion of waters up to a daily maximum “clearly places the subject, in the absence of legislation by Congress to the contrary, under [the President’s] supervision.”<sup>66</sup>

The opinion also responded to the President’s question as to whether he had “any authority to control the importation into [the United States] from Canada of electric current generated by water power from the Niagara River.”<sup>67</sup> The Attorney General opined that, due to the lapse of a statute regarding electricity transmission from Canada, the President was “free to control the matter under [his] plenary power to prevent any physical connection (not authorized by Congress) between any foreign country and the United States.”<sup>68</sup> The opinion recognized the executive branch’s power as being “subject, of course, to affirmative control by Congress” to prohibit or permit the importation of electrical power into the United States from Canada.<sup>69</sup> The Attorney General also concluded that “in the absence of legislation by Congress,” the President could subject the importation of Canadian electrical power “to such conditions as to [him] may seem good.”<sup>70</sup>

Finally, it should be noted that Executive Order 11423, discussed earlier in this report, delegated authority to the Secretary of State to receive all applications for permits for cross border facilities including pipelines, cable cars, bridges, and similar facilities only “to the extent that

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Diversion of Water from Niagara River, 30 Op. Att’y Gen. 217 (1913).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

congressional authorization is not required.”<sup>71</sup> However, Executive Order 13337 omitted the qualification “to the extent that congressional authorization is not required,” when amending the section in Executive Order 11423 that empowered the Secretary to receive all such applications.<sup>72</sup>

## **Congressional Action Related to Foreign Commerce**

A history of legislation related to border crossing facilities further suggests that congressional action related to permitting of pipeline border crossings is a legitimate exercise of Congress’s authority to regulate foreign commerce. Examples of congressional legislation “regarding certain types of border crossing facilities,” include the Submarine Cable Landing Licensing Act of 1921 and the International Bridge Act of 1972.<sup>73</sup> Additionally, Congress has passed several statutes relating specifically to petroleum or pipelines, and some of these require the President to make particular findings, such as that certain exports are in the national interest: the Export Administration Act of 1979,<sup>74</sup> the Mineral Leasing Act of 1920,<sup>75</sup> the Naval Petroleum Reserve Production Act of 1976,<sup>76</sup> the Outer Continental Shelf Lands Act Amendments of 1978,<sup>77</sup> the Energy Policy and Conservation Act,<sup>78</sup> and the Comprehensive Anti-Apartheid Act of 1986.<sup>79</sup>

## **Judicial Interpretations of the Executive and Legislative Authorities to Regulate Foreign Commerce**

The Supreme Court’s pronouncements on the foreign commerce clause recognize the expansive scope of this enumerated congressional power.<sup>80</sup> The Court has said that this power is “exclusive

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<sup>71</sup> Exec. Order No. 11423, 33 Fed. Reg. 11741 (August 16, 1968).

<sup>72</sup> See Exec. Order No. 13337, § 2(a), 69 Fed. Reg. 25299, 25300-01 (May 5, 2004).

<sup>73</sup> P.L. 67-8; P.L. 92-434. See Memorandum in Support of Defendant’s Motion to Dismiss Plaintiff’s First Amended Complaint, at 13 n.5 (October 20, 2008), *Natural Resources Defense Council, Inc. v. United States Department of State*, 658 F. Supp. 2d 105 (D.D.C. 2009) (No. 08-CV-01363).

<sup>74</sup> P.L. 96-72. This act prohibited the export from the United States or any of its territories or possessions of domestically produced crude oil transported by pipeline over rights-of-way granted under the Trans-Alaska Pipeline Authorization Act, P.L. 93-153.

<sup>75</sup> P.L. 66-146. This act restricted the export of crude oil transported by pipelines on federal lands, with an exemption for certain crude oil. This act allowed the export of unexempted oil provided the President made certain findings, recommended the export, and reported to Congress, and Congress enacted a joint resolution approving such export.

<sup>76</sup> P.L. 94-258. This act provided that before certain exports of petroleum could occur, the President must make, publish, and report to Congress the express finding that they will not diminish the total quantity or quality of petroleum available to the United States, are in the national interest, and are in accord with the Export Administration Act.

<sup>77</sup> P.L. 95-372. This act provided that before certain oil could be exported, the President must make and publish an express finding that the exports will not increase reliance on imported oil, are in the national interest, and are in accord with the Export Administration Act.

<sup>78</sup> P.L. 94-163. This act required the President to issue a rule prohibiting the export of crude oil produced in the United States, except that he may exempt from the prohibition crude oil exports that he determines to be consistent with the national interest and with statutory policies regarding the availability of domestic supplies.

<sup>79</sup> P.L. 99-440. This act prohibited exports of crude oil and refined petroleum products to South Africa, and the prohibition was lifted by Executive Order 12769, which was allowed under the act.

<sup>80</sup> See, e.g., *Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904) (“The 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. *Lottery Case*, 188 U.S. 321, 353-356; *Leisy v. Hardin*, 135 U.S. 100, 108.”); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 n.13 (1979) (citing *Buttfield* for the proposition that Congress’s power over foreign commerce is “exclusive and absolute”); *California Bankers Ass’n v. Shultz*, 416 U.S. 21 (1974).



and plenary.”<sup>81</sup> In the seminal 1824 Commerce Clause case *Gibbons v. Ogden*, the Supreme Court said the words of the Commerce Clause “comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend.”<sup>82</sup> As of 2006, the Supreme Court had “never struck down an act of Congress as exceeding its powers to regulate foreign commerce.”<sup>83</sup>

In addition, although there is no precedent that directly addresses Congress’s power to legislate pipeline border crossings, language found in multiple judicial opinions further suggests that the executive authority to regulate such facilities may be amended by legislation. As noted above in *Sierra Club v. Clinton*,<sup>84</sup> the plaintiff challenged the Secretary of State’s 2009 decision to issue a permit authorizing a pipeline from Canada to Wisconsin. The reviewing federal district court found that the authority to issue permits for these border-crossing facilities “does not derive from a delegation of congressional authority ... but rather from the President’s constitutional authority over foreign affairs and his authority as Commander in Chief.”<sup>85</sup> In reaching its conclusion, the court noted that “despite the fact that cross-border permits for pipelines have been issued by Presidents in the past, Congress has not attempted to exercise any exclusive authority over the permitting process. Congress’s inaction suggests that Congress has accepted the authority of the President to issue cross-border permits.”<sup>86</sup> This seems to suggest a recognition by the court that the cross-border permitting process is not the exclusive province of the executive branch and that Congress may legislate in this area if it is so inclined.

Similarly, in *Sisseton-Wahpeton Oyate v. U.S. Department of State*,<sup>87</sup> the reviewing federal district court engaged in a discussion of the nature of the authority being exercised by the President in granting cross-border permits. The court noted that

In this case, the proposed pipeline crosses international borders. *Under the federal Constitution, then, the authority to regulate such a project vests in either the legislative or executive branch of government.* Congress has failed to create a federal regulatory scheme for the construction of oil pipelines, and has delegated this authority to the states. Therefore, the President has the sole authority to allow oil pipeline border crossings under his inherent constitutional authority to conduct foreign affairs.<sup>88</sup>

As with the Attorney General opinions discussed above, the court’s language suggests that Congress possesses the constitutional authority to legislate border crossing facilities, which suggests that Congress also can legislate to amend the role of the executive branch with respect to such facilities.

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<sup>81</sup> Board of Trustees of University of Illinois v. United States, 289 U.S. 48, 56 (1933). The Court stated that “[a]n exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action.” *Id.* at 56-57. The Court also stated that “[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.” *Id.* at 59.

<sup>82</sup> 22 U.S. 1, 193-94 (1824).

<sup>83</sup> United States v. Clark, 435 F.3d 1100, 1113 (9<sup>th</sup> Cir. 2006), *cert. denied*, 549 U.S. 1343 (2007).

<sup>84</sup> 689 F. Supp. 2d 1147 (D. Minn. 2010). This case is discussed in greater detail above at p. 5-6.

<sup>85</sup> *Id.* at 1162.

<sup>86</sup> *Id.* at 1163.

<sup>87</sup> 659 F. Supp. 2d 1071 (D. S.D. 2009).

<sup>88</sup> *Id.* at 1081 (emphasis added).

## Summary

As the discussion above demonstrates, all three branches of the federal government have historically taken an expansive view of the nature of Congress's authority to regulate foreign commerce, even in the absence of existing legislation in the area. Although the Temporary Payroll Tax Cut Continuation Act of 2011 appears to be the first legislation enacted on the subject of cross border pipeline permitting, the absence of previous legislation related to the permitting of cross border facilities does not mean that Congress lacks the constitutional authority to take action on these matters.

The executive branch also possesses some ability to act in the area of border crossing permitting, derived from the power to conduct foreign affairs under Article II of the Constitution. The executive's ability to act in this area, however, is informed by the previous lack of federal legislation in this area. The absence of legislation up to this point may have "enable[d], if not invite[d], measures on independent presidential responsibility" in which the President has acted in the "absence of either a congressional grant or denial of authority."<sup>89</sup> However, if Congress chose to assert its authority in the area of border crossing facilities, this would likely be considered within its constitutionally enumerated authority to regulate foreign commerce.<sup>90</sup> Congress may consider legislation to overturn the domestic effect of legal action denying a permit for a border crossing facility for the Keystone XL pipeline. It could also potentially establish criteria for the issuance of any cross border permits, and potentially require the issuance of permits to entities which fulfill such criteria.

## Constitutional Concerns Related to Potential Action by States

As noted earlier, the federal government's role in siting the Keystone XL pipeline limited to the border crossing facility, although its environmental review considered impacts of the entire project pursuant to NEPA. However, some state and local government officials voiced concern regarding the pipeline's proposed route through areas perceived to present safety or environmental issues. At least one state, Nebraska, took action in November 2011, adopting two laws that (1) carve out a role for the state in siting "major oil pipelines" that run through the state,<sup>91</sup> and (2) directing collaboration with the State Department on a supplemental environmental statement for the proposed pipeline.<sup>92</sup>

Debate over the legislation in Nebraska gave rise to two constitutional concerns that some feel may limit the extent to which states may legislate and regulate interstate oil pipelines generally, and the proposed Keystone XL pipeline in particular. First, some have expressed concern that a

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<sup>89</sup> *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J. concurring).

<sup>90</sup> *See United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress exceeded its constitutional bounds.").

<sup>91</sup> Neb. Laws LB1 (November 22, 2011), available at [http://nebraskalegislature.gov/FloorDocs/Current/PDF/Final/LB1\\_S1.pdf](http://nebraskalegislature.gov/FloorDocs/Current/PDF/Final/LB1_S1.pdf).

<sup>92</sup> Neb. Laws LB4 (November 22, 2011), available at [http://nebraskalegislature.gov/FloorDocs/Current/PDF/Final/LB4\\_S1.pdf](http://nebraskalegislature.gov/FloorDocs/Current/PDF/Final/LB4_S1.pdf).

state action may place too great of a burden on interstate commerce, in violation of a doctrine known as the dormant Commerce Clause. Second, some have wondered whether state legislation or regulation of interstate pipelines is preempted by federal legislation related to interstate pipeline safety.

## The Dormant Commerce Clause

### Legal Background

The Constitution provides that Congress shall have the power to regulate commerce with foreign nations and among the various states.<sup>93</sup> This power has been cited as the constitutional basis for a significant portion of the laws passed by Congress over the last 50 years, and it currently represents one of the broadest bases for the exercise of congressional authority. Although the Constitution does not explicitly provide that this federal power displaces the power of states to regulate interstate commerce, the courts have long found that such restrictions are an inherent part of the federal authority.<sup>94</sup>

State interference with trade was widespread before the ratification of the Constitution and a source of much dispute, so one goal of granting Congress the power to regulate interstate commerce was to limit such practices.<sup>95</sup> It was not clear at first to what extent states retained authority over such commerce. However, the doctrine of a dormant Commerce Clause was soon recognized by the courts as a limit on state legislation, even in the absence of congressional regulation.<sup>96</sup> *Dormant* is used to describe this right because it is not an express provision in the Constitution.

Although the meaning and application of the dormant Commerce Clause has varied over time, the modern standard, as applied to state regulatory actions, contains two basic inquiries. First is the question of whether a state regulation discriminates against other states on its face or in effect, showing an intent to benefit in-state economic interests at the expense of out-of-state interests. If that is the case, then no further analysis is required,<sup>97</sup> and the law will generally be struck down.<sup>98</sup> Second, if a law is non-discriminatory, but still has some impact on interstate commerce, the court will evaluate the law using a balancing test to find whether there is a legitimate public purpose.<sup>99</sup>

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<sup>93</sup> U.S. Const., Art. I, §8, cl. 3.

<sup>94</sup> See generally, Johnny Killian, George Costello & Kenneth Thomas, *Constitution of the United States of America: Analysis and Interpretation* 223-227 (2002).

<sup>95</sup> *Id.* at 221-222.

<sup>96</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Wilson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829); *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851).

<sup>97</sup> “When a state statute clearly discriminates against interstate commerce, it will be struck down ... unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.” *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). See *Maine v. Taylor*, 477 U.S. 131 (1986) (upholding state ban on importation of out-of-state baitfish based on possible presence of parasites and nonnative species in baitfish shipments).

<sup>98</sup> Discriminatory laws motivated by “simple economic protectionism” are subject to a “virtually per se rule of invalidity,” *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), *Dean Milk Co. v. City of Madison, Wisconsin*, 340 U.S. 349 (1951), *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977), which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose. *Maine v. Taylor*, 477 U.S. 131 (1986). See also *Brown-Forman Distillers v. New York State Liquor Authority*, 476 U.S. 573 (1986).

<sup>99</sup> The most commonly cited case for this balancing test is *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

State public health, environment and safety concerns are generally considered by the courts to represent a legitimate public purpose.

### **State Authority for Energy Facility Siting**

As a preliminary matter, it should be noted that land use regulation, such as zoning, has traditionally been considered primarily a state concern. Also, there are many instances of states taking an important role in regulating the siting of energy facilities and associated rights-of-way. This includes state statutes governing the siting of oil pipelines within their borders.<sup>100</sup> In addition, siting electricity transmission lines has also historically been the exclusive province of states regardless of the nature of the facilities and the degree to which the interstate electricity grid depends upon those facilities. States retain primary authority to make siting decisions even in areas considered particularly important to the interstate electricity grid.<sup>101</sup> Other federal legislation has recognized the state's role in making siting decisions with respect to other tools of interstate commerce like wireless telecommunications facilities<sup>102</sup> and interstate highways.<sup>103</sup>

Of course, federal legislation may reduce the primacy of state authority. For instance, federal law provides that siting decisions for interstate natural gas pipelines are made by FERC pursuant to Section 7 of the Natural Gas Act.<sup>104</sup> Further, interstate natural gas pipelines still must obey state and local laws, including zoning ordinances, unless preempted by federal law. Thus, there seems to be little question that both historical practice and modern regulatory schemes recognize a significant role for state regulatory actions regarding siting energy facilities and associated rights-of-way.

### **Application of the Dormant Commerce Clause to State Action Related to Oil Pipeline Siting**

In order to make a dormant Commerce Clause analysis, the court must have a fully developed record to allow “a sensitive, case-by-case analysis of purposes and effects.”<sup>105</sup> Such a record is lacking in the Keystone XL case thus far. Without knowing what final action states may take, it is difficult to speculate which, if any, of those potential actions might present dormant Commerce Clause concerns. It is possible, however, to outline the factors a court might consider in reviewing a dormant Commerce Clause challenge to state action related to the pipeline.

The first question that a court would consider in a dormant Commerce Clause challenge would be whether a particular state regulation or siting decision was discriminatory. So long as the

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<sup>100</sup> See, e.g., S.D. Codified Laws §49-41B-4.1 (requiring a state permit and the approval of the state legislature prior to construction of a “trans-state” transmission facility, defined to include pipelines). To CRS’s knowledge, no such statute has ever been the subject of a legal challenge based on the dormant Commerce Clause.

<sup>101</sup> Energy Policy Act of 2005, P.L. 109-58, at §1221.

<sup>102</sup> Section 704(a) of the Telecommunications Act of 1996 (47 U.S.C. §332(c)(7)) allows state and local governments to make decisions regarding the siting of wireless communications facilities, subject to certain limitations, such as mandating that the local decision must not “prohibit or have the effect of prohibiting the provision of personal wireless services.”

<sup>103</sup> Under the Federal Aid Highway Act (23 U.S.C. §101 *et seq.*), siting decisions for interstate highways are made solely by the states.

<sup>104</sup> 15 U.S.C. §717f(c).

<sup>105</sup> *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

regulatory scheme provided a uniform standard for reviewing siting decisions for energy transmission it seems unlikely it would be found unconstitutional due to discrimination. In order to be found discriminatory, it would need to be shown that the intent or effect of the legislation was to benefit in-state economic interests at the expense of out-of-state interests. For instance, protectionist legislation which favored in-state companies regarding right-of-way acquisition might run afoul of this requirement. However, to the extent that the law applies equally to both in-state and out-of-state pipeline companies, it is not clear that there would be a basis for an argument that such a law was discriminatory.<sup>106</sup>

If a law, statute or siting decision was found not to be discriminatory, then a court would move to a *Pike* analysis, in which an excessive burden on interstate commerce must be shown. One court described the *Pike* analysis as putting the burden on the challenging party to show that a statute encumbers interstate commerce in a way that “is clearly excessive in relation to the putative local benefits.”<sup>107</sup> Although lower courts have varied in their application of this test,<sup>108</sup> it does appear that states are given significant deference by courts to establish environmental, public health, and safety standards.

Some have posited that a court might apply a heightened level of scrutiny to any state action regarding the Keystone XL pipeline on the grounds that the action would regulate “foreign commerce.” The Supreme Court has held that state action which burdens foreign commerce should be subjected to a “more rigorous and searching scrutiny.”<sup>109</sup> However, this heightened level of scrutiny has generally been applied to those areas where the state action directly affects foreign trade or foreign entities, not where it burdens commerce generally. Accordingly, it is unlikely that any state action related to the siting of the Keystone XL pipeline within its borders would be seen as a direct regulation of foreign trade. Rather, the action would most likely be seen as dictating the terms and conditions of the domestic transit of an imported good after it has been imported.

Next, putative local benefits would be identified and weighed. It does not appear to be difficult to establish before a court that an oil pipeline siting statute would serve local interests. As discussed above, courts have considered safety and economic concerns in evaluating similar legislation, and a court might also consider environmental, aesthetic, or any number of other non-protectionist concerns.<sup>110</sup> The relative weight of the local benefits would depend not only on the benefits identified by a court, but also on what implementing regulations look like and how a regulatory scheme is applied in a particular case.

Once a court had established what legitimate state interest was being served, it would then evaluate the level of burden on interstate commerce that was imposed by the state regulatory

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<sup>106</sup> For example, an argument has been made that legislation that impacts only pipes in excess of a certain diameter, as has been proposed in draft legislation in Nebraska, might only affect interstate pipelines. If the law does not discriminate between in-state and out-of-state ownership, control, or other economic impacts of these pipelines, this distinction alone would not be grounds for a finding of discriminatory state action in violation of the dormant Commerce Clause.

<sup>107</sup> *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981), quoting *Pike*, 397 U.S. at 142.

<sup>108</sup> See James D. Fox, *State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause*, 1 Ave Maria L. Rev. 175 (2003).

<sup>109</sup> *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984).

<sup>110</sup> Note that the existence of a legitimate state interest would not override an express federal preemption of state authority. This topic will be treated later in this report.

activity. In general, it appears unlikely that the passage of an oil siting statute similar to laws in other states would by itself create an “undue burden on interstate commerce” that would dictate reversal of the law. Statutes that require state permission prior to construction and operation and conformity with siting and regulatory requirements as set forth by a state agency during the review process are not uncommon and appear to be challenged only rarely.<sup>111</sup>

A state action related to the siting of an oil pipeline could be found to impose a significant burden on commerce. For example, if the statute requires the owner/operator of a proposed pipeline to obtain a permit before siting a pipeline in the state, but the regulatory agency tasked with enforcing the statute refused to permit a proposed pipeline across the state regardless of location, that refusal arguably may constitute an undue burden on interstate commerce.<sup>112</sup> However, even that decision might not be a *per se* violation of the dormant Commerce Clause, as a court might choose to evaluate the burden imposed by the re-routing of the pipeline through other states, or the burden imposed by using an alternative means of transport of the oil.

Assuming that a state statute or regulatory scheme would not preclude the passage of the Keystone XL pipeline through the state, it may still impose some administrative burden, and, in addition, might delay project construction or make the project more expensive. The burden on commerce is measured by the level of burden, delay, and expense. A court would consider what costs could be associated with this delay, and how this would affect the overall viability of the project. As noted, however, the fact that there are costs associated with regulatory burdens does not appear to have led to significant challenges to oil pipeline siting statutes in the past.

One argument that could be made is that new state requirements for oil pipelines in the Keystone XL pipeline planning process where none previously existed could add significantly to the cost or viability of the pipeline. Establishing the economic effect of a delay would depend on factors that could not be easily established until legislation was passed and siting decisions were made. For instance, what changes to the Keystone XL planning process would be required because of a change in siting to the original proposal? What costs associated with the pipeline have already been expended, and would the value of those expenditures be diminished by failure to begin construction by a certain date? What financial commitments might expire, and what would be the costs of new ones? How might delay otherwise raise costs, and would the economic viability of the project be threatened? What other economic or business considerations would be involved?

One could argue further that a court would need to consider how changed regulations might affect the burden on commerce. Thus, to the extent that the Keystone XL Pipeline planning process had accounted for certain regulatory hurdles, the state action might not significantly add to those regulatory burdens. However, new regulations could mean additional processing. To the extent that a court found that delays, even if costly, were a necessary component of the state effectuating legitimate state interests in public health and safety, then a court would be likely to find that the state’s action was not an unconstitutional burden on interstate commerce.

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<sup>111</sup> But see *Lakehead Pipeline Company v. Illinois Commerce Commission*, 696 N.E.2d 345 (Ill. App. 3<sup>rd</sup> Dist. 1998).

<sup>112</sup> *Dakota, Minnesota & Eastern Railroad Corp., v. South Dakota*, 236 F. Supp. 2d 989, 1018 (S.D.S.D. 2002)(finding dormant Commerce Clause violation because administrative burdens imposed on a pipeline project would prevent the pipeline from being built).

## Federal Preemption of State Pipeline Legislation

### Background

Before turning to whether and how a state statute might be preempted, it is useful to review the history and content of federal pipeline safety legislation. The initial federal legislation governing fossil fuel pipeline safety was the Natural Gas Pipeline Safety Act of 1968.<sup>113</sup> This pipeline safety legislation was amended in 1979 to include liquid fuels,<sup>114</sup> and has been since been amended on a number of occasions, including by the Pipeline Safety Improvement Act of 2002.<sup>115</sup> Thus, what is often referred to as the “Pipeline Safety Act” is actually several statutes enacted over the last fifty years and codified at 49 U.S.C. Section 60101 *et seq.* However, for the sake of convenience this memorandum will refer to the collection of federal legislation codified at 49 U.S.C. Chapters 601-605 as the “Pipeline Safety Act.”

### How Preemption Is Evaluated

In addition to the arguments that state action regulating interstate pipelines might run afoul of the dormant Commerce Clause, several parties have also voiced concerns as to whether certain state actions related to oil pipelines could be preempted by the federal Pipeline Safety Act. Under the Supremacy Clause,<sup>116</sup> statutes and treaties as well as the constitution itself supersede state laws that “interfere with, or are contrary to” their dictates.<sup>117</sup> In such cases, the federal law is said to “preempt” the state law. In evaluating Supremacy Clause challenges to state statutes or other state actions, courts will generally consider three ways that a state action might be preempted. First, when acting within its constitutional limits, Congress may expressly preempt state law.<sup>118</sup> Second, federal law may preempt state law if the two conflict.<sup>119</sup> This type of conflict occurs either when “compliance with both federal and state regulations is a physical impossibility”<sup>120</sup> or if the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>121</sup> And third, “Congressional intent to preempt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation.”<sup>122</sup>

The preemption argument in the case of Keystone XL is based on a concern that potential state action affecting pipeline siting might be preempted by federal pipeline safety statutes, despite state intent to protect public safety and the environment.

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<sup>113</sup> P.L. 90-481.

<sup>114</sup> P.L. 96-129.

<sup>115</sup> P.L. 107-355.

<sup>116</sup> U.S. Const. Art. VI, cl. 2.

<sup>117</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). *See also* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819).

<sup>118</sup> *California Federal Savings and Loan v. Guerra*, 479 U.S. 272, 280 (1987), *citing* *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

<sup>119</sup> *Id.* at 281.

<sup>120</sup> *Id.*, *quoting* *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

<sup>121</sup> *Id.*, *quoting* *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>122</sup> *Id.* at 280-281, *quoting* *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

## ***Express Preemption of State Action Related to the Proposed Keystone XL Pipeline***

Turning first to express preemption, the Pipeline Safety Act contains the following language:

A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation only if those standards are compatible with the minimum standards proscribed under this chapter. *A state authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.*<sup>123</sup>

In order to determine what state action is expressly preempted, it must first be determined what is meant by “safety standards for interstate pipeline facilities or interstate pipeline transportation.” It is difficult to draw specific parameters as to what sort of state action would constitute a “safety standard for interstate pipelines facilities or interstate pipeline transportation” and therefore would be an area in which any state action would be expressly preempted by the Pipeline Safety Act. There are at least five sources for guidance on the parameters of the Pipeline Safety Act’s express preemption: related statutory provisions, the “plain meaning” of the statutory language, the “industry usage” of the language, the federal agency’s exercise of the statutory authority granted to it, and interpretations of the language by the federal courts.

### ***Related Statutory Provisions***

The Pipeline Safety Act offers an express statement of federal preemption, but also includes a limitation on the federal exercise of authority pursuant to the act: “[t]his chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility.”<sup>124</sup> This suggests that so long as the state action can be deemed only to “prescribe the location or routing of a pipeline facility,” there would likely be no federal preemption.

The difficulty for proposed state actions affecting interstate pipelines arises where decisions related to location and routing may impact matters related to safety. This analysis should provide guidance to the state in determining what action can be taken without crossing the line from a legitimate state action affecting location/routing to a state adoption of “safety standards” that would be preempted by the Pipeline Safety Act.

Before moving forward with this analysis of what action may avoid being deemed preempted, it is important to note that the Pipeline Safety Act’s preemption provision prohibits states from adopting safety standards for both “interstate pipeline facilities” and for “interstate pipeline transportation.”<sup>125</sup> It is not clear what sort of state action might be preempted by a prohibition on safety standards for “pipeline facilities” and “pipeline transportation,” but it is important that a state be aware of the existence of this prohibition and note that a court would likely seek to address this language in any preemption challenge based on 49 U.S.C. Section 60104(c).

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<sup>123</sup> 49 U.S.C. §60104(c) (emphasis added).

<sup>124</sup> 49 U.S.C. §60104(e)

<sup>125</sup> 49 U.S.C. §60104(c).



### ***The Plain Meaning of the Preemption Clause Related to Safety Standards***

The primary rule of statutory interpretation is that, in the absence of a statutory definition (as is the case here), words in statutes are to be given their “plain meaning,” and the plain meaning of “safety standards” is generally understood to be explicit rules regarding levels of safety that must be attained.

It is unclear whether the plain meaning or ordinary usage of the phrase “safety standards” would extend beyond pipeline performance standards to action taken by a state with respect to the siting of pipelines- an authority that is expressly *not* preempted by the Pipeline Safety Act- that is done for the express purpose of protecting public safety.<sup>126</sup> If however the state action related to siting were made for reasons not related to safety, a “plain meaning” reading of the statute would still suggest that there would be no preemption.

### ***Industry Usage of the Phrase “Safety Standards”***

A second rule of statutory interpretation is that some words or phrases may be ascribed the meaning given to them in the field addressed by the statute. The industry’s perception of what concepts are (and are not) considered aspects of pipeline “safety” is therefore instructive here. One such example are the “safety and government-cited standards” for “pipeline operations” published by the American Petroleum Institute (API).<sup>127</sup> Of those standards and recommendations, only “managing system integrity” seems to relate to the pipeline’s location, and, on initial review, those standards seem to be concerned only with different standards and practices that may apply in certain “high consequence” areas, rather than planning or routing concerns.

The API also has “safety and fire prevention” standards which seem to contemplate emergency prevention and response rather than external safety issues.<sup>128</sup> These industry-sourced standards may suggest that the industry considers “safety standards” to include only standards that impact pipeline operations such as avoiding leaks, preparedness and early warning systems, integrity testing, and related concepts, rather than standards to be contemplated during the planning/routing process.

### ***PHMSA’s “Safety Standards” Promulgated Pursuant to the Pipeline Safety Act***

Another helpful tool in interpreting the meaning of the phrase “safety standards for interstate pipeline facilities or interstate pipeline transportation” is the extent to which the federal regulatory agency tasked with implementing those standards has asserted its authority. The Pipeline and Hazardous Materials Safety Administration (PHMSA) is a division of the U.S. Department of Transportation tasked with, among other things, the promulgation and enforcement of regulations issued pursuant to the terms of the Pipeline Safety Act. These regulations can be

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<sup>126</sup> Presumably safety concerns often are a factor in pipeline siting.

<sup>127</sup> The standards are referred to as “government-cited” because the Pipelines and Hazardous Materials Safety Administration incorporates by reference into its regulations some of these industry standards. The standards are available at <http://publications.api.org/> (registration is required).

<sup>128</sup> *Id.*

found at 49 C.F.R. Parts 190-195. The regulations are helpful in interpreting the Pipeline Safety Act because they offer insight into the PHMSA's perception of its authority under the act.

Multiple substantive matters are addressed in PHMSA's pipeline safety regulations, which are issued pursuant to its authority under the Pipeline Safety Act.<sup>129</sup> These requirements all appear to relate to the physical properties of the pipeline and associated facilities, the qualifications of the personnel employed in the construction, operation and maintenance of the pipelines, or emergency response requirements.

The regulations seem to recognize the different safety and environmental hazards presented by the siting of pipelines in different locations. For example, the regulations appear to establish varying standards for pipelines in rural areas, "unusually sensitive areas," and other geographical distinctions. It appears that these distinctions are made in order to establish different physical, emergency response and other requirements rather than to dictate a policy of siting pipelines away from these areas. State actors that infringe on this assertion of federal jurisdiction could be preempted by federal statute.

Thus, it appears that the PHMSA seems to view the extent of its authority over "safety standards for interstate pipeline facilities or interstate pipeline transportation" to extend to subjects such as the physical makeup up the pipeline, monitoring requirements, personnel qualifications, emergency response requirements, and related topics. If this is the extent of the reach of the Pipeline Safety Act's jurisdiction with respect to oil pipelines, state action would avoid preemption so long as it does not affect these aspects of oil pipeline operation.

### ***Federal Jurisprudence Challenging State Action as Preempted by the Pipeline Safety Act***

Finally, jurisprudence in the federal courts can assist in understanding the parameters of the federal authority to adopt "safety standards for interstate pipeline facilities or interstate pipeline transportation" and the express limitation on the states to adopt such standards. Although there is no case law evaluating a challenge to a state statute or regulatory action governing the location of an interstate pipeline, these cases help to draw the line between a permissible state activity governing pipeline activities and an impermissible foray into interstate pipeline safety standards expressly preempted by the Pipeline Safety Act.

In *Texas Midstream Gas Services v. City of Grand Prairie*,<sup>130</sup> a natural gas pipeline operator sought to enjoin the Grand Prairie City Council from enacting and enforcing a city ordinance known as "Section 10," requiring a special permit from the city in order to build a natural gas compressor station, and mandating that compressor stations comply with certain setback requirements, security requirements, aesthetic and noise level requirements.<sup>131</sup> Parties were also required to pave means of vehicular access to the facilities in order to obtain a permit.<sup>132</sup> In this instance, the pipeline operator had announced its intentions to build and operate the facility prior

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<sup>129</sup> See 49 C.F.R. parts 190–195.

<sup>130</sup> 608 F.3d 200 (3<sup>rd</sup> Cir. 2010).

<sup>131</sup> *Id.* at 203.

<sup>132</sup> *Id.* at 203-204.

to the enactment of Section 10 by the Grand Prairie City Council.<sup>133</sup> The pipeline operator claimed, among other things, that Section 10 was preempted by the Pipeline Safety Act. After a federal district court held that only that portion of Section 10 requiring a security fence was preempted by the Pipeline Safety Act and rejected the request for injunction regarding enforcement of the remainder of Section 10, the pipeline operator appealed to the U.S. Court of Appeals for the Fifth Circuit. That court affirmed the lower court's decision and rejected the request for an injunction, thus allowing the city to enforce Section 10 with the exception of the security fence requirement.<sup>134</sup>

With respect to the setback requirement, the court noted that

The question is whether the setback requirement is a "safety standard." It is not. Along with the other provisions of Section 10, the setback requirement primarily ensures that bulky, unsightly, noisy compressor stations do not mar neighborhood aesthetics. City Council records reveal that Grand Prairie's primary motivation in adopting Section 10 was to preserve neighborhood visual cohesion, avoiding eyesores or diminished property values.<sup>135</sup>

The pipeline company claimed that, regardless of the purpose of the enactment, Section 10 had the effect of regulating fire safety, and thus was preempted by the Pipeline Safety Act.<sup>136</sup> The court rejected this argument, finding that "[a] local rule may incidentally affect safety, so long as the affect is not 'direct and substantial.'"<sup>137</sup> The court also addressed the scope of the PSHMA regulations as discussed above. In response to an assertion by the pipeline that Section 10 was preempted because the PHMSA regulations "address the location of compressor stations," the court clarified that "the PSA itself only preempts *safety* standards," and that the regulation cited by the pipeline "touches on compressor station location only as a means of effectuating this legislative directive. A regulation promulgated by an administrative agency cannot expand the unambiguously expressed preemptive scope set by Congress."<sup>138</sup> This decision helps illustrate the type of state or local actions related to pipeline facilities that the courts have held to be preempted by the Pipeline Safety Act's assertion of exclusive federal jurisdiction over "safety standards" for interstate pipeline facilities so long as the state or local action does not have "safety standards" for the pipeline as its primary intent.

Another U.S. Court of Appeals decision, *Kinley v. Iowa Utilities Board*,<sup>139</sup> illustrates the sort of state or local action that the courts have found would be preempted by the Pipeline Safety Act. In *Kinley*, the owner/operator of an interstate petroleum product pipeline challenged an Iowa state statute that established a "comprehensive state program supervising the intrastate and interstate transportation of solid, liquid or gaseous substances ... in order to protect the safety and welfare of the public."<sup>140</sup> The state statute, referred to as "Chapter 479" required that such facilities be permitted by the state.<sup>141</sup> The pipeline owner/operator challenged the state's assertion of

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<sup>133</sup> *Id.* at 203.

<sup>134</sup> *Id.* at 212.

<sup>135</sup> *Id.* at 211.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*, quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 85 (1990).

<sup>138</sup> *Id.*, citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (emphasis in original).

<sup>139</sup> 999 F.2d 354 (8<sup>th</sup> Cir. 1993).

<sup>140</sup> *Id.* at 356.

<sup>141</sup> *Id.*

jurisdiction over the operations of its interstate pipeline as preempted by the Pipeline Safety Act. After the district court agreed with the owner that the state's assertion of jurisdiction over interstate pipelines under Chapter 479 was preempted, the state appealed to the Eighth Circuit Court of Appeals. On appeal, the state acknowledged that certain aspects of Chapter 479 that explicitly dealt with safety were preempted by the Pipeline Safety Act. However, the state argued that there were certain "non-safety" provisions of Chapter 479, specifically hearing, permit and inspection provisions as well as financial responsibility requirements designed to protect the state's farmland and topsoil from damage due to the construction, operation and maintenance of the pipelines and to guarantee payment of property and environmental damages, that were not preempted.<sup>142</sup> The court disagreed, finding that the hearing, permit and inspection provisions of Chapter 479 are "so related to the federal safety regulations that they are preempted" by the Pipeline Safety Act, and further holding that "environmental and damage remedies provisions are not severable from the preempted hearing, permit and inspection provisions and thus are preempted as well."<sup>143</sup> The court thus affirmed the lower court's opinion and disallowed the application of Chapter 479 to the interstate pipeline.<sup>144</sup>

The example of *Kinley* is instructive to states seeking to regulate interstate pipelines. A state that is contemplating such action might analyze Iowa's Chapter 479 to avoid creating law that would, like Iowa's Chapter 479, be preempted by the Pipeline Safety Act. It should, however, be noted that with respect to the "environmental and damage remedies" provisions, the court found that these provisions were preempted by the Pipeline Safety Act not by virtue of their content but rather because they could not be severed from other aspects of Chapter 479. As the court noted in *Kinley*, the question of severability is not a constitutional question but instead is a matter of state law.<sup>145</sup>

Many states have statutes and regulations that govern interstate pipelines subject to the Pipeline Safety Act that appear not to have been deemed preempted by the Pipeline Safety Act. Although the lack of a successful preemption challenge does not conclusively demonstrate that the state statute would survive such a challenge, a state might nevertheless find that such statutes and regulations provide guidance in avoiding preemption.

### **Conflict Preemption of State Action Related to the Proposed Keystone XL Pipeline**

If the state action is not expressly preempted, it may be preempted by what is commonly known as "conflict preemption." There appear to be two arguments that action regarding the siting of the proposed Keystone XL pipeline would be preempted by conflict with federal law and would therefore be unconstitutional. The first is that a siting statute would conflict with the president's authority to permit cross-border pipelines. It is difficult to comprehend how a state statute that

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<sup>142</sup> *Id.* at 357.

<sup>143</sup> *Id.* at 360.

<sup>144</sup> *Id.* The analysis in the *Kinley* decision is brief, in part because the court found that many of the issues raised had already been adjudicated in *ANR Pipeline Co. v. Iowa State Commerce Commission*, 828 F.2d 465 (8<sup>th</sup> Cir 1987). In that case, the U.S. Court of Appeals heard a similar preemption challenge to a previous iteration of Iowa Code Chapter 479 brought by a pipeline company that had been fined by the state due to alleged violations of the law. The more expansive discussion of the previous iteration of the preempted Iowa law found in that decision may also be instructive in seeking to avoid state action preempted by the Pipeline Safety Act.

<sup>145</sup> *Id.* at 359.

addresses the location of a facility within its borders would “conflict” with an exercise of executive branch authority to authorize cross-border pipelines. There would likely be no operational conflict, as compliance with both the federal requirement and a state permitting/siting requirement is not only physically possible but has been achieved by numerous other international pipeline projects that have obtained presidential permits and also satisfied permitting and siting requirements of other states.<sup>146</sup> It is also not clear whether and how a state permitting/siting requirement would “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Although the State Department considered the environmental impacts of the entire Keystone XL project when conducting its NEPA review, the State Department’s actual permitting authority extends only to that portion of the facility that crosses the U.S.-Canada border. According to its own terms, the purpose of the exercise of executive authority found in Executive Order 13337 is

to expedite reviews of permits as necessary to accelerate the completion of energy production and transmission projects, and to provide a systematic method for evaluating and permitting the construction and maintenance of certain border crossings for land transportation ... that do not require the construction and maintenance of facilities connecting the United States with a foreign country, while maintaining safety, public health, and environmental protections.<sup>147</sup>

Viewed in isolation, some of this language could be interpreted to suggest a generic federal “purpose and objective” of accelerating completion of energy production and transmission projects, in which case state legislation which might impede the completion of such projects could be considered to be in conflict with the stated federal purpose. However, this appears likely to be too narrow a view of the objective of Executive Order 13337, which appears intended to expedite the processing of presidential permit applications. It therefore seems unlikely that a court would construe state action impacting the siting of an oil pipeline within the state’s borders as “an obstacle to the accomplishment and execution of the full purposes and objectives” of the federal government as expressed in Executive Order 13337.

A second potential claim of “conflict preemption” would be an assertion that state action conflicts with the Pipeline Safety Act. It is impossible to draw a conclusion without knowing the nature of the state’s action. Additionally, it is difficult to articulate an argument that a state statute related to oil pipeline siting would present either an “operational conflict” with the Pipeline Safety Act or would be deemed “an obstacle to the accomplishment and execution of the full purposes and objectives” of the Pipeline Safety Act, which are stated as “to provide adequate protection against risks to life and property posted by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation.”<sup>148</sup> So long as state action did not interfere with the accomplishment and execution of these objectives by the federal government and did not make it impossible for an entity to comply with its actions, the Pipeline Safety Act, and any regulations issued pursuant to the act, a court would likely not find that the state’s action was invalidated by “conflict preemption” with the Pipeline Safety Act.

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<sup>146</sup> See, e.g., the “Alberta Clipper” pipeline project, the border-crossing of which was authorized by the U.S. Department of State in CITE. Enbridge Pipelines LLC has also obtained permits for the siting of that portion of the Alberta Clipper facility that is located in the state of North Dakota., pursuant to that state’s statutory and regulatory requirements.

<sup>147</sup> *Executive Order 13337—Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States*, 69 Fed. Reg. 25229 (April 30, 2004).

<sup>148</sup> 49 U.S.C. §60102(a).

## **Field Preemption of State Action Related to the Proposed Keystone XL Pipeline**

The third and final potential preemption of state action is what is commonly known as “field preemption”; that is, where it is inferred from congressional action that Congress intended to remove a state’s regulatory authority over an entire subject. However, the Supreme Court has held that

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a “reliable indicium of congressional intent with respect to state authority,” “there is no need to infer congressional intent to pre-empt state laws from the substantive provisions” of the legislation.<sup>149</sup>

Because Congress explicitly addressed the issue of preemption in the Pipeline Safety Act at 49 U.S.C. Section 60104, there is no need to explore the notion of “field preemption” with respect to that legislation.

## **Judicial Review of the NEPA Process for Permitting Under Executive Order 13337**

The State Department reviews environmental impacts prior to making the national interest determination. However, the legal necessity of the State Department’s review under NEPA for projects under Executive Order 13337 is uncertain. Compliance with NEPA in this instance could mean a project once immune from judicial oversight is subject to court review.

### **Executive Order 13337**

As discussed above, Executive Order 13337 delegates the President’s authority to the State Department to issue permits for certain energy projects that cross international borders. Executive Order 13337 requires that the State Department seek the views of certain Agency heads, including the Secretary of the Interior and the Administrator of the Environmental Protection Agency, prior to issuing the determination.<sup>150</sup> While the introductory language of the order indicates one purpose of the process is to maintain “environmental protections,” the order does not explicitly require consideration of environmental impacts. It states only that the permit be in the national interest. Executive Order 13337 is a modification of Executive Order No. 11423, which predates NEPA,<sup>151</sup> and thus, does not reference a NEPA review to inform the national interest determination.

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<sup>149</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992), *quoting* *Malone v. White Motor Corp.*, 435 U.S.497, 505 (1978) *and* *California Federal Savings and Loan Assn v. Guerra*, 479 U.S. 272, 282 (1987).

<sup>150</sup> Exec. Order No. 13337 §1(b). 69 Fed. Reg. 25299 (May 5, 2004).

<sup>151</sup> Executive Order No. 11423 was issued in 1968 (33 Fed. Reg. 11741 (August 20, 1968)), whereas NEPA was enacted on January 1, 1970.

## **Keystone XL NEPA Background**

For the Keystone XL project, an environmental impact statement (EIS) was prepared under NEPA.<sup>152</sup> On January 28, 2009, the Department of State announced receipt of the application and its intent to conduct a NEPA review:

With respect to the application submitted by Keystone, the Department of State has concluded that the issuance of the Presidential permit would constitute a major Federal action that may have a significant impact upon the environment within the meaning of the National Environmental Policy Act (NEPA) of 1969. For this reason, Department of State intends to prepare an EIS to address reasonably foreseeable impacts from the proposed action and alternatives.<sup>153</sup>

## **State Department NEPA Regulations**

The State Department's announcement was consistent with its regulations. Under 22 C.F.R. Section 161.7(c), the State Department will prepare an environmental assessment<sup>154</sup> for certain projects, including issuing permits for construction of international pipelines as provided under Executive Order 11423.<sup>155</sup>

Pursuant to its regulations, the State Department evaluates the environmental impacts under NEPA prior to making a national interest determination for a permit. For example, it prepared an environmental assessment for an oil pipeline that crossed from Alberta, Canada, to Superior, Wisconsin.<sup>156</sup> It also prepared an EIS for the earlier Keystone oil pipeline from Canada.<sup>157</sup>

## **Judicial Review**

Courts have considered whether any environmental review prepared by the State Department for projects seeking a permit under Executive Order 13337 is subject to judicial review. Only trial-level courts have heard the issue, and the decisions in those courts have been split. The U.S. District Court for the District of Columbia held that there was no judicial review of Executive Order 13337 actions.<sup>158</sup> A year later, the U.S. District Court for the District of Minnesota, which was not bound by that precedent, held that a State Department NEPA review prepared for a permit under Executive Order 13337 was a final agency action subject to review by a court.

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<sup>152</sup> See Keystone XL report for details on the Keystone NEPA process.

<sup>153</sup> 74 Fed. Reg. 5019, 5020 (January 28, 2009).

<sup>154</sup> Under NEPA, an environmental assessment (EA) is a review to see whether an agency action might result in significant environmental impacts. If an agency foresees significant impacts, it may prepare an environmental impact statement (EIS) directly, rather than first preparing an EA.

<sup>155</sup> 45 Fed. Reg. 59553 (September 10, 1980). The State Department's NEPA regulations establish categories of action subject to NEPA and the environmental review procedures applicable to those actions. For actions determined to have a "significant" effect on the environment, an EIS must be prepared. 22 C.F.R. §161.7(a). An environmental assessment (EA) may be prepared to make that determination. 22 C.F.R. §161.7(c)(1). An EA is generally not necessary if an action's environmental impacts are known to be significant or if the action normally requires an EIS (§161.8(b)).

<sup>156</sup> See *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147 (D. Minn. 2010).

<sup>157</sup> See *NRDC v. U.S. Department of State*, 658 F. Supp. 2d 105 (D.D.C. 2009).

<sup>158</sup> *NRDC v. U.S. Department of State*, 658 F. Supp. 2d 105 (D.D.C. 2009).

In order to sue the federal government, the government must waive of sovereign immunity. For federal agency actions, that waiver is typically provided by the Administrative Procedure Act (APA): “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”<sup>159</sup> Courts have consistently held that an EIS is a final agency action subject to review under the APA. However, under accepted precedent, no NEPA review is required for actions by a President because NEPA applies to “agencies of the Federal government,”<sup>160</sup> and not to presidential actions.<sup>161</sup> Thus, although it seems no NEPA review was required under Executive Order 13337, the State Department’s NEPA review may be an agency action that is judicially reviewable. By conducting a NEPA review, the State Department may have opened that evaluation to court scrutiny.

### District Court Holdings Related to Executive Order 13337

District courts disagree over whether an EIS would be an *agency* action under these circumstances. The district court of D.C. held that it is not, relying on the fact that the Executive Order is a delegation by the President of a constitutional authority.<sup>162</sup> The court in that case focused on the issuance of the permit and not on the EIS, itself. Since the delegation did not change the underlying authority for the action, just who issues the permit, according to the D.C. district court, any activity by the State Department pursuant to that Executive Order is a presidential action, and not an agency action.<sup>163</sup>

The U.S. District Court for the District of Minnesota disagreed with the reasoning of the D.C. district court and found that an EIS by the State Department for a cross-border pipeline permit was reviewable.<sup>164</sup> The court noted the State Department’s *Federal Register* notice in which it stated that the pipeline permit was a “major federal action.”<sup>165</sup> The court noted that although the permit pertained to a pipeline crossing an international border, that did not excuse the State Department from analyzing the environmental impacts of the entire route. More important, the court held that the fact that the *permit* for the international crossing was a presidential action did not “convert the State Department’s preparation of the FEIS into a presidential action.”<sup>166</sup>

To some extent, the two courts are arguing about two different things: the issuance of the permit, and the issuance of the EIS. However, only the District of Minnesota separates the two actions, noting that the issuance of the permit was not before the court,<sup>167</sup> and allowing judicial review of the EIS. Further, evidence appears to support the notion that an EIS is an agency action separate from the State Department’s issuance of a presidential permit under Executive Order 13337. First, the State Department, under APA notice and comment rulemaking created a rule stating it would

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<sup>159</sup> 5 U.S.C. §704.

<sup>160</sup> 42 U.S.C. §4332(2)(C).

<sup>161</sup> *See Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978); *Utah Association of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004).

<sup>162</sup> *NRDC v. State*, 658 F. Supp. 2d 105 (D.D.C. 2009).

<sup>163</sup> *Id.* at 109 (D.D.C. 2009).

<sup>164</sup> *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1157 fn3 (D. Minn. 2010) (“the Court respectfully disagrees with th[at] decision[] insofar as [it] hold[s] 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”).

<sup>165</sup> *Id.* at 1157.

<sup>166</sup> *Id.* at 1157.

<sup>167</sup> The issuance of the permit was not before the court. *Id.* at 1161.



prepare an EA for pipelines under that Executive Order.<sup>168</sup> If the State Department failed to complete a NEPA review while that rule was still in effect,<sup>169</sup> it could be liable under the APA for acting contrary to its own regulations. Second, there is no directive in the Executive Order to perform any type of environmental review. A permit could be issued without any NEPA review, but occurs because of a State Department regulation requiring an EA, consistent with NEPA. Thus the NEPA review could be characterized as a congressional delegation of authority by statute (NEPA) rather than a presidential delegation of authority via Executive Order 13337. Additionally, the State Department's description of its process indicates that the national interest determination is separate from the NEPA review, lending further support to the argument that there are two actions: "Following the release of the Final EIS, a review period begins to determine if the proposed project is in the national interest. This broader evaluation of the application extends beyond environmental impact, taking into account economic, energy security, foreign policy, and other relevant issues."<sup>170</sup>

In reaching its conclusion that issuing a permit under Executive Order 13337 is judicially untouchable, the D.C. district court reviewed Supreme Court precedent and noted that no decision is directly on point.<sup>171</sup> The Supreme Court has considered presidential actions only in the context of those authorized by statute.<sup>172</sup> In those cases, *Franklin v. Massachusetts*<sup>173</sup> and *Dalton v. Specter*,<sup>174</sup> the Court reviewed challenges to the sufficiency of agency or commission reports submitted to the President before he acted. The decisions of the President in each case were held to be insulated from judicial review because, regardless of the documents' content, the Court held the President had ultimate discretion. The reports submitted to the President as part of each underlying statutory directive did not change the nature of the authority: regardless of the content of the reports, the decision was still made by the President. In the case of *Franklin*, the statute did not require the President to use the data in the report.<sup>175</sup> In *Dalton*, the Court held that despite the statute's requirement limiting the President to approving or rejecting the list in its entirety, the ultimate authority was still presidential: no action was final until the President submitted his certificate of approval to congress.<sup>176</sup>

Distinctions between the Supreme Court cases and an EIS for Executive Order 13337 may be made. In those court cases, the documents given to the President were required by an underlying

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<sup>168</sup> See 45 Fed. Reg. 59553 (September 10, 1980).

<sup>169</sup> The State Department could remove that regulation pursuant to a formal rulemaking procedure and may then not be bound by NEPA.

<sup>170</sup> See, State Department Fact Sheet, p. 2 (August 26, 2011), available at <http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf?Open>.

<sup>171</sup> Similarly, the case *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah, 2004), can be distinguished as the EIS in that case was prepared in support of an agency recommendation (as opposed to an agency decision) and was deemed advisory, and not final. Additionally, in *Tulare County v. Bush*, 185 F. Supp. 2d 18 (D.D.C. 2001), cited by the court, the challenge was based on a failure to prepare an EIS.

<sup>172</sup> As noted above, Executive Order 13337 is derived from constitutional authority.

<sup>173</sup> *Franklin v. Massachusetts*, 505 U.S. 788 (1992). This case challenged the Secretary of Commerce census report methodology as authorized under 13 U.S.C. §141. The Supreme Court described the process as having three parts. First, the Secretary of Commerce counts the U.S. population. Second, Commerce reports that total population to the President. And third, the President transmits a statement to Congress of the number of representatives for each state.

<sup>174</sup> *Dalton v. Specter*, 511 U.S. 462 (1994). This case challenged base closures in which a commission submits recommended closures to the President who certifies approval of the recommendations to Congress.

<sup>175</sup> *Franklin*, 505 U.S. at 797.

<sup>176</sup> *Dalton*, 511 U.S. at 469.

statute and deemed part of the delegated authority. In cases under Executive Order 13337, there is no presidential directive suggesting or requiring an environmental review. The EIS was a discretionary action of the agency based on a statutory requirement that agencies act “to the fullest extent possible” to review agency actions.<sup>177</sup> To make that distinction more clear, if a Secretary submitted a “view” under Executive Order 13337 Section 1(b)(2) stating it was not in the national interest to issue the permit, but the State Department issued the permit anyway, under Supreme Court precedent neither the “view” nor the permit issuance appears to be reviewable. Under the holdings in *Franklin* and *Dalton*, that “view” would not be final and the permit issuance would be part of the delegated presidential authority because the “view” was advisory and part of the delegated presidential authority. In contrast, if the EIS finding was in error, well-established case law would allow challenge of the EIS as “arbitrary and capricious” under the APA.<sup>178</sup> While that might not change the State Department’s determination of the project’s being in the national interest, it would make the EIS a final agency action reviewable under accepted legal precedent.

Second, the reports in *Franklin* and *Dalton* were found not to be final actions because the presidential decision still had to be made. Whereas, courts have held repeatedly that a completed EIS is a final action.<sup>179</sup> In fact, in *Franklin*, the Court noted the ways that the census report was not an APA agency action: it was “not promulgated to the public in the Federal Register, no official administrative record is generated, and its effect on reapportionment is felt only after the President makes the necessary calculations and reports the results to Congress.”<sup>180</sup> In contrast, each of those factors occurs for an Executive Order 13337 NEPA review: it was promulgated to the public, there is an administrative record, and under Supreme Court precedent, injury under NEPA occurs when the agency fails to comply with the law.<sup>181</sup> Because the State Department prepared a supplemental EIS to address EPA’s concerns with the draft EIS, the State Department appears to concede that its EIS was different from the documents at issue in *Franklin* and *Dalton*.

The *Franklin* Court said that until the President acted there was “no determinate agency action to challenge, since the President, not the Secretary, takes the final action that affects the States.”<sup>182</sup> In the case of Keystone XL, while issuing a permit is a final action taken under presidential authority, the EIS may also be a final action, which is taken under separate statutory authority. The D.C. court’s holding did not recognize that distinction. Instead, the D.C. court found that the permit was a presidential action not subject to judicial review. Minnesota found that the EIS was a final agency action subject to judicial review.

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<sup>177</sup> 42 U.S.C. §4332.

<sup>178</sup> *Kleppe v. Sierra Club*, 427 U.S. 290 (1976).

<sup>179</sup> See *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 737 (1998) (“a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper”).

<sup>180</sup> *Franklin*, 505 U.S. at 796.

<sup>181</sup> *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726 (1998).

<sup>182</sup> *Franklin*, 505 U.S. at 799.

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