IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TRANSCANADA KEYSTONE PIPELINE, LP and TC OIL PIPELINE OPERATIONS INC. Plaintiffs, vs. JOHN F. KERRY, Secretary of the Department of State; LORETTA E. LYNCH, Attorney General of the United States; JEH CHARLES JOHNSON, Secretary of the Department of Homeland Security; and SALLY JEWELL, Secretary of the Department of Interior; Defendants.	§	Civil Action No. 4:16-cv-00036

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff TransCanada owns and operates an extensive network of U.S. and Canadian oil pipelines. It seeks to extend a principal pipeline system from the United States into Canada, by building the Keystone XL Pipeline. TransCanada has committed to comply with every regulatory requirement previously imposed on the many other cross-border oil pipelines that have routinely been approved.

The Executive Branch has asserted an unprecedented Presidential power to prohibit the construction of the pipeline altogether, no matter what operational requirements apply to TransCanada. It concedes that no statute provides the President with any such power. Instead, it asserts that the President has unilateral power under the Constitution to prohibit the cross-border commerce at issue — a power that the Executive Branch claims resulted from a supposed pattern of conduct acquiesced in by *Congress*.

The defendants are right to focus on whether Congress has approved the President's power to prohibit the pipeline's construction. Through the Domestic and Foreign Commerce Clauses, the Constitution provides powers over cross-border trade to Congress. U.S. Const. art. I, § 8, cl. 3. Supreme Court cases, beginning with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and continuing to the present, confirm that the President has the power he claims here only if it accords with the "expressed or implied will of Congress." *Id*. at 637 (Jackson, J., concurring). Those cases also confirm that Congress' will can be reflected in various ways short of enacted legislation, including ongoing acquiescence amounting to consent to a longstanding, unbroken practice.

That test makes this a simple case. Both Houses of Congress, by a formal, majority vote, passed the Keystone XL Pipeline Approval Act and expressed Congress' will to approve the construction of that particular pipeline and to disapprove of any Presidential power to act to the

contrary. The relevant issue is whether Congress has approved of the President's asserted power, and the President's veto of the Act does nothing to erase Congress' clear disapproval of the President's asserted power. The defendants argue that Congress' clear and unmistakable expression of its will does not matter because the President's veto prevented the Keystone XL Pipeline Approval Act from becoming an enacted statute. But that veto merely meant that the President was not *also* violating an enacted law when he engaged in his unauthorized action to bar construction of the Keystone XL Pipeline. It does not change the fact that he acted in the absence of any statutory authorization and contrary to the express will of Congress in an area that the Constitution commits to Congress' power and responsibility. *Youngstown* and its progeny establish that in those circumstances, such a Presidential action is unlawful.

Separately, Congress has implicitly rejected any broad Presidential power to disallow cross-border oil pipelines by passing statutes that comprehensively ensure oil pipelines' safe operation, reasonable rates and service terms, and appropriate development. Those statutes, buttressed by legislation implementing agreements to foster cross-border trade (including, specifically, commerce with Canada), reflect Congress' direction to the Executive Branch to foster pipeline development, subject to appropriate operational regulation — not to bar pipeline development altogether. And, Congress through the Clean Air Act specifically limited the Executive Branch's authority, asserted here, to advance greenhouse gas emission policies. The leading circuit court case on Presidential power over cross-border facilities, invoked by Justice Jackson in *Youngstown*, strongly supports these conclusions.

Defendants point to Congressional acquiescence in an "unbroken, longstanding practice," but that inquiry in fact further confirms that Congress has consented, at most, to the Executive Branch's limited operational regulation of cross-border pipelines — not to any unprecedented,

open-ended power to prohibit construction of a pipeline for reasons unrelated to the pipeline's operation or even to the border crossing itself. Instead, the only "unbroken, longstanding practice" is that the Executive Branch has routinely *granted* approval to cross-border pipelines and like facilities, imposing only operational requirements related to the border crossing. (Defendants point to no instance where the President has ever prohibited construction of a cross-border pipeline, much less any instance based on the kinds of open-ended foreign policy considerations, unrelated to the border, invoked here.) As soon as the Executive Branch appeared poised to address the Keystone XL Pipeline by departing for the first time from the established tradition of narrow operational regulation of pipelines, Congress repeatedly objected to the Executive Branch's actions and ultimately passed the Keystone XL Pipeline Approval Act. Congress thus has not consented to the Executive Branch's actions, and the scope of its acquiescence clearly precludes rather than enables the President to prohibit construction of the Keystone XL Pipeline.

STATEMENT OF FACTS

A. The Keystone System And The Keystone XL Pipeline

This case involves the State Department's determination that TransCanada is prohibited from building a component of the Keystone XL Pipeline that would expand TransCanada's existing Keystone Pipeline System in the United States from Steele City, Nebraska to Morgan, Montana and then across the U.S.-Canada border to Hardisty, Alberta.[1] *See* Dep't of State, *Record of Decision and Nat'l Interest Determination* 2-3, 32 (Nov. 3, 2015) ("Prohibition Decision") (Exhibit B to the Complaint). In addition to transporting crude oil from Alberta, the

[1] The Keystone XL Pipeline would be owned by Plaintiff TransCanada Keystone Pipeline, LP and operated by Plaintiff TC Oil Pipeline Operations Inc., which are U.S. subsidiaries of TransCanada Corporation. Complaint ¶¶ 8-9. This Memorandum refers to all three companies, individually or collectively, as "TransCanada."

pipeline would carry up to 100,000 barrels per day of crude oil extracted from the Bakken region in Montana to downstream points in the United States connected by the Keystone System. *Id.* at 7.

TransCanada's existing Keystone System of 2,369 miles of interconnected petroleum pipelines in the United State and the proposed Keystone XL Pipeline are depicted on a map in paragraph 17 of the Complaint and reprinted in the appendix to this brief, *see* Ex. 1. The initially completed portion of the Keystone System (the "Keystone I Pipeline") transports crude oil produced in Alberta, Canada to the United States. *See* Dep't of State, *Record of Decision and National Interest Determination* 2 (Feb. 28, 2008) ("Keystone I Decision," Ex. 2). It extends from an oil supply hub near Hardisty, Alberta to the U.S.-Canada border in Cavalier County, North Dakota. *Id.* at 4-5. From there, the pipeline runs south to Nebraska (and, eventually, Oklahoma), and east from Nebraska to terminals in Illinois. *Id.* at 4. TransCanada received a Presidential permit to construct and operate the Keystone I Pipeline in 2008 and began to operate it in 2010. *See id.* at 24-25; Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit, 3 (Sept. 19, 2008) ("1st Keystone XL Application," Ex. 3).

In 2008, TransCanada proposed to expand the Keystone System by building the Keystone XL Pipeline. As originally proposed, the project included, in addition to a pipeline segment from the U.S.-Canadian border to Hardisty, Alberta, three principal sections in the United States: (i) the segment at issue in this case, extending from the Keystone I Pipeline in Steele City, Nebraska to the U.S.-Canadian border; (ii) the "Gulf Coast Pipeline," extending from the Keystone Pipeline at Cushing, Oklahoma to Nederland, Texas; and (iii) the "Houston Lateral" pipeline segment extending from the Gulf Coast Pipeline beginning in Liberty County, Texas to Harris County, Texas. *See* 1st Keystone XL Application, at 5.

In 2011, TransCanada completed the Cushing Extension, which extended the Keystone I Pipeline from Steele City, Nebraska to Cushing, Oklahoma. *See* Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit, 5 (May 4, 2012) ("2d Keystone XL Application," Ex. 4). Over the next five years, TransCanada further expanded the Keystone System by building the Gulf Coast Pipeline and Houston Lateral pipeline segments that were originally proposed as segments of the Keystone XL Pipeline. *Id.* These segments had economic utility independent of the rest of the Keystone XL Pipeline, and the President did not assert any power over them (because they were entirely in the United States). *See* Prohibition Decision at 8. The value and capacity utilization of these additional pipeline components are, however, directly dependent on TransCanada's ability to build and operate the portion of the Keystone XL Pipeline extending from Steele City, Nebraska across the U.S.-Canada border and at issue in this case.

B. Regulatory Requirements And The Presidential Permit Process For Cross-Border Oil Pipelines

Apart from the Presidential action at issue in this case, the Keystone XL Pipeline would be subject to an extensive array of federal, state, and local laws regulating oil pipelines in the United States, as the State Department has acknowledged. *See* Dep't of State, *Final Environmental Impact Statement for the Keystone XL Project* tbl.1.10-1, at 1-27 – 1-32 (Aug. 26, 2011) ("FEIS") (Ex. 5).

For example, to build the pipeline, TransCanada must acquire easements and comply with state and local laws regulating the location of the pipeline and the pump stations along the pipeline route. *See id.* To have the pipeline cross federal land, TransCanada must obtain a right-of-way grant from the Bureau of Land Management under the Federal Land Policy Management Act of 1976, 43 U.S.C. § 1761, and a Temporary Use Permit under the Mineral Leasing Act, 30

U.S.C. § 185. To have the pipeline cross wetlands or navigable waters, TransCanada needs permits from the U.S. Army Corps of Engineers under the Clean Water Act, 33 U.S.C. § 1344, or the River and Harbors Act of 1899, *id.* § 403.

In addition, the Keystone XL Pipeline would be subject to extensive regulatory requirements promulgated by the Pipeline and Hazardous Materials Safety Administration ("PHMSA") under the Pipeline Safety Act, to protect "against risks to life and property posed by pipeline transportation and pipeline facilities." 49 U.S.C. § 60102(a). PHMSA regulations govern pipeline design, construction, pressure testing, operation and maintenance, qualification of pipeline personnel, and corrosion control. *See* 49 C.F.R. pt. 195.

The Keystone XL Pipeline also would be regulated by the Federal Energy Regulatory Commission ("FERC"), which requires that rates be reasonable and that shippers have equal access to pipeline transportation. *See* 49 U.S.C. § 60502; 49 U.S.C. app. § 1 (1988). And, to the extent that the pipeline would facilitate domestic economic activities that emit greenhouse gases, those emissions are regulated by the Clean Air Act, 42 U.S.C. § 7401 *et. seq*. *See Massachusetts v. EPA*, 549 U.S. 497 (2007).

In addition to all of these sources of regulation (and others listed in the FEIS), nearly all of which spring from Acts of Congress, the President claims the power to issue Presidential permits for various facilities, including oil pipelines, that would cross a U.S. border. The permitting process is administered by the Secretary of State pursuant to Executive Order 13337. *See* 69 Fed. Reg. 25,299 (Apr. 30, 2004) (Ex. 1 to Defs' Br.). Executive Order 13337 was designed to expedite and ensure the issuance of permits for energy projects that had previously been addressed by Executive Order 11423, which President Johnson issued in 1968. *See* 33 Fed. Reg. 11,741 (Aug. 16, 1968) (Ex. 18 to Defs' Br.).

Prior to 1968, no uniform practice applied. Executive permission to construct and maintain facilities at the U.S. border had "from time to time been sought and granted in the form of Presidential permits," but no "systematic method" existed for the issuance of Presidential permits for many cross-border facilities, including oil pipelines. *Id.* Executive Order 11423 directed the Secretary of State to receive permit applications, consult with certain specified cabinet officials and department heads, and issue Presidential permits if he found it "would serve the national interest." *Id.* at 11,741-11,742. Such permits for cross-border oil pipelines (and other facilities) were routinely granted and simply imposed minor operational obligations on the pipeline operator. *See* Complaint ¶¶ 108, 110; Executive Order 11423, 33 Fed. Reg. at 11, 741 (permission "sought and granted … ").

In 2004, President Bush issued Executive Order 13337 "to expedite reviews of permits as necessary to accelerate the completion of energy production and transmission projects." 69 Fed. Reg. at 25,299. That order requires officials consulted by the Secretary of State to provide their views within 90 days. *Id.* at 25,299-25,300. The Secretary of State must notify those officials of his proposed decision, and then issue the final decision within 15 days if no objection is received. *Id.* at 25,300.

Following this process, the State Department has routinely, consistently, and relatively promptly issued permits for a number of oil pipelines, including the Keystone I Pipeline, and those permits imposed only minor operational requirements upon the pipeline operator. Department-approved pipelines include those transporting the same type of oil from the same region in Canada that the Keystone XL Pipeline extension would transport. For example, TransCanada submitted a permit application for the Keystone I Pipeline in April 2006, and the State Department issued the permit in March 2008 after TransCanada committed to standard and

non-onerous operational measures to mitigate the impact of the pipeline's construction and operation. *See* Keystone I Decision at 12-18. The State Department found that the Keystone I Pipeline "serves the strategic interests of the United States" because it "increases the diversity of available supplies among the United States' worldwide crude oil sources," "increases crude oil supplies from a source region that has been a stable and reliable trading partner of the United States," "does not require exposure of crude oil in high seas transport and railway routes that may be affected by heightened security and environmental concerns," and "provides additional supplies of crude oil to make up for the continued decline in imports from several other major U.S. suppliers." *Id.* at 22. The decision also stated that the President had asserted authority only over "facilities at the border of the United States," that no Presidential authority existed over domestic facilities, and that the President's interest arose from "the impact the proposed cross-border facility … will have upon U.S. relations with the country in question, whether Canada or Mexico." *Id.* at 22-23. As a result, the Department concluded that limiting the permit to "the first mainline shut-off valve or pumping station would adequately protect [the Department's] foreign relations interest in implementing [the Executive Orders]." *Id.*

Similarly, the State Department in 2009 granted a permit to a competitor of TransCanada (Enbridge) for a pipeline that would import the same Albertan "heavy crude" that the Keystone XL Pipeline would transport. *See* Dep't of State, *Record of Decision and Nat'l Interest Determination Regarding The Alberta Clipper Pipeline* 2 (Aug. 3, 2009) ("Alberta Clipper Decision") (Ex. 32 to Defs' Br.). The State Department granted the permit even though some had expressed concerns about the "levels of greenhouse gas (GHG) emissions associated with oil sands crude." *Id.* at 26. Those concerns, the Department stated, are "best addressed" through domestic and international processes unrelated to the Presidential permit process. *Id.*

To TransCanada's knowledge, no President and no Secretary of State has ever denied a Presidential permit for a cross-border oil pipeline. *See* Complaint ¶¶ 5, 108. Nor has any President or Secretary of State ever denied a Presidential permit to any other type of cross-border facility on the ground that he needed to restrict foreign and domestic commerce to enhance his influence in foreign affairs. *See id.* ¶ 112. Defendants have not disputed those allegations or cited any instance, prior to the denial of the permit for the Keystone XL Pipeline, of the President denying a permit for a cross-border oil pipeline or for any other major cross-border facility. Instead, the State Department has routinely *granted* permits for cross-border energy facilities. *See* Adam Vann & Paul W. Parfomak, *Presidential Permits for Border Crossing Energy Facilities*, at 9 (Congressional Research Service, Oct. 29, 2013) (Ex. 6) ("CRS has identified over 100 operating or proposed oil, natural gas, and electric transmission facilities crossing the U.S.-Mexico or U.S.-Canada border"); *see also id.* at 12, tbl.3 (listing 19 cross-border oil pipelines).

C. Congress Rejects The Executive Branch's Handling Of The Application For A Permit For The Keystone XL Pipeline

When TransCanada applied for a Presidential permit for the Keystone XL Pipeline, the State Department's review soon deviated from that traditional, routine practice of permit application review and approval, subject to minor operational requirements. The delay associated with the permit process, and, later, the increasing awareness that the Executive Branch might take the unprecedented action of prohibiting the pipeline's construction for reasons unrelated to the standard operational requirements, drew the opposition of Congress.

In September, 2008, TransCanada filed an application to construct and operate the 1.2 mile segment from the U.S.-Canada border to the first pipeline isolation valve in Montana. *See*

1st Keystone XL Application at 4. As previously noted (*supra* at p. 4), the original proposal was for a pipeline from Hardisty, Alberta to the Gulf Coast in Texas.

The State Department commenced an extensive, multi-year review of the environmental impacts of the entire Keystone XL Pipeline, using a process consistent with but not required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* In April 2010, the State Department issued an initial report which concluded, among other things: (1) "since the crude oil delivered by the Project would be replacing similar crude oils from other sources, the incremental impact of these emissions would be minor;" and (2) alternative modes of transporting the crude oil from the U.S.-Canada border to Port Arthur, Texas "would be less safe, would require construction of substantially more infrastructure, have greater atmospheric emissions (including GHG), and/or pose greater safety hazards than the proposed Project." U.S. Dep't of State, *Draft Environmental Impact Statement for the Keystone XL Oil Pipeline Project*, ES-5, -ES-21 (Apr. 16, 2010) ("DEIS") (Ex. 7). This proved to be the first of five environmental assessments by the State Department reaching this same conclusion.

TransCanada then agreed to adopt 57 project-specific conditions, over and above the applicable code requirements, for the design, construction, and operation of the Keystone XL Pipeline. *See* Dep't of State, *Supplemental Draft Environmental Impact Statement for the Keystone XL Oil Pipeline Project*, Appendix C (Apr. 22, 2011) (Ex. 8). These conditions were similar to (but slightly broader than) the operational conditions the State Department had required of the Keystone I Pipeline. *Compare id. with* Keystone I Decision at 13-18. But even with these conditions accepted, the State Department did not grant the permit.

Instead, the State Department decided that new information warranted preparation of a Supplemental Draft Environmental Impact Statement ("SDEIS"), which resulted in additional

delay. The resulting SDEIS found that "the information provided in this SDEIS does not alter the conclusions reached in the draft EIS regarding the need for and the potential impacts of the proposed Project." Dep't of State, *SDEIS for the Keystone XL Oil Pipeline Project*, Executive Summary, ES-5 (Apr. 22, 2011) (Ex. 9). Four months later, a Final EIS ("FEIS") again concluded that (1) the Keystone XL Pipeline "is not likely to impact the amount of crude oil produced from the oil sands;" and (2) the alternative means of transporting that crude oil are "either not reasonable or not environmentally preferable." Dep't of State, *FEIS for the Keystone XL Oil Pipeline Project*, Executive Summary, ES-12, ES-15 (Aug. 26, 2011) (Ex.10).

Despite these consistent findings, the State Department in November 2011 claimed that it needed additional proceedings to consider the permit application. *See* Prohibition Decision at 8. By that time, the permit application had been pending for over three years, far exceeding the periods the Department required to review and grant permits for the Keystone I Pipeline and the Enbridge Pipeline. *See* Keystone I Decision at 1, 24 (less than two years); Alberta Clipper Decision at 2, 27 (less than 2.5 years).

In December 2011, Congress sought to end the State Department's delay by passing the Temporary Payroll Tax Cut Continuation Act of 2011. *See* Pub. L. No. 112-78, 125 Stat. 1280 (2011) (Ex. 11). Title V of that Act stated that the President, acting through the Secretary of State, "shall grant a permit under Executive Order No. 13337" for the Keystone XL Pipeline within 60 days, unless the "President determines that the Keystone XL Pipeline would not serve the national interest." *Id.* § 501(a), (b)(1), 125 Stat. at 1289. If the President failed to act within 60 days, a permit meeting certain requirements specified in the Act "shall be in effect by operation of law." *Id.* § 501(b)(3), 125 Stat. 1290. If, however, the President determined that the pipeline is not in the national interest, "the President shall, not later than 15 days after the date of

the determination," report the reasons for that determination to certain specified committees and officers of the House and Senate. *Id.* § 501(b)(2).

President Obama denied the permit application on January 18, 2012 and reported to Congress that his decision was "based on not having necessary information with respect to the Keystone XL permit application at this time." *Report to Congress Under the Temporary Payroll Tax Cut Continuation Act of 2011* at 5 (Ex. 12). He also said the decision did not preclude TransCanada from submitting a new application. *Id.*; *see also* Prohibition Decision at 8.

TransCanada in May 2012 renewed its application for a cross-border permit for the Keystone XL Pipeline. The application again proposed that the facility would extend from the Keystone I Pipeline at Steele City, Nebraska to the border crossing near Morgan, Montana, but it had a different route through Nebraska and no longer included the Gulf Coast and Houston Lateral segments. *See* 2d Keystone XL Application at 3-5; Prohibition Decision at 8.

The State Department then undertook another NEPA review that resulted in a new Draft Supplemental Environmental Impact Statement ("DSEIS"), issued in March 2013, and, in January, 2014, completed its Final Supplemental Environmental Impact Statement ("FSEIS"). Both documents affirmed the conclusions of the prior environmental assessments. The FSEIS particularly concluded that (1) the approval of the project "is unlikely to significantly impact the rate of extraction in the oil sands;" (2) "the transportation of Canadian crude by rail is already occurring in substantial volumes;" and (3) alternative rail-based transportation scenarios would result in "total annual GHG emissions (direct and indirect)" that "range from 28 to 42 percent *greater* than for the proposed project." Dep't of State, *FSEIS for the Keystone XL Project*, ES-9, ES-16 ES-34 & tbl.ES-6 (Jan. 2014) (emphasis added) (Ex. 13).

By this time, the Keystone XL Pipeline had long since become the focus of political controversy, and there was concern that the President would deny the application. As a result, the House of Representatives passed various measures that would permit the construction of the pipeline without regard to any action by the President, and other measures were introduced that sought to limit the President's power over cross-border pipelines altogether. *See* 160 Cong. Rec. H7965-72 (daily ed. Nov. 13, 2014), and *id.* H7982-83 (daily ed. Nov. 14, 2014) (House passage of H.R. 5682, the Approval of the Keystone XL Pipeline Act, authorizing TransCanada to construct and operate the Keystone XL Pipeline) (Ex. 14); 160 Cong. Rec. H7819-58 (daily ed. Sept. 18, 2014) (House passage of H.R. 2, the American Energy Solutions for Lower Costs and More American Jobs Act, § 103, providing that "no Presidential permit shall be required" for the Keystone XL Pipeline) (Ex. 15); Northern Route Approval Act, H.R. 3, 113th Cong., § 3 (2013) (passed House on May 22, 2013, and providing that "no Presidential permit shall be required" for the Keystone XL Pipeline) (Ex. 16); H.R. 4348, 112th Cong., §§ 201-204 (2012) (passed House April 18, 2012, and required FERC to issue permit for Keystone XL Pipeline) (Ex. 17); *see also* Complaint ¶ 87.

Finally, in early 2015, both Houses of Congress passed the Keystone Pipeline Approval Act, S. 1, 114th Cong. (2015), (Ex. 18). *See* 161 Cong. Rec. S637-41 (daily ed. Jan. 29, 2015) (Senate passage) (Ex. 19); 161 Cong. Rec. HR947-60 (daily ed. Feb. 11, 2015) (House passage) (Ex. 20). The Act completely eliminated any role for the President or Secretary to consider or act in relation to the Keystone XL Pipeline and instead authorized TransCanada to:

> construct, connect, operate, and maintain the pipeline and cross-border facilities described in the application filed on May 4, 2012, by TransCanada Corporation to the Department of State (including any subsequent revision to the pipeline route within the State of Nebraska required or authorized by the State of Nebraska).

S.1, § 2(a). The Act also stated that the FSEIS issued by the State Department in January 2014 "shall be considered to fully satisfy" the requirements of NEPA and "any other provision of law that requires Federal agency consultation or review" with respect to the Keystone XL Pipeline, and that any prior "Federal permit or authorization" for the pipeline "shall remain in effect." *Id.* § 2(b), (c). The Act also stated that it was not altering any laws concerning the process TransCanada must follow to "secure access from an owner of private property to construct the pipeline and cross-border facilities." *Id.* § 2(e).

President Obama vetoed the Act on February 24, 2015. He said it was an "attempt[] to circumvent longstanding and proven processes for determining whether or not building and operating a cross-border pipeline serves the national interest." 161 Cong Rec. S1073 (daily ed. Feb. 24, 2015) (Ex. 21).

D. The Executive Branch Prohibits Construction Of The Keystone XL Pipeline

After eight more months of delay, the President on November 6, 2015 announced that the Secretary of State had determined that TransCanada would be prohibited from constructing the Keystone XL Pipeline, and that he agreed with that decision. *See* Statement By The President On The Keystone XL Pipeline at 1 (Nov. 6, 2015) (Ex. A to the Complaint). That same day, the State Department made public a Record of Decision and National Interest Determination explaining the reasons and legal basis for the determination. *See* Ex. B to the Complaint. The Decision confirmed that the prohibition was "based on [the President's] Constitutional powers" which had been "delegated to the Secretary of State" and that "[n]o statute establishes criteria for this determination" or otherwise supported the exercise of unilateral Presidential powers. Prohibition Decision at 3.

Despite its ultimate determination, the Decision concluded that constructing the Keystone XL Pipeline would *advance* the national interest in three important respects. First, the pipeline

would increase "energy security by providing additional infrastructure for the dependable supply of crude oil." *Id.* at 29. Second, the pipeline would have "meaningful" economic benefits for the United States. *Id.* at 30. Spending on the Keystone XL Pipeline project would support approximately 42,100 jobs over a two-year construction period. *Id.* The pipeline "would also generate tax revenue for communities in the pipeline's path." *Id.* And "pipeline activity would contribute .02 percent to the national G.D.P. based on 2012 statistics." *Id.* Third, the Decision found that approval of the pipeline would advance the United States' relationship with Canada, "one of the United States' closest strategic allies." *Id.* In contrast, denial of the permit "may lead to a cooling of U.S.-Canadian relations and could affect Canadian cooperation on Western Hemisphere issues and international security cooperation." *Id.* at 25.

Separately, the Decision conceded that the Keystone XL Pipeline is "unlikely to significantly impact the level of GHG-intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States." *Id.* at 29. In fact, the Decision acknowledged the State Department's conclusion from the FSEIS that if the Keystone XL Pipeline is not built, the crude oil could be transported from Alberta by rail, or rail in conjunction with other pipelines and tankers, and "annual GHG emissions (direct and indirect)" would "be *greater* than" if the Keystone XL Pipeline were constructed. *Id.* at 23 (emphasis added). A senior State Department official also reiterated that "we don't believe that this project denial will affect production" of oil in Canada, which was the principal basis for the environmental objection to the project. U.S. Dep't of State, *Background Briefing on the Keystone XL Pipeline* (Nov. 6, 2015), http://www.state.gov/r/pa/prs/ps/2015/11/249266.htm.

The Decision nevertheless reasoned that "the general understanding of the international community is that a decision to approve the proposed Project would precipitate the extraction

and increased consumption of particularly GHG-intensive crude oil." Prohibition Decision at 31. A decision to approve the Keystone XL Pipeline "would be viewed internationally as inconsistent with the broader U.S. efforts to transition to less-polluting forms of energy." *Id.* As a result, the Decision concluded that "granting a Presidential Permit for this proposed Project would undermine U.S. climate leadership and thereby have an adverse impact on encouraging other States to combat climate change and work to achieve and implement a robust and meaningful global climate agreement." *Id.* Permitting the pipeline to proceed "would undercut the credibility and influence of the United States in urging other countries … to implement efforts to combat climate change, including in advance of the December 2015 climate negotiations." *Id.* It was thus necessary to prohibit the pipeline's construction. *Id.* That is, prohibiting construction was required to take advantage of foreigners' *misperception* of the pipeline's effects in order to increase the President's stature and negotiating position abroad.

The President agreed with the State Department's analysis. He said that in three weeks he would be going to meet his "fellow world leaders in Paris" to try to reach an "ambitious framework" to reduce carbon emissions. Statement by the President on the Keystone XL Pipeline at 4. In the President's view, "America is now a global leader when it comes to taking serious action to fight climate change. And frankly, approving this project would have undercut that global leadership." *Id.*

NATURE OF PROCEEDINGS AND QUESTION PRESENTED

TransCanada's complaint presents the question whether the Constitution gives the President the unilateral power, unsupported by any statute and contrary to the expressed wishes of Congress, to prohibit development of the Keystone XL Pipeline on the basis that the pipeline would cross a U.S. border and would, if permitted to proceed, undercut the President's influence in international climate change negotiations. Defendants believe the President has that power

and have filed a motion to dismiss or, in the alternative, for summary judgment. TransCanada opposes Defendants' motion and has filed a cross-motion for summary judgment. TransCanada agrees with the defendants, however, that no material facts are in dispute and that the Court can resolve this case as a matter of law based on the pending summary judgment motions.

STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In making this determination, the court "resolve[s] factual controversies in favor of the nonmoving party, but only where there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Squyres v. Heico Cos.*, 782 F.3d 224, 230-31 (5th Cir. 2015) (alteration in original).

ARGUMENT

I. THE EXECUTIVE BRANCH EXCEEDED ITS CONSTITUTIONAL AUTHORITY BY PROHIBITING THE DEVELOPMENT OF THE KEYSTONE XL PIPELINE

A simple and direct application of the separation of powers principles set forth in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and subsequent Supreme Court cases confirms that the Executive Branch exceeded its constitutional authority when claiming the unilateral power to prohibit the development of the Keystone XL pipeline. That governing legal framework establishes that the Executive Branch's action was lawful only if it conformed with the "expressed or implied will of Congress." *See infra* Part I.A. In two separate and direct respects, Congress clearly expressed its will in a manner that precluded the exercise of

Presidential power at issue. *See infra* Part I.B. And, Congress' consent to only the Executive Branch's very limited prior exercises of cross-border authority further confirms that the action in this case was contrary to Congress' will. *See infra* Part II. The order prohibiting construction of the Keystone XL Pipeline was thus unconstitutional.

A. The Executive Branch's Action Was Lawful Only If It Accorded With The "Expressed Or Implied Will" Of Congress

To decide whether a specific Presidential action has exceeded the powers of that office, courts use a three-part framework that begins with the understanding that "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown*, 343 U.S. at 585). This framework also recognizes that "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

That three-part framework, and thus the underlying constitutional question, depends upon the "expressed or implied will of Congress." *Id.* at 637 (Jackson, J., concurring). First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum," *id.* at 635 (Jackson, J., concurring), and will generally be upheld if within the federal government's power. *Id.* at 636; *Medellin*, 552 U.S. at 524. Second, "[w]hen the President acts in the absence of either a congressional grant or denial of authority," *Youngstown*, 343 U.S. at 637, "the validity of the President's action . . . hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action," *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981). In such a case, courts then consider, on one hand, whether Congress has "enacted legislation, or even passed a resolution, indicating its displeasure with the" President's action, *id.* at 687, and, on the other, whether

Congress previously has acquiesced in a "*particular exercise* of Presidential authority," *Medellin*, 552 U.S. at 528 (emphasis added). *See Dames & Moore*, 453 U.S. at 686 ("a systematic, unbroken executive practice … never before questioned [by Congress]" can "raise a presumption … of its consent"). Third, when the President's action is "'incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,' and [a court] can sustain his actions 'only by disabling the Congress from acting upon the subject.'" *Medellin*, 552 U.S. at 525 (quoting *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring)).

Two aspects of this case further focus the inquiry specifically on determining the "expressed or implied will of Congress." Initially, the order prohibiting the construction of the Keystone XL Pipeline itself acknowledged that no statute supported the Executive Branch's actions. Instead, the action was solely "based upon [the President's] Constitutional powers" delegated to the Secretary, and "[n]o statute establishes criteria for this determination." Prohibition Decision at 3. As a result, the court must look to other bases for evidence of Congressional approval or disapproval. Second, in considering the "disjunction or conjunction" of the President's powers "with those of Congress," *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring), the paramount consideration is that the Constitution expressly provides Congress with power over the international and domestic commerce at issue here. *See* U.S. Const. art I, § 8, cl. 3 (Domestic and International Commerce Clauses). As a result, Congress cannot be "disabl[ed] ... from acting upon the subject," *Medellin*, 552 U.S. at 525 (quoting *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring)), and the President's action is unconstitutional if it is "incompatible with the expressed or implied will of Congress." *Id*. Indeed, from the very first exercise of Presidential power over cross-border facilities and in the decades following it, the Executive Branch repeatedly acknowledged that, in light of Congress' role in regulating

international commerce, any such Presidential action was subject to, and able to be countermanded by, Congressional action. *See infra* pp. 32-33.

The defendant officials agree that this case is governed by this legal framework and turns on the nature of Congress' will or consent. They wisely do not argue that any Presidential authority could displace or "disabl[e]" Congress' power over the cross-border trade at issue, *see* Defs' Br. 13, 38, and they state that "[t]his Court … need not consider" the scope of Presidential power in the absence of Congressional approval or disapproval. *Id.* at 16. Instead, they rest their argument on the supposed existence of a "long-continued practice, known to and acquiesced in by Congress,'" indicating that it "had been made in pursuance of [Congressional] consent or of a recognized [] power of the Executive." *Id.* (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) (alterations in original)); *see also id*. at 13 (argument based on Congressional "affirm[ance]" and "long accept[ance]" of practice at issue). While no such acquiescence exists, *see infra* Part II, the government's argument, too, rests on the nature of the "implied or expressed will of Congress," including through Congress' expression of "consent."

B. The Executive Branch's Prohibition Of The Development Of The Keystone XL Pipeline Is Incompatible With The Clearly Expressed Will Of Congress

In two separate ways, Congress has clearly expressed its will in a manner incompatible with the Executive Branch's order prohibiting TransCanada from building the Keystone XL Pipeline. One is the specific Congressional direction that the Keystone XL Pipeline should be built without regard to the President's approval or disapproval. *See* Part I.B.1 *infra*. The other is the extensive Congressional legislation directed toward pipeline development and the control of greenhouse gas emissions that is at odds with the Secretary's assertion that the Keystone XL Pipeline cannot be developed. *See* Part I.B.2 *infra*.

1. The 2015 Keystone XL Pipeline Approval Act.

a. *Expression of Congressional will*. In early 2015, both the House and Senate formally considered, voted on, and with more than majority support passed the "Keystone XL Pipeline Approval Act." *See supra* pp. 13-14. That Act provided specifically that TransCanada "may construct, connect, operate, and maintain the pipeline and cross-border facilities" for the Keystone XL Pipeline (defined by reference to the specific, additional permit application TransCanada filed with the Secretary of State). *See* Keystone XL Pipeline Approval Act, S. 1, § 2(a). Following passage of the Act by both the Senate and the House, the Secretary of the Senate formally enrolled the bill and forwarded it to the President as the considered and official expression of the views of the entire Congress. *See* 161 Cong. Rec. S1073 (daily ed. Feb. 24, 2015). As the measure's very title confirms, that action reflected Congress' determination — its will — that the Keystone XL Pipeline is approved and should be constructed and that Congress disapproved of any exertion of Presidential power to the contrary. The measure addressed what had become one of the most controversial issues of the moment. It responded to — and sought to end — the Executive Branch's extensive delay in providing any permit for the pipeline's construction, and it sought to foreclose any order purporting to bar the pipeline's construction. *See supra* pp. 13-14; Complaint ¶¶ 28-49. No clearer and more direct expression of Congress' will on the specific pipeline and issue before this Court could be imagined.

b. *The President's veto of the Act does not alter or negate the expression of Congressional will*. Contrary to the defendants' contention that the President's later veto of the Keystone XL Pipeline Approval Act renders the Act irrelevant (Defs' Br. 40-45), the President's veto does not change how the passage of that Act clearly expressed *Congress'* views and will on the matter at issue. The President's subsequent action does not add to or detract from the

expression of Congress' views reflected in the formal majority votes of both Houses of Congress. For purposes of determining what Congress' will had been, all the President's veto accomplished was to force Congress also to determine separately whether two-thirds of the members of each of its Houses endorsed the Act. Nothing in logic, the nature of how any multi-member legislative body communicates its position, or any separation of powers case suggests that this Court must disregard Congress' expression of will reflected in passage of the Keystone XL Pipeline Approval Act simply because it did not later muster a *super*majority vote — or that the *super*majority threshold must be met before Congress can express its will.

The entire *Youngstown* inquiry and resulting three-part legal framework contradict the defendants' argument that Congress can express its will only through enacted legislation. If that were the case, the separation of powers inquiry would be quite simple: only an enacted statute barring the action would ever render a Presidential action unlawful. Contrary to the *Youngstown* framework, courts would not need to determine the "expressed or implied will of Congress," to consider the alignment of the President's actions with the powers of Congress, or to consider the different *Youngstown* categories. *See Youngstown*, 343 U.S. at 636-49 (Jackson, J., concurring); *Medellin*, 552 U.S. at 525-30; *Dames & Moore*, 453 U.S. at 677-88. Under that view, a President could take any action an enacted statute did not affirmatively prohibit, even where (as here) it is conceded that no enacted statute authorizes that action either.

The Supreme Court's separation of powers decisions are entirely contrary to the defendants' argument for such limited Congressional influence over Presidential authority. Those decisions rely on expressions of Congressional will reflected in actions far less formal than enacted legislation or the two-House majority votes at issue here, and instead look for any evidence that "Congress has in some way resisted the exercise of Presidential authority." *Dames*

& Moore, 453 U.S. at 688. Decisions applying the *Youngstown* framework have looked at expressions of Congressional will or acquiescence reflected in treaty votes limited only to the Senate, in committee reports, in floor statements of individual members of Congress, in bills and amendments that were never enacted, and in the passage of resolutions that never became laws.

For example, in *Dames & Moore*, the Supreme Court indicated that a Congressional resolution expressing displeasure with the President's action would be relevant to determining the President's authority. The Court upheld the President's suspension of certain legal claims by U.S. nationals because Congress had generally acquiesced in claims settlement *and* "[j]ust as importantly, Congress has not disapproved of the action taken here." *Id.* at 687-88. Even "though Congress has held hearings on the Iranian Agreement itself, Congress has not enacted legislation, or *even passed a resolution*, indicating its displeasure with the Agreement." *Id.* (emphasis added, footnote omitted). As a result, the Court was not faced with a situation in which "Congress has in some way resisted the exercise of Presidential authority." *Id.* at 688. Likewise in *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), legislative history provided the basis for the Court to hold that the President had no authority to convey a compensable interest in certain public lands. The Court relied on a Senate committee report, a statement made during a floor debate stating that the President had no such authority, and the absence of any objection to that statement. *See id.* at 328-30. And, in *Medellin*, the Court based its finding that the President acted without constitutional authority on the expression of Congressional will found in just the Senate's vote to consent to a treaty's ratification, as reflecting an implicit determination that the resulting treaty did *not* constitute domestic law or otherwise support the President's action. 552 U.S. at 527. The various Supreme Court cases addressing Congressional acquiescence in or consent to a longstanding practice similarly find the

expression of Congress' will in measures far less formal than enacted legislation. *See infra* pp. 31, 41-43.

Youngstown itself was premised on legislative history reflecting Congress' determination not to affirmatively provide the President with the power at issue in that case. In concluding that the President lacked unilateral authority to seize the nation's steel mills to avert a work stoppage, the Court relied on the legislative history of the Labor Management Relations Act of 1947 and concluded that it revealed Congressional opposition to giving the President seizure authority. 343 U.S. at 586; *see also id.* at 599-602 (Frankfurter, J., concurring). In the House, the opposition was expressed in a vote against an amendment that would have given the President seizure authority. *Id.* at 600-01 & n.4 (Frankfurter, J., concurring); *see also id.* at 586 & n.3 (Opinion of the Court citing this same House vote). In the Senate, the opposition was expressed in a Senate Report and floor statement of the Chairman of the Senate Labor Committee explaining why the bill reported by the Committee, and later enacted into law, did not grant the President seizure power. *Id.* at 599-600 & nn.2-3 (Frankfurter, J., concurring); *see also id.* at 586 & n.4 (Court Opinion citing floor statement of the Senate Committee chair); *id.* at 639 n.8 (Jackson, J., concurring in the analysis and legislative history of Justice Frankfurter's concurrence). But both types of opposition showed "clearly and emphatically" that Congress made a conscious decision — through inaction rather than through the Act itself — not to give the President seizure authority. *Id.* at 602 (Frankfurter, J., concurring); *see also id.* at 586 (Court Opinion finding that legislative history showed that "Congress had refused to adopt that method of settling labor disputes").

In two related respects, the Executive Branch's own practices regarding separation of powers determinations themselves reflect these consistent holdings from the Supreme Court and

conclusively undermine the argument defendant officials now make before this Court. First, the Department of Justice renders formal opinions on separation of powers issues, and those opinions routinely examine Congressional measures short of enacted legislation to determine the will of Congress — including Congressional resolutions and even the statements of individual members of Congress. *See, e.g.*, *Deployment of United States Armed Forces Into Haiti*, 18 Op. Off. Legal Counsel 173, 175 (1994) (resolution expressing sense of Congress that the President would not need express prior statutory authorization to deploy troops into Haiti was either an "implied authorization of Congress" or a case in which Congress had "enable[d], if not invite[d], measures on independent Presidential responsibility" even though it is not enacted law) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)) (Ex. 22); *Authority to Use United States Military Forces in Somalia*, 16 Op. Off. Legal Counsel 6, 13 & n.6 (1992) (sense of Congress resolution is evidence that Congress recognizes the existence of Presidential authority even though it is not enacted law) (Ex. 23). Indeed, the Department of Justice has similarly relied on statements of individual members of Congress to justify the President's limited authority over cross-border facilities, closely related to that at issue here. *See Foreign Cables*, 22 Opp. Att'y Gen. 13, 19 (1898) (finding congressional approval of President Grant's exercise of authority to grant permission for the landing of foreign cables in the "tacit acquiescence of the Congress" and "the expressed approval of *individual members* of that body") (Ex. 3 to Defs' Br.) (emphasis added); *see infra* pp. 32-33.

Second, from President Grant's initial exercise of authority to various related actions over the ensuing decades, the Executive Branch has repeatedly indicated that its actions related to cross-border facilities are subject to Congress' subsequent expression of views. *See infra* pp. 32-33; *see also United States v. Midwest Oil Co.*, 236 U.S. 459, 466-67 (1915) (Executive practice

subject to, and justified as serving to enable, subsequent Congressional determinations). These statements have been based on the recognition that the Constitution commits to Congress, not the President, control over the relevant cross-border trade. *See Foreign Cables*, 22 Op. Att'y Gen. at 16; *Midwest Oil*, 236 U.S. at 471-72. It would be inconsistent with this acknowledged Congressional role, and with Congress' ability to defend and define the exercise of those powers, to count only supermajority votes, and not the formal majority votes of both Houses of Congress, as expressing the "expressed or implied will of Congress" on the matter.

Finally, there is no merit to the defendant officials' remarkable argument that Congressional measures short of enacted legislation must be given effect as expressions of Congress' will when they *approve* of Presidential action but those very same types of measures must be disregarded when they *disapprove* of it. *See* Defs' Br. 42-45. This all-too-convenient position finds no support in any of the *Youngstown* cases, which make clear that Congress can express disapproval other than through enacted legislation. *See supra* pp. 22-24. And, the argument makes no sense: either Congress has or hasn't expressed its will when it has acted, and that fact doesn't change according to whether the content of the view expressed is favorable or unfavorable to the President's unilateral action (or according to whether the expression of Congressional will is later followed by a Presidential veto). Defendants are not even correct that some issue of protecting Presidential powers is at issue: Congress is, in this context, protecting its *own* powers by expressing its consent (or lack thereof) to the President's ability to regulate international and interstate commerce.

Nor does *INS v. Chadha*, 462 U.S. 919 (1983), assist the defendant officials. *Chadha* preceded many of the key cases applying *Youngstown* and does not call the reasoning of any of those decisions into question. Instead, it simply held that an enacted law is required to limit the

Executive Branch's ability to implement *another enacted law*, a function protected by the Bicameralism and Presentment Clauses. *See id*. at 952-55. Here, of course, the Executive Branch concedes that it is not implementing *any* enacted law, so this case presents no such issue (and, even if the Bicameralism Clause were relevant, the Keystone XL Pipeline Approval Act approved by both Houses of Congress satisfied it). Instead, as the Supreme Court has consistently recognized, the relevant consideration for determining whether the President exceeded any non-statutory authority he may have is what Congress has expressly or impliedly indicated as its will, which can be discerned from many measures short of enacted legislation and which in this instance has been made crystal clear. *See supra* Part I.B. That is particularly true here, when the President claims authority over a matter of commerce otherwise committed to Congress and where it would thus be especially inappropriate to require Congress to muster a supermajority vote to defend its own powers.

2. Congress' Regulation Of Pipelines And Greenhouse Gas Emissions

In addition to the Keystone XL Pipeline Approval Act discussed above, Congress' will has also been reflected in a series of statutes designed to ensure the development of oil pipelines while providing the Executive Branch with limited powers to regulate their operation in particular respects — and those limitations especially bar prohibiting the pipeline's construction to further policies related to greenhouse gas emissions.

Congress has enacted a series of statutes predicated on the assumption that oil pipelines will and should be developed and, consistently, has provided the Executive Branch with only limited powers to regulate particular aspects of, but not to prohibit, that development. For example, the Interstate Commerce Act (in its current form) authorizes FERC to approve oil pipeline rates, to prohibit practices that are "unjust or unreasonable," and to prescribe "just, fair,

and reasonable" practices that oil pipelines must follow, 49 U.S.C. app. §§ 1(5), 15(1). *See generally W. Ref. Sw., Inc. v. FERC*, 636 F.3d 719, 724 (5th Cir. 2011) (describing regulatory scheme); *see also supra* pp. 5-6. Congress further focused Executive Branch regulatory power through the Pipeline Safety Act, 49 U.S.C. § 6101 *et seq.*, leading PHMSA to issue comprehensive safety regulations that govern the lifecycle of an oil pipeline from design through construction, operation, and maintenance. *See supra* p. 6. Congress also passed legislation implementing the North American Free Trade Agreement ("NAFTA") and the World Trade Organization Agreement ("WTO"), which encompass the cross-border energy commerce reflected in the Keystone XL Pipeline and underscore that such commerce is in the national interest (while limiting when and how the Executive Branch may restrict such commerce (which includes investment)). *See* Complaint ¶¶ 79-83. Through all these statutes, Congress has established criteria and processes guiding and limiting when oil pipelines may be regulated, and has displaced any separate discretionary authority the Executive Branch may have to prohibit the development of particular oil pipelines altogether. This is especially true where, as here, the Keystone XL Pipeline would comprise an enormous domestic infrastructure project and would be an extension from an existing, predominantly U.S. pipeline system across the U.S.-Canada border.

In particular, Congress clearly precluded the Executive Branch from prohibiting the development of oil pipelines as a means to advance policies related to greenhouse gas emissions. The Clean Air Act, 42 U.S.C. § 7401 *et. seq.*, provides the Executive Branch with robust but discrete and limited powers to advance greenhouse gas emission policies, and the President cannot otherwise regulate interstate or international commerce to advance those policies. The Act authorizes EPA to regulate greenhouse gases emissions from moving sources, such as cars,

trucks, and aircraft, *see Massachusetts v. EPA*, 549 U.S. at 528-29, and emissions from stationary sources, such as oil refineries and power plants, *see Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2435 (2014). The statute sets forth Congress' "primary goal" to "encourage or otherwise promote reasonable Federal, State, and local governmental actions" for "pollution prevention," but it emphasizes that any such actions must be "*consistent with the provisions of [the statute]*." 42 U.S.C. § 7401(c) (emphasis added). The Supreme Court, too, has recognized that the Act limits EPA's power to regulate greenhouse gas emissions, and that those limits must be enforced to preserve the "Constitution's separation of powers" under which "Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446 (citing *Medellin*, 552 U.S. at 526-27). That faithful execution of the law does not extend to prohibiting the construction of cross-border oil pipelines such as the Keystone XL Pipeline.

In the only appellate case addressing the President's independent powers over cross-border facilities (and the only case that considers the effect of domestic regulation on those powers), the Second Circuit and the United States District Court for the Southern District of New York concluded that far less extensive statutes stripped the President of any constitutional authority to prohibit development of the cross-border facility otherwise governed by those statutes — especially a facility extending outside the United States to another country. At issue was the President's authority to preclude the Western Union Telegraph Company from extending a submarine cable offshore from its domestic network to connect with the telegraph lines of a foreign company. *United States v. W. Union Tel. Co.*, 272 F. 311 (S.D.N.Y.), *aff'd*, 272 F. 893 (2d Cir. 1921), *rev'd as moot on consent of the parties*, 260 U.S. 754 (1922). The renowned District Court Judge Augustus Hand found that because Western Union's telegraph service was

regulated under the Interstate Commerce Act and because the company had a right under that statute and the Post Roads Act to construct and operate its telegraph business in the United States, the President had exceeded his constitutional authority in attempting to bar Western Union from extending its network. *Id.* at 320-22; *id.* at 323 (developing the cross-border facility was thus "an act within a field as to which Congress has generally legislated so as to free it from the executive control sought to be exercised"). The President's power, he concluded, was especially weak when directed (as in this case) to a cross-border extension of a U.S. network out of the nation's territory. *Id.* at 321-22. The Second Circuit affirmed, concluding that the underlying power over cross-border facilities "is in Congress," that the President's act reflected no long-standing practice, and that the Post Roads Act would also likely bar the assertion of power. 272 F. 893, 894 (2d Cir. 1921) (per curiam).

Justice Jackson cited this *Western Union* decision in his concurring opinion in *Youngstown*, *see* 343 U.S. at 636 n.2, and addressed the decision in his hand-written notes about the case, *see* Adam J. White, *Justice Jackson's Draft Opinions in the Steel Seizures Cases*, 69 Alb. L. Rev. 1107, 1110-11 (2006) (Ex. 24). The *Western Union* decision resonates in Justice Jackson's conclusion that the President had no authority to seize the steel mills because "Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure." *Youngstown*, 343 U.S. at 639 (Jackson, J., concurring). That same reasoning and *Western Union* itself apply here. Through statutes regulating oil pipelines and greenhouse gas emissions, Congress has covered the field by providing the Executive Branch with limited regulatory powers that are inconsistent with any broad Presidential power to prohibit the Keystone XL Pipeline's construction altogether, and especially any power to do so to advance greenhouse gas emission policies.

II. CONGRESSIONAL ACQUIESCENCE SUPPORTS ONLY LIMITED REGULATION TO ENSURE PIPELINE COMPLIANCE WITH DISCRETE, BORDER-RELATED OPERATIONAL REQUIREMENTS, NOT BROAD POWER TO PROHIBIT CONSTRUCTION OR LIMIT INTERNATIONAL TRADE FOR REASONS UNRELATED TO THE BORDER

Even where, as here, the challenged Executive Branch action intrudes on the Congressional power over international trade, Congress may through acquiescence amounting to consent empower the President to continue to undertake an established, longstanding practice. Only a "'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [undertaken] in pursuance of its consent.'" *Dames & Moore*, 453 U.S. at 686 (first alteration in original) (quoting *Midwest Oil*, 236 U.S. at 474). For a practice to be so authorized by Congressional consent, the "particular[r] ... practice" must be longstanding rather than an "unprecedented action," *Medellin*, 552 U.S. at 532, and it must "have been allowed to be so often repeated as to crystallize into a regular practice," *Midwest Oil*, 236 U.S. at 472-73, one "long pursued to the knowledge of the Congress and never before questioned." *Dames & Moore*, 453 U.S. at 686 (quoting *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring)).

These principles confirm that the Executive Branch's challenged action exceeded the President's authority. The "long-continued practice" known to Congress and subject to its consent is, at most, the Executive Branch's limited operational regulation designed to facilitate cross-border pipelines and directly related to the facility's crossing of the border. *See* Part II.A *infra*. The Executive Branch's prohibition on construction of the Keystone XL Pipeline, in contrast, was an "unprecedented action" that has nothing to do with regulating pipeline operation, addressing any operational concern related to the border crossing, or indeed addressing any aspect of border protection. Congress' adverse response, in 2011-2015, to the Executive Branch's anticipated disapproval of the pipeline confirms the unprecedented nature of

the Executive Branch action and, at a minimum, confirms the absence of any relevant Congressional consent or acquiescence. *See* Part II.B *infra*. The defendants' arguments to the contrary misstate TransCanada's argument, have been rejected repeatedly by the Supreme Court, and ignore the actual practice that Congress might be understood to have ratified or consented to. *See* Part II.C *infra*.

A. Congress Has Acquiesced At Most In The President's Regulation To Ensure That Pipeline Operation Addresses Problems Related Directly To The Border Crossing

As set out at length in the Complaint, there is a longstanding, unbroken practice related to border-crossing facilities of the sort that may establish Congressional acquiescence amounting to consent. But that practice is quite narrowly focused on regulating the operation of cross-border facilities and is quite at odds with the decision at issue in this case.

Beginning with President Grant, certain Presidents have exercised a limited power to regulate the operation of cross-border facilities to address certain, discrete regulatory difficulties arising from the crossing of the border itself. This power presumed that the facilities would be approved as providing benefits associated with international trade and, in the formative decades of the practice, was acknowledged to be subject to Congressional action. President Grant's message to Congress explaining his presumed approval and limited regulation of the landing of foreign cables framed and illustrates this tradition. He stated that he had acted only "[i]n the absence of legislation by Congress" and would continue to allow the construction of facilities subject only to certain, limited conditions "unless Congress otherwise direct[s]." *Foreign Cables*, 22 Op. Att'y Gen. at 16, 18. Those conditions, he explained, were that the foreign state owner of the cable must provide U.S. citizens with reciprocal landing rights, and that the cable must be operated in a manner that did not extend or create a monopoly, must provide priority access to government messages, and must conform to applicable rate regulation. *Id.* at 17.

Although subsequent Administrations wavered over whether the President had any such power over international trade in the absence of express statutory authorization, *see* Complaint ¶ 97, President Grant's framework for authorizing cross-border cables was affirmed in 1898 by Acting Attorney General Richards and implemented more widely thereafter. Richards defended the President's power, as set forth by President Grant to, "in the absence of legislative enactment, … control the landing of foreign submarine cables" in order to impose conditions to "forbid unjust discriminations, prevent monopolies, promote competition, and secure reasonable rates." *Foreign Cables*, 22 Op. Att'y Gen. at 27. The Attorney General acknowledged that the "Executive permission to land a cable is, of course, subject to subsequent Congressional action." *Id.* Prior Secretaries of State had similarly and repeatedly indicated that any Presidential power in this respect was subject to Congress' subsequent action. *Id.* at 19-22.

The Richards opinion reflected the most extensive Executive Branch defense of the limited exercise of Presidential power and served as the basis for subsequent approvals of cross-border facilities in the following decades. *See, e.g.*, *Granting of License for the Constr. of a Gas Pipe Line*, 38 Op. Att'y Gen. 163 (1935) (Ex. 8 to Defs' Br.); *Diversion of Water from Niagara River*, 30 Op. Att'y Gen. 217 (1913) (Ex. 7 to Defs' Br); *Wireless Telegraph-Int'l Agreement*, 24 Op. Att'y Gen. 100 (1902) (Ex. 6 to Defs' Br). More recent defenses in court of the President's power over cross-border oil pipeline facilities have also traced the power to these Attorney General decisions and the limited, underlying practice they addressed. *See, e.g.*, Memorandum in Support of Defendants' Motion to Dismiss Plaintiffs' Complaint at 3-4, *The Sisseton-Wahpeton Oyate v. Dep't of State*, No. 3:08-cv-03023-CBK (D.S.D., Feb. 18, 2009) (Ex. 25); Memorandum in Support of Defendants' Motion to Dismiss at 12-13, *NRDC v. Dep't of State*, No. 1:08-cv-01363-RJL (D.D.C., Oct. 20, 2008) (Ex. 26).

For various types of cross-border networked facilities, Congress created a statute-based permitting process that affirmed this practice of limited regulatory oversight and eliminated the President's unilateral power over cross-border facilities. *See* Complaint ¶¶ 104-105. These statutes limited the President's regulation of submarine cables in a manner similar to the operational considerations set forth by President Grant, and vested regulatory authority over natural gas pipelines and electricity facilities in administrative agencies and not in the President. *See* 47 U.S.C. §§ 34-35 (current version of the Kellogg Act enacted in 1922 to regulate submarine cables); 16 U.S.C. § 824(e) (current version of the Federal Water Power Act enacted in 1920 to regulate electricity facilities); 15 U.S.C. § 717b(a), (c)) (current version of the Natural Gas Act enacted in 1938 to regulate natural gas pipelines); Complaint ¶¶ 104-105.[2]

The practice of any systematic regulation of oil pipelines developed much later, and it, too, took the form of only limited operational regulation. The government cites only one oil pipeline permit issued before 1968, and before then no formal orders or processes of Executive Branch oversight addressed oil pipelines. In 1968, President Johnson issued Executive Order 11423, which established a process for issuing Presidential permits for the types of cross-border facilities, including oil pipelines, that Congress had not by statute directed the Executive Branch to regulate. *See supra* p. 7. In 2004, President George W. Bush partially modified that Executive Order by issuing Executive Order 13337 to "expedite reviews of permits as necessary to accelerate the completion of energy production and transmission projects." 69 Fed. Reg. at 25299. Executive Order 13337 thus expressly confirmed that the permitting process was

[2] President Roosevelt and President Eisenhower thereafter established procedures governing how the Executive Branch would exercise powers over the cross-border facilities authorized by the Federal Power Act, the Natural Gas Act, and the Kellogg Act. *See* Exec. Order No. 10530, 19 Fed. Reg. 2709 (May 12, 1954) (cable connections addressed by the Kellogg Act) (Ex. 14 to Defs' Br.); Exec. Order No. 10485, 18 Fed. Reg. 5397 (Sept. 9, 1953) (natural gas and electricity transmission facilities) (Ex. 15 to Defs' Br.); Exec. Order No. 8202, 4 Fed. Reg. 3243 (July 15, 1939) (Ex. 17 to Defs' Br.). Executive Orders 10530 and 10485 remain in effect, as subsequently modified.

designed to *facilitate* the expeditious development of cross-border oil pipelines. The Secretary purported to act pursuant to that order when he prohibited the construction of the Keystone XL Pipeline. *See* Prohibition Decision at 2.

The actual practice of how the Executive Branch has issued permits to cross-border oil pipelines (and to other cross-border networked facilities) confirms that any "longstanding, unbroken practice" is confined to the narrow, operational regulation described in the initial assertions of Presidential power and continued in the modern era — until the break from tradition with the prohibition of the Keystone XL Pipeline's construction. That traditional practice ensures the development of pipeline facilities is subject only to discrete operational requirements that operators can readily — and do routinely — meet. As the Complaint described at length, oil pipeline permits have been routinely granted for decades under this limited regulatory approach. Complaint ¶¶ 108, 110. That is, until the challenged action, no President had denied a permit for a major, cross-border oil pipeline, much less denied any such permit because of any perceived or actual hostility to the nature of the cross-border trade facilitated by the pipeline or to advance foreign policy goals unrelated to the border crossing. *Id.* ¶¶ 108, 112-113. The government official defendants, who are in full possession of any contrary information, effectively concede this limited scope of prior regulation and do not cite any examples to suggest that the Executive has ever before departed from the limited, operational regulation that has routinely been applied in cross-border oil pipeline permits.

B. Congress Has Clearly Not Acquiesced In Or Consented To Any Practice Reflected In The Decision Prohibiting Construction Of The Keystone XL Pipeline

The plain terms of the State Department decision denying the permit for the Keystone XL Pipeline very clearly reflect an extreme departure from the historical practice developed over the past decades with Congress' apparent knowledge and consent. The decision acknowledges that

TransCanada had agreed to comply with all the usual operational requirements traditionally associated with Presidential permits for cross-border oil pipelines. Prohibition Decision at 14. The decision was instead a blunt prohibition on the construction of the pipeline: no adjustment to the operation of the pipeline would enable TransCanada to construct the Keystone XL Pipeline. Nor did the decision even attempt to invoke what would be novel, border-related interests related to bilateral relations with Canada or the impact of the pipeline on the United States: it conceded that denying the permit would impair relations with Canada, *id.* at 25, and that granting the permit would benefit the United States with lower energy prices, increased employment, and increased energy security, *id.* at 29-30. The decision did not even rest on any supposed and indirect harm, unrelated to the border, that might result from greenhouse gas emissions associated with the pipeline. *Id.* Instead, the decision reflected the most extreme and unprecedented exercise of power: the prohibition on construction based on the President's asserted foreign policy interests in dealing with foreign nations on climate issues completely unrelated to the border. *Id.* at 31. And even that asserted nexus to foreign policy interests was extremely tenuous: the decision's rationale was that because foreign audiences perceived that the Keystone XL Pipeline would "precipitate the extraction and increased consumption of particularly GHG-intensive crude oil" (contrary to the U.S. government's own assessment), prohibiting the pipeline's construction would demonstrate the United States' commitment to fighting greenhouse gases and buttress its "leadership" in negotiating with foreign powers regarding greenhouse gas emissions. *Id.*

The defendant officials' initial brief in this case confirms the unprecedented nature of the Executive Branch's decision. The brief cites no prior instance when the President regulated cross-border pipelines in any manner other than the limited operational review outlined above.

More importantly, it points to no instance when the President has prohibited the construction of any cross-border oil pipeline, much less any denial that would reflect a practice consistent with the rationale employed in the order. (Nor does it do so for any other type of networked facility.) If the Executive Branch's action is indeed "unprecedented," it cannot be upheld based on Congressional acquiescence and consent. *Medellin*, 552 U.S. at 532.

The absence of Congressional consent and acquiescence is further confirmed by Congress' reaction to the controversy surrounding the Executive Branch's delay and potential adverse action concerning the Keystone XL Pipeline. The multi-year delay alone marked a departure from historical practice, and Congress in late 2011 sought to end that delay by requiring a Presidential determination within a fixed period of time. The resulting 2011 Payroll Tax Act required the President to make a decision within 60 days, see Pub. L. No. 112-78, § 501(a), 125 Stat. at 1289, and, if the President failed to act, deemed the permit granted subject to the narrow regulatory conditions (consistent with and thus reaffirming the traditional practice of limited, operational regulation). *See id*. § 501(b)(3), 125 Stat. at 1290; supra pp. 11-12. And, in case the President did depart from the established tradition through an outright denial unrelated to operational concerns, the Act required the President to report to Congress the basis for any denial, *see id.* § 501(b)(2), so that Congress could further express its views on the matter. Because the 2011 Payroll Tax Act was clearly part of the pattern of Congress' expressing its disapproval of the President's delay and potential further departure from the established tradition of narrow operational regulation, *see supra* pp. 9-14, the defendants are quite wrong in claiming that the Act in some manner reflects Congress' consent to an open-ended Presidential power, *see*

Defs' Br. 29-30, as the subsequent Congressional actions related to the Keystone XL Pipeline further confirm.[3]

Once the President responded to the 2011 Act by effectively declining to make a final determination, *see supra* p. 12, Congress did express those further views to the contrary. Initially, the House as a whole and various committees passed various measures that would either limit the President's power over cross-border facilities altogether or do so with respect to at least the Keystone XL Pipeline. Complaint ¶ 87. Finally, Congress' opposition to the anticipated departure from established practice culminated in both Houses of Congress passing the Keystone XL Approval Act. However this Court resolves the issues presented by that Act addressed above, *see supra* Part I.B.1, the Act absolutely confirms that Congress did not acquiesce "in this particular exercise of Presidential authority," *Medellin*, 552 U.S. at 528.

C. The Defendants' Additional Arguments Regarding Congressional Acquiescence And Consent Are Without Merit

The following sections address why there is no merit to defendant officials' additional arguments that (i) the President cannot be found to lack all authority over cross-border facilities; (ii) a long-standing practice of Presidential permits for border facilities justifies the order; and (iii) the President has reserved broad powers over cross-border facilities.

1. The Need For Some Measure Of Federal Authority

Much of defendant officials' brief addresses an issue this case simply doesn't present: whether the President can exercise *any* authority over cross border facilities in the absence of an authorizing statute. Defs' Br. 13-16. The defendants argue at some length, for example, that

[3] For like reasons, the defendants' reliance on the testimony of an Assistant Secretary of State to a House committee, explaining the factors the State Department would consider in making that "national interest" determination for the Keystone XL Pipeline (Defs' Br. 29-30), undermines rather than supports the defendants' argument. That testimony simply confirmed that the Executive Branch was considering taking unprecedented action, which prompted the multiple and unambiguous expressions of Congressional disapproval and non-acquiescence in the novel exercise of powers over cross-border facilities. *See supra* pp. 13-14.

national interests in territorial integrity or sovereignty might provide the President with at least some measure of power had Congress not expressed any view. *Id.* They also repeatedly assert that TransCanada's position would leave the border without any protection, *id.* at 1, 36-37, or contradicts prior statements in other litigation acknowledging that the President has some authority over cross-border oil pipelines. *Id.* at 36-37.

Whether the President would have any independent authority absent Congress' acquiescence or indication of its preference, however, has no bearing on this case. Instead, as both parties ultimately agree, whether the Presidential power exists depends on the "expressed or implied will of Congress," including as manifested through acquiescence to a longstanding practice. *See* Defs' Br. 12-32; *supra* pp. 18-20. Even if the issue of independent authority were germane, however, it would be of no assistance to the defendants. Defendants do not explain how the President's having authority to regulate international commerce, a matter expressly committed to Congress by the Constitution's Domestic and International Commerce Clauses, could be necessary to protect the nation's territorial integrity, or how any such interest in territorial integrity could support the particular decision here, which prohibits development of a pipeline to advance the President's negotiating leverage in foreign affairs unrelated to the border with Canada. They point to no practice or acknowledgement of any such Presidential power by Congress or any court that might support application of that authority here; instead, prior Administrations have repeatedly conceded and acknowledged that Congress' role is paramount in addressing such cross-border facilities in light of its power over cross-border commerce and that the President acts subject to that paramount role. *See supra* pp. 32-33.

Similarly, the defendants simply mischaracterize TransCanada's position and the nature of its challenge here. As outlined above and at length in the complaint, TransCanada

acknowledges that a tradition of operational regulation undertaken by the Executive Branch exists and has been acknowledged by Congress. TransCanada argued in favor of that Presidential power in other litigation (*see* Exs. 19-21 to Defs' Br.) and has consistently participated in and complied with the limited regulatory proceedings and operational conditions reflecting that tradition in applying for permits for the Keystone System (*see supra* pp. 3-4). To the extent the resulting judicial decisions support the President's limited power exercised previously over prior pipelines, those decisions support TransCanada's arguments. Had the Secretary of State simply imposed the operational requirements on the Keystone XL Pipeline that had been imposed on the Keystone I Pipeline or other pipelines before that, TransCanada would have acknowledged that to be part of the established, longstanding practice known to Congress. But once the President acted in a much different and unprecedented manner, and prohibited the pipeline's construction altogether (and once Congress passed the Keystone XL Approval Act in response), that presented an entirely different question. And that broad and unprecedented claim of authority to bar the pipeline's construction completely in order to enhance international negotiating leverage, and not any question of whether the President is without power altogether over the border, is the issue presented by this case.

2. Scope Of The Practice Related To Cross-Border Facilities

The defendant officials' principal argument regarding the issue that *is* presented by the case is no more successful. Defendants argue that Congress has acquiesced in the particular type of order at issue in this case simply because there is generally "a long history of Presidents exercising authority over border-crossing facilities." Defs' Br. 18-29. They make the related argument that the reasons provided or purpose for denying the permit cannot be considered in assessing the constitutionality of the challenged order. *Id.* at 33-36. These arguments are,

however, contrary to controlling cases and inconsistent with the nature of Congress' acquiescence and expression of will in relation to cross-border facilities.

In other cases, the Supreme Court has repeatedly rejected very similar arguments by the government. In nearly every case where the Supreme Court has limited Presidential power or found it lacking, the government unsuccessfully defended the particular assertion of Presidential power by arguing that a very general practice existed and had been accepted by Congress. In rejecting those arguments, the Supreme Court looked beneath the asserted general practice and examined instead the particular practice at issue in light of the context in which it arose and the President's asserted rationale. For example, in *Medellin*, the President claimed that he had the power to direct state courts to enforce a judgment of the International Court of Justice, and invoked a series of prior instances in which the President had "assumed responsibility for responding to previous ICJ decisions" without Congressional opposition. *See* U.S. Amicus Br. in *Medellin* at 19, 552 U.S. 491 (Ex. 27). The Court held that none of the prior instances supported Congressional acquiescence in "this *particular* exercise of Presidential authority," because none involved the President's assertion of the power "to establish on his own federal law or to override state law." *Medellin*, 552 U.S. at 528, 530 (emphasis added).

In *Hamden v. Rumsfeld*, 548 U.S. 557 (2006), the Court considered the legitimacy of particular military commissions established at Guantanamo, and the government argued that a series of Congressional actions reflected an endorsement of the President's general power to "invoke military commissions when he deems them necessary." *Id.* at 593 (quoting government's brief). The Court rejected the government's general characterization of the accepted practice, ruling instead that Congress had acknowledged at most the President's authority to establish commissions when justified by the law of war. *Id.* at 594-95. Even in

Dames & Moore, where the Court upheld the President's power, the government argued that Congress had endorsed the general practice of claims settlement, but the Court closely examined whether there was any evidence, including legislative proceedings, whereby Congress expressed its view regarding the particular type of power exercised (or regarding the particular Presidential action challenged before the Court). *See Dames & Moore*, 453 U.S. at 679-84, 686-88; *cf. Kent v. Dulles*, 357 U.S. 116, 127-28 (1958) (where statutory grant of power to issue passports was "expressed in broad terms," but that same power had in practice been "exercised quite narrowly" by the State Department, Court would "hesitate to impute to Congress, when [it later] made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose").

Indeed, in *Youngstown* itself, the Court rejected an argument very similar to the defendants' argument in this case. There, the government defended President Truman's seizure of the steel mills on the ground that "other Presidents without congressional authority have taken possession of private businesses in order to settle labor disputes." *Youngstown*, 343 U.S. at 588. The dissent adopted the government's argument that Congress had broadly acquiesced in a general practice of seizures undertaken by the President, *id.* at 685-99 (Vinson, J., dissenting), an argument that closely resembles the defendants' argument here that Congress has broadly acquiesced in a general practice of issuing or withholding permits for border-crossing facilities. The Court majority was not persuaded, and its members focused instead on the particular purposes and justifications related to the particular seizure at issue before the Court. As Justice Jackson explained, the "chief" case on which the government relied had only "superficial similarities with the present case" that yielded, "upon analysis," to distinctions that left it unable

to provide any authority for his actions. *Id.* at 648-49 (Jackson, J., concurring); *see also id.* at 611 (Frankfurter, J., when the individual context and justification of the challenged order was considered, he found "[n]o remotely comparable practice" that authorized the President's seizure of the steel mills).

These leading cases are enough to defeat the defendants' claim that this Court cannot consider the nature and rationale of the challenged order, but even the cases they invoke do not apply by their own terms to a challenge to the President's authority. For example, the defendants invoke *Dalton v. Specter*, 511 U.S. 462, 475 (1994), *see* Defs' Br. 34, but that decision expressly indicates that a court *can* consider the rationale of an order where a claim, as here, "concerns … a want of [Presidential] power," *Dalton*, 511 U.S. at 474 (alteration in original). TransCanada does not seek a determination that the State Department's decision was unwise policy or an arbitrary exercise of Presidential discretion, which may well be conclusions beyond the power of the courts (and which is the import of the cases the defendants cite at Br. 33-36); instead, TransCanada seeks a determination that the decision exceeded the President's power granted by the Constitution. As the separation of powers cases just canvassed hold, and as confirmed by *Dalton* itself and the many jurisdictional cases outlined in the Complaint, at paragraphs 63-64, the court may consider the nature and rationale of the decision to determine if it is within the Executive's authority to issue.

3. General Reservations Of Broader, Unexercised Powers

Finally, the defendants attempt to argue that Congress acquiesced in and consented to a broader, open-ended practice of Presidential decisionmaking by invoking (1) an oil pipeline permit issued by President Kennedy that was subject to such future conditions as the President "may see fit" to impose; and (2) language in the current Executive Order stating that the

Secretary of State may grant permits for cross-border facilities that serve the "national interest." Defs' Br. 29-32.

In the absence of any actual instances where Presidents denied permits or regulated operators on any broad or open-ended basis, these statements in orders and permits have nothing to do with what Congress knew and what it can be understood to have consented to. For the Executive to acquire power through congressional acquiescence, there must be a "systematic, unbroken, executive practice," *Dames & Moore*, 453 U.S. at 686 (quoting *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring)), which is comprised of acts "so often repeated as to crystallize into a regular practice." *Midwest Oil*, 236 U.S. at 472-73. And the practice must be "long pursued to the knowledge of the Congress." *Dames & Moore*, 453 U.S. at 686 (quoting *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring)). Thus, what matters for purposes of congressional acquiescence is the way in which the Executive has actually exercised permitting authority over cross-border facilities, not the way in which the Executive described his power in his own Executive Order. As described above, the "unbroken executive practice" was, until the challenged action, that pipelines would be routinely approved and subjected only to operational regulation. *See supra* pp. 34-35.

Second, other acts of Congress preclude an inference of consent to an open-ended border authority, much less an authority so broad as to support the challenged action here. For example, that broad power to deny permits based on, for example, the nature of lawful commerce or the impact of commerce on foreign affairs would be contrary to Congress' efforts to *advance* international trade and investment. These measures include the broad field of statutes addressing oil pipelines and their development, canvassed above, which are designed to facilitate the development of networked facilities, including oil pipelines. *See supra* pp. 27-28. They also

include enacting legislation approving and implementing NAFTA and the WTO Agreement. *See supra* p. 28.[4] Under all these various statutes, limitations on such cross-border trade are permitted only in limited circumstances and generally only for established regulatory objectives set out in the statutes and limited to overseeing the operation of the cross-border facility. They are, therefore and as one would expect, fully harmonious and entirely consistent with Congress' consent to a traditional practice of the Executive Branch's regulating cross-border facilities only to impose appropriate operational conditions but not to exercise any open-ended power to evaluate whether oil pipelines might proceed at all even once those appropriate regulatory conditions are satisfied.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss or, in the alternative, for summary judgment should be denied, and Plaintiffs' motion for summary judgment should be granted.

[4] Defendants point by analogy to the Natural Gas Act, as adopting a "public interest" standard for FERC to apply to natural gas facilities that is "similar" to the standard in Executive Order 13337. Defs' Br. 30 n.11. A statute empowering an independent administrative agency to issue a permit has no bearing on what independent, non-statutory powers Congress may have understood the President to possess. In any event, the Act undermines defendants' point. It states that the importation or exportation of natural gas "to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay." 15 U.S.C. §717b(c). Indeed, "FERC has drawn from the goals of NAFTA and its interpretation of [15 U.S.C. §717b] when identifying the required scope of its public interest determination in evaluating applications for Presidential Permits." L. Luther & P. Parfomak, *Presidential Permit Review for Cross-Border Pipelines and Electric Transmission*, 9 (Congressional Research Service, Aug. 6, 2015) (Ex. 28) (citing cases).

Dated: May 2, 2016

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CERTIFICATE OF SERVICE

I certify that on this 2d day of May 2016, a copy of Plaintiffs' Brief In Opposition To Defendants' Motion To Dismiss Or In The Alternative For Summary Judgment, And In Support Of Plaintiffs' Cross-Motion For Summary Judgment, and a copy of Plaintiffs' supporting Exhibits, were filed with the Court through the ECF system, which provides electronic service of the filing to all counsel of record who have registered for ECF notification in this matter.

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