

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS**

TRANSCANADA KEYSTONE XL  
PIPELINE, LP and TC OIL PIPELINE  
OPERATIONS INC.,

*Plaintiffs,*

v.

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 the Interior,

*Defendants.*

No. 4:16-cv-00036

**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS  
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT  
AND  
OPPOSITION TO PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

At issue in this lawsuit is a determination by the Secretary of State, with the concurrence of the President of the United States, that allowing the proposed Keystone XL pipeline to cross the U.S. border and transport millions of gallons of crude oil into the United States daily would be contrary to the national interest and undermine the United States' foreign policy objectives. Defendants demonstrated in their opening brief that the President's Article II powers as Commander-in-Chief and the nation's sole organ in foreign relations encompasses this permitting authority, as confirmed by "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned." *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J. concurring)). TransCanada does not dispute the nearly 150 years of the Executive's exercise of this independent constitutional authority over border crossings. Nor does TransCanada rebut Defendants' showing that because the President's authority to deny a permit for the Keystone XL project was explicitly affirmed by Congress in the Temporary Payroll Tax Cut Continuation Act of 2011, § 501, Pub. L. No. 112-78, 125 Stat. 1280 (2011) ("Payroll Tax Act"), this case falls within either the first category of Justice Robert Jackson's analytical framework in *Youngstown*, or the second category's "zone of twilight," where the concurrent, or unspecified distribution of, powers of the Executive and Congress has been settled by the President's exercise of the authority and longstanding congressional acquiescence. *Youngstown*, 343 U.S. at 637-38 (Jackson, J. concurring).

Instead, TransCanada argues that Congress' power under the Commerce Clause of the Constitution conflicts with and should override the President's permitting authority. But Congress has not exercised its Commerce power in this area. TransCanada itself acknowledged when defending the Presidential permit for another Keystone pipeline that "Congress has chosen



not to regulate oil pipeline border crossings,”<sup>1</sup> and “the President is entirely unconstrained by statute with respect to border crossing for oil pipelines.”<sup>2</sup> In challenging the President’s authority now, TransCanada argues that unsuccessful attempts by members of Congress to enact legislation that would have approved the Keystone XL project, including passage of a bill that was vetoed by the President, are sufficient to override the President’s permitting authority. Under TransCanada’s theory, even “floor statements of individual members of Congress” would be sufficient to supersede long-recognized constitutional authority of the President. Pls’ Opp., ECF No. 49 (May 2, 2016) at 23. In support of this theory, TransCanada invokes Justice Jackson’s third *Youngstown* category, which is “[w]hen the President takes measures incompatible with the expressed or implied will of Congress.” *Youngstown*, 343 U.S. at 637-38. In that situation, the President’s power “is at its lowest ebb,” and the President’s action can be sustained “only by disabling the Congress from acting upon the subject.” *Id.*

TransCanada’s position hinges on the proposition that views of members of Congress never enacted into law can constitute the “will of Congress” and trump the longstanding exercise of Presidential power. That is simply wrong. Justice Jackson himself taught that Congress is “expected to *speak its will* with considerable formality, after deliberation assured by three readings in each House. Its exact language requires Executive approval, or enough support to override a veto.” Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 125 (1949) (emphasis added). Indeed, not a single case cited by TransCanada stands for the proposition that legislative activities not resulting in the enactment of law could override a longstanding Presidential authority. If that were so, the constitutional requirements of Bicameralism and Presentment would be reduced to irrelevance, and the result here would be that, through judicial action, the Keystone XL pipeline would be permitted to cross our border

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<sup>1</sup> Defs’ Ex. 20 (*Sisseton-Wahpeton Oyate v. Dep’t of State*, 3:08-cv-3023, TransCanada’s MTD Reply brief, ECF No. 48 (Apr. 13, 2009)), ECF No. 42-6 (Apr. 1, 2016) at 15.

<sup>2</sup> Defs’ Ex. 21 (*NRDC v. Dep’t of State*, 1:08-cv-01363, TransCanada’s MTD brief, ECF No. 25 (Oct. 20, 2008)), ECF No. 42-6 (Apr. 1, 2016) at 17.

when *neither* of the political branches has provided consent. That would not be a correct application of *Youngstown* under the constitutional scheme nor would it be appropriate as a matter of law.

The fundamental flaw in TransCanada’s argument is that it conflates the type of showing and measures relevant for different *Youngstown* categories. In the context of the second *Youngstown* category, where the President exercises his own independent constitutional authority “in absence of either a congressional grant or denial of authority,” *Youngstown*, 343 U.S. at 637, legislative activities short of enactments into law serve to show that Congress had knowledge of the Executive’s exercise of authority and the opportunity to act. Congress’ subsequent failure to enact a conflicting or superseding law therefore may be deemed an implicit approval of the Presidential authority or action. Thus, the fact that bills contrary to the President’s action had been introduced but did not garner sufficient approval to become law is properly an indication of congressional acquiescence. *See, e.g., Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 429 (2003); *Dames & Moore*, 453 U.S. at 682 n.10, 685-86 & 686 n.11; *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983). But such abortive legislative activities cannot override Executive authority or action. *See INS v. Chadha*, 462 U.S. 919, 953 (1983). Nor, it follows, can they be given effect as expressions of congressional will for purposes of the third *Youngstown* category.

TransCanada alternatively argues with respect to the second *Youngstown* category that any congressional acquiescence in the Executive’s authority over oil pipeline border crossings extends to only the Executive’s grant of permits (after minor regulatory adjustments), not the denial of permits. But that logic cannot hold; any meaningful permitting authority must include the authority to deny the permit. This has been the premise of Presidential action since President Ulysses Grant first acted to control the landing of a foreign cable on U.S. shores in 1869 based upon “his power to prevent its landing altogether.” *Foreign Cables*, 22 Op. Att’y Gen. 13, 18 (1898) (Defs’ Ex. 3, ECF No. 42-3 (Apr. 1, 2016)). No one has a right to physically connect the sovereign territory of the United States to a foreign country without the Government’s consent. And contrary to TransCanada’s contention, compliance with regulatory schemes that may relate

to oil pipelines located in the United States does not constitute or establish the Government's consent to cross the border. In the absence of any statutory authority governing such consent, the President has the responsibility and authority to determine whether to grant or deny permission to build cross-border infrastructure. As Justice Jackson explained, in the second *Youngstown* category, where the President and Congress have concurrent authority or the distribution of authority is uncertain, the absence of congressional legislation may "as a practical matter, enable, if not invite, measures on independent presidential responsibility." *Youngstown*, 343 U.S. at 637 (Jackson, J. concurring). This is certainly the case when the subject matter implicates complex foreign policy interests, including potential national security concerns, as the construction of cross-border conduits does.

Finally, the history of congressional acquiescence in this area solidly refutes TransCanada's claim. Most significantly, in the only statute on Keystone XL that actually became law, Congress provided that "[t]he President shall not be required to grant the permit . . . if the President determines that the Keystone XL pipeline would not serve the national interest." Payroll Tax Act, § 501(b)(1), 125 Stat. at 1289. Congress clearly understood that the "national interest" determination would involve a complex assessment of multiple considerations, and gave no hint that it believed the Executive would be restricted to narrow regulatory or operational concerns in making that determination. *See id.* § 501(b)(2) (if the President decided to deny the permit, he was to submit "a report that provides a justification for determination, including consideration of economic, employment, energy security, foreign policy, trade, and environmental factors"). Although TransCanada disagrees with the Executive's rationale for denying the permit, the Executive's action in denying the permit falls easily within the national interest determination and thus well within Executive discretion under existing authority. That judgement, moreover, is beyond the purview of the Judiciary.

For these reasons, addressed further below, the Court should grant Defendants' motion to dismiss or their alternative motion for summary judgment and deny TransCanada's cross motion for summary judgment.

## ARGUMENT

### **I. THIS CASE DOES NOT PRESENT A CONFLICT BETWEEN THE PRESIDENT AND CONGRESS FALLING WITHIN THE THIRD *YOUNGSTOWN* CATEGORY**

In their opening brief, Defendants demonstrated that this case falls comfortably along the continuum within the first or second *Youngstown* category. *See* Defs’ Mem., ECF No. 42-1 (Apr. 1, 2016) at 13-29. The President has independent constitutional authority over oil pipeline border crossings, Congress has long accepted and acquiesced in that authority, and Section 501 of the Payroll Tax Act, 125 Stat. at 1289, explicitly affirmed the Executive’s authority to deny the 2008 application for the Keystone XL pipeline if the project would not serve the “national interest” as set forth in Executive Order No. 13337, 69 Fed. Reg. 25,299 (Apr. 30, 2004) (Defs’ Ex. 1, ECF No. 42-3 (Apr. 1, 2016))—the operative Order governing the permitting of cross-border oil pipelines. TransCanada has not shown otherwise. Its primary argument is that this case falls within the third *Youngstown* category because members of Congress have attempted—without success—to prevent the President from taking action on the Keystone XL application. But only a validly enacted law can create a conflict between the political branches for purposes of *Youngstown*’s third category, and Congress has passed no law eliminating the President’s authority over cross-border oil pipelines or otherwise restricting the President’s discretion in making the “national interest” determination.

#### **A. Legislative Activities Not Having the Force of Law Do Not Deprive the President of Authority Long Exercised With Congressional Recognition and Acceptance**

TransCanada argues that the Court must invalidate the Executive’s denial of the Keystone XL permit because that action is incompatible with the “expressed or implied will of Congress” reflected in a series of bills—including the vetoed Keystone XL Pipeline Approval Act, S.1, 114th Cong. (2015) (Defs’ Ex. 24, ECF No. 42-7 (Apr. 1, 2016))—that never became law. *See* Pls’ Opp. at 22-23. According to TransCanada, even “committee reports” or “floor statements of individual members of Congress” can serve as manifestations of the “will of Congress” for purposes of *Youngstown*’s third category. *See id.* As discussed below, TransCanada is wrong.

With limited exceptions unambiguously provided in the Constitution itself,<sup>3</sup> the “expressed or implied will of Congress” must be discerned from statutes, and not from a boundless array of congressional activities that do not result in the enactment of law.

**1. The constitutional structure of checks and balances requires that the “expressed or implied will of Congress” for purposes of the third *Youngstown* category be determined based on the existence or absence of enacted legislation**

The Constitution has specified “a single, finely wrought and exhaustively considered, procedure” for Congress to express its will. *Chadha*, 462 U.S. at 951, *see* Defs’ Mem. at 43. Every bill passed by both Houses of Congress must be presented to the President, and if the President vetoes the bill, the bill can only become law if it is then passed by two-thirds of each House. Const. Art. I, §§ 1, 7. Because “Presentment to the President and the Presidential veto were considered so imperative,” the drafters of the Constitution “took special pains to assure that these requirements could not be circumvented.” *Chadha*, 462 U.S. at 947. The Constitution draws the line at enactment, and there is no principled way to move that line in measuring congressional disapproval, whether a bill is merely one vote short of overriding Presidential veto or far from passing either House of Congress. Justice Jackson’s analytical framework for assessing the separation of powers between the political branches therefore must be construed consistently with this constitutional structure. Indeed, Justice Jackson himself understood that Congress’ will must be divined through constitutionally-mandated processes:

The Constitution evidently intended Congress itself to reduce the conflicting and tentative views of its members to an agreed formula. It was expected to *speak*

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<sup>3</sup> As the Supreme Court explained in *Chadha*, 462 U.S. at 955, “when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action,” and there are but four “explicit and unambiguous” provisions “by which one House may act alone with the unreviewable force of law, not subject to the President’s veto”: (a) the House of Representatives alone initiates impeachments, Cons. Art. I, § 2, cl. 6; (b) the Senate alone conducts impeachment trials and convicts following trial, Cons. Art. I, § 3, cl. 5; (c) the Senate alone approves or to disapproves presidential appointments, Cons. Art. II, § 2, cl. 2; and (d) the Senate alone gives advise and consent to treaties negotiated by the President, Cons. Art. II, § 2, cl. 2.

*its will with considerable formality, after deliberation assured by three readings in each House. Its exact language requires Executive approval, or enough support to override a veto.*

Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. at 125 (emphasis added).

Thus, the classification of an executive action in one of Justice Jackson's three *Youngstown* categories must turn on the existence and nature of legislation: (1) executive action is taken "pursuant to an express or implied authorization of Congress" when a law provides authority for the action; (2) it is made "in absence of either a congressional grant or denial of authority" when there is no law on point; and (3) it is "incompatible with the expressed or implied will of Congress" when a law denies the authority at issue. *Youngstown*, 343 U.S. at 635, 637-38 (Jackson, J. concurring). That the third *Youngstown* category concerns only conflicts between Presidential action and duly enacted laws is confirmed by the fact that resolution in the President's favor requires a court to "disable the Congress from acting upon the subject." *Id.* at 637-38 (Jackson, J. concurring). A court does so by invalidating a statute. *See, e.g., Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095-96 (2015) (invalidating section 214(d) of the Foreign Relations Authorization Act because the power to recognize foreign states belongs to the President alone under the Constitution and the statute conflicted with the Executive's consistent decision to decline to recognize any country's claim of sovereignty over Jerusalem). This case does not present a conflict under category three because Congress has enacted no law that conflicts with the President's exercise of authority here.

TransCanada argues that "*Youngstown* itself was premised on legislative history reflecting Congress' determination not to affirmatively provide the President with the power at issue in that case." Pls' Opp. at 24. But as TransCanada also admits, the various opinions in *Youngstown* were examining the legislative history of *enacted statutes*. *See id.* The legislative history was used to help illuminate whether the intent of the Labor Management Relations Act of 1947 and two other related statutes was to remove seizure of property as an available remedy to resolve labor disputes in the circumstances of the case. *See, e.g., Youngstown*, 343 U.S. at 586 (opinion of Black, J., for the court) (discussing the legislative history of the Labor Management

Relations Act); *id.* at 599-600 (Frankfurter, J., concurring) (same, to demonstrate that Congress “clearly understood that as a result of that legislation the only recourse for preventing a shutdown in any basic industry, after failure of mediation, was Congress”). In other words, the Court was trying to discern the “implied will of Congress” as expressed through statutes regulating labor disputes. *Youngstown*, therefore, does not support the proposition that there can be a free-floating “will of Congress” unanchored to any enacted law.

TransCanada also argues that if only enacted statutes could render a Presidential action unlawful, then a President could take any action he likes as long as there is no statute on point. *See* Pls’ Opp. at 21-22. That contention is also plainly wrong. The President, of course, is otherwise constrained by the authority vested in him under Article II of the Constitution. There is no dispute between the parties in this case that the President’s power “must stem either from an act of Congress or from the Constitution itself.” *Youngstown*, 343 U.S. at 585, *see* Pls’ Opp. at 18. The *Youngstown* analytical framework thus contemplates the President having a legitimate claim of independent constitutional authority. *See Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring) (in category three, the President “can rely only upon his *own constitutional powers* minus any constitutional powers of Congress over the matter,” and in category two, “he can only reply upon *his own independent powers*”) (emphasis added).

In this regard, Defendants demonstrated in their opening brief that the President has independent authority over border crossings based on his foreign relations and Commander-in-Chief powers under Article II of the Constitution. *See* Defs’ Mem. at 13-16. TransCanada has made no serious attempt to refute Defendants’ showing beyond arguing that Congress has greater power over border crossings under the Commerce Clause of the Constitution. Const. Art. I, § 8. But Congress has not exercised any authority over oil pipeline border crossings here, and requiring Congress to follow constitutionally-mandated procedures to do so will hardly invite, let alone result in, the President’s assertion of authority that he does not already have under Article II. Congress can pass laws to check Presidential action, and if a bill is vetoed, the Constitution provides a process to check the “final arbitrary action of one person”—the President’s unilateral



veto power is “limited by the power of two thirds of both Houses of Congress to overrule a veto.” *Chadha*, 462 U.S. at 951.<sup>4</sup>

**2. TransCanada’s reliance on legislative activities not resulting in law improperly conflates the kind of showing appropriate to support congressional acquiescence with measures necessary to find a *Youngstown* category three conflict**

TransCanada’s reliance on legislative activities that did not actually become law to establish a purported conflict between the political branches fundamentally conflates the kind of showing and measures relevant to the second and third *Youngstown* categories. As established above, the will of Congress for purposes of *Youngstown*’s third category must be derived from the constitutionally-required procedures, for anything less would circumvent the checks and balances imposed by the Framers of the Constitution. Thus, a litigant seeking to establish a cognizable conflict between the President and Congress must be able to point to a duly enacted law. The Supreme Court made this clear in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), which involved the President’s exercise of claims settlement authority to make an executive agreement with Germany regarding the claims of Holocaust victims in the United States. In holding that a state law impermissibly interfered with the President’s longstanding authority in this area, the Court noted that “Congress ha[d] done nothing to express disapproval of the President’s policy,” despite the “repeate[d]” introduction of contrary legislation. *Id.* at 429. Because none of these bills had been enacted into law, the Court concluded that “Congress has not acted on the matter addressed here.” *Id.* It is not surprising then that TransCanada is unable to identify a case invalidating Presidential action—or even recognizing the existence of a *Youngstown* category three conflict—on the strength of congressional activities that did not result in an enactment into law.

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<sup>4</sup> TransCanada attempts to distinguish *Chadha* on the basis that it predated other cases applying *Youngstown*. See Pls’ Opp. at 26-27. But *Chadha* postdated both *Youngstown* and *Dames & Moore*, and in any event, its timing has no bearing here because the case merely reflects what the Constitution clearly provides in Article I, Section 7, Clause 2.



In *Youngstown* category two, however, “[w]hen the President acts in absence of either a congressional grant or denial of authority,” *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), a court may examine legislative activities short of enactment to determine whether Congress has acquiesced in the Presidential authority or action. See *Medellín v. Texas*, 552 U.S. 491, 528 (2008) (“Under the *Youngstown* tripartite framework, congressional acquiescence is pertinent when the President’s action falls within the second category . . . .”). This is so because such activities demonstrate Congress’ knowledge of the Executive’s exercise of authority and the opportunity to act on that knowledge, and thus Congress’ resulting failure to enact a statute denying Presidential authority may be deemed an implicit approval of the Presidential authority or action. The Supreme Court has repeatedly used this line of reasoning in finding congressional acquiescence.

For example, in *Dames & Moore*, the Court found congressional acquiescence in the practice of claims settlement by executive agreement based on both the enactment of related statutes and the fact that “Congress has consistently failed to object to this longstanding practice . . . even when it has had an opportunity to do so.” 453 U.S. at 680-81 & n.10; see also *id.* at 685 & n.11 (noting that “[i]t is telling that the Congress . . . considered but rejected several proposals designed to limit the power of the President to enter into executive agreements, including claims settlement agreements” and “[t]he rejected legislation would typically have required congressional approval of executive agreements before they would be considered effective”).

Similarly, in *Bob Jones University v. United States*, in concluding that Congress had acquiesced in the Executive’s interpretation of a provision of the Internal Revenue Code, the Court cited the fact that Congress had held “[e]xhaustive hearings” on the issue at various times and “there ha[d] been no fewer than 13 bills introduced to *overturn* the IRS interpretation.” 461 U.S. at 600 (emphasis added). “It is hardly conceivable,” the Court said, “that Congress—and in this setting, any Member of Congress—was not abundantly aware of what was going on. In view of its prolonged and acute awareness of so important an issue, *Congress’ failure to act on*

*the bills proposed on this subject provides added support for concluding that Congress acquiesced in the [IRS' interpretation].” Id. at 600-01 (emphasis added); see also Haig v. Agee, 453 U.S. 280, 298 & n.43 (1981) (citing committee hearings to support congressional knowledge and acquiescence in the Executive’s construction of the Passport Act).*

The cases on which TransCanada relies fall neatly along these lines, and none stands for the proposition that Presidential action can be invalidated by legislative activities without the force of law. For example, TransCanada cites *Medellín*, 552 U.S. at 527, for the proposition that Senate approval alone could defeat Presidential action. See Pls’ Opp. at 23. *Medellín* involved a conflict between a Presidential directive and non-self-executing treaties approved by the Senate. As should be apparent, at issue in the cited portion of the opinion was the Senate’s constitutional role to advise and consent in the ratification of treaties negotiated by the President, a role not shared with the House of Representatives. See Cons. Art. II, § 2, cl. 2. Senate advice and consent to treaties is one of four “explicit and unambiguous” exceptions to the rules of Bicameralism and Presentment in the Constitution. See *Chadha*, 462 U.S. at 955; *supra* note 3. *Medellín* thus confirms that in a *Youngstown* category three analysis, Congress’ will must be expressed through a constitutionally-mandated process by which law is enacted.

TransCanada also cites *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 328-29 (1942), for the proposition that floor statements and committee reports can evidence the will of Congress. See Pls’ Opp. at 23. The legislative activities cited by the Court in that case, however, were used to discern Congress’ will as manifested in a properly enacted statute. There an Indian tribe sought compensation for lands allegedly taken when the President revoked a prior order withdrawing the lands from the public domain for the tribe’s use. Although the Executive had consistently made clear that lands reserved for Indian tribes by executive order gave the Indian tribe only the license to use the land at the pleasure of the President, the tribe argued that the General Allotment Act of 1877 provided the tribe an ownership right. The Court disagreed, citing a senator’s floor statements discussing the bill which led to the General Allotment Act, as well as a subsequent committee report on another bill discussing the Act. *Sioux Tribe* 316 U.S.

at 328-29. Most significantly for purposes of this case, *Sioux Tribe* did not involve any conflict between the political branches regarding the scope of the President's authority. *See id.* at 324 (noting the government's argument that the President lacked the authority claimed by the tribe); *id.* at 330 (discussing the "belief shared by Congress and the executive"). Nothing in that decision could support an argument that floor statements and committee reports by themselves could create a conflict with Executive action.

Nor can the Supreme Court's passing reference to congressional resolutions in *Dames & Moore*, 453 U.S. at 687, which TransCanada relies upon extensively, be read to mean that resolutions not having the force of law could create a *Youngstown* category three conflict. As an initial matter, to the extent that the Court may have been referring to joint resolutions, they are subject to the requirements of Bicameralism and Presentment and have the full force of law. *See* Const. Art. 1, § 7; *see, e.g., Bowsher v. Synar*, 478 U.S. 714, 756, (1986) (Stevens, J., concurring in judgment) ("The joint resolution, which is used for 'special purposes and . . . incidental matters,' makes binding policy and 'requires an affirmative vote by both Houses and submission to the President for approval'—the full Article I requirements." (citations omitted)); *United States v. California*, 332 U.S. 19, 28 (1947) (joint resolution vetoed by the President could not restrict the Executive's exercise of statutory authority); *Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1309 (D.C. Cir. 2004) ("[T]here is no question that the Resolution is a law, enacted in accordance with the bicameralism and presentment requirements of Article I.").

But even if the Court in *Dames & Moore* was referring to concurrent resolutions of Congress, which would not have the force of law, the Court did not indicate that a mere concurrent resolution would be sufficient to override Presidential authority long accepted by Congress. As noted above, the Court held in that case that Congress had acquiesced in the President's suspension of claims against Iran pending in American courts based on: the "general tenor of Congress' legislation in this area"; "a history of congressional acquiescence in the conduct of the sort engaged in by the President"; and the fact that Congress had had opportunities to act on the matter but did not. *Dames & Moore*, 453 U.S. at 678-79, 687. The

Court noted that although Congress had held hearings on the matter, it “ha[d] not enacted legislation, or even passed a resolution, indicating its displeasure.” *Id.* at 687. This passing reference to a resolution “indicating displeasure”—made in the context of examining whether Congress had acquiesced in the President’s authority—hardly constitutes a holding that legislative activities lacking the force of law could, without more, supersede the longstanding exercise of Presidential authority under Article II. *Cf. Chadha*, 462 U.S. at 923 (declaring unconstitutional a statute “authorizing one House of Congress, by resolution, to invalidate the decision of the Executive Branch [made] pursuant to authority delegated by Congress”). Indeed, because Congress had not “even passed a resolution,” the Court was “clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority,” *Dames & Moore*, 453 U.S. at 688, and thus had no reason to consider whether a mere concurrent resolution could ever overcome a long history of acquiescence by Congress.

TransCanada also contends that in rendering formal opinions regarding Presidential authority, the Department of Justice (“DOJ”) routinely has relied on “Congressional resolutions” that were “short of enacted legislation.” *See* Pls’ Opp. at 25. But the opinions by DOJ’s Office of Legal Counsel (“OLC”) cited by TransCanada were relying on joint resolutions that were presented to, and approved by, the President. *See* Pls’ Ex. 22 (ECF No. 53), *Deployment of United States Armed Forces Into Haiti*, 18 Op. Off. Legal Counsel 173, 175 (1994) (relying on the Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, 107 Stat. 1418 (1993), a joint resolution approved by President Clinton on Nov. 11, 1993); Pls’ Ex. 23 (ECF No. 53), *Authority to Use United States Military Forces in Somalia*, 16 Op. Off. Legal Counsel 6, 13 & n.6 (1992) (relying on the Horn of Africa Recovery and Food Security Act, Pub. L. No. 102-274, 106 Stat. 115 (1992), a joint resolution approved by President George H.W. Bush on Apr. 21, 1992). Moreover, in each case, the OLC interpreted the joint resolution as support for its conclusion that the President did have authority to act as proposed, not to suggest that the joint resolution denied Presidential authority. The OLC certainly did not opine that expressions

of the views of congressional members that did not become law would be sufficient to overcome Executive authority under Article II.

The only DOJ opinion cited by TransCanada that relied on statements of individual members of Congress is Acting Attorney General Richards' opinion in *Foreign Cables*, 22 Op. Att'y Gen. 13, which is discussed in detail in Defendants' opening brief. *See* Defs' Mem. at 19-20. That opinion concluded that, in the absence of legislative enactment, the Executive had the authority to impose the conditions originally outlined by President Grant to Congress in 1875 regarding submarine cables connecting the United States with a foreign country. The opinion also noted that President Grant's views were "understood to have met the approval of Congress and of the people of the United States, indicated by the tacit acquiescence of the Congress, and by the expressed approval of individual members of that body . . . ." 22 Op. Att'y Gen. at 19. This reference to the views of individual members of Congress was in the context of confirming congressional acquiescence in the Executive's action, not disapproval thereof. The entire premise of the opinion was precisely that "Congress ha[d] not acted upon the matter." *Id.* at 15.

In sum, neither the constitutional structure of checks and balances, nor any legal authority, supports TransCanada's assertion that congressional members' disapproval of an Executive action which falls short of enacted legislation is sufficient to deny or limit Presidential authority.

**B. Congress Has Not Enacted Statutory Law That Conflicts With the Executive's Authority to Decide the Permitting of Cross-Border Oil Pipelines**

TransCanada also argues that Congress has "covered the field" of oil pipeline crossings through a series of statutes and trade agreements "designed to ensure the development of oil pipelines," thus "displac[ing] any separate discretionary authority the Executive Branch may have." Pls' Opp. at 27-28, 30; *see Youngstown*, 343 U.S. at 639 (Jackson, J. concurring) (explaining that the President's action to seize steel mills was "clearly eliminated" from the category of congressional acquiescence "because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this

seizure”). According to TransCanada, the Executive must grant a permit, and TransCanada is entitled to have the Keystone XL pipeline cross the U.S. border, as long as the pipeline complies with those statutes. This argument is also meritless; there is no statute or regulatory scheme that would displace the President’s permitting authority at issue in this case.

The regulatory landscape has not changed since TransCanada last argued that “Congress has chosen not to regulate oil pipeline border crossings.” TransCanada’s *Sisseton* MTD reply brief (Defs’ Ex. 20, ECF No. 48) at 15. The Pipeline Safety Act, 49 U.S.C. § 60101 *et seq.*, for example, only dictates minimum safety standards for pipeline transportation and pipeline facilities within the United States, *see id.* § 60102(a)(2). The Interstate Commerce Act regulates the rates, charges and fares for common carriers’ interstate transportation of oil by pipeline or the valuation of that pipeline. *See* Interstate Commerce Act, § 6, 24 Stat. 379, 380-82 (Feb. 4, 1887); 49 U.S.C. § 60502; 18 C.F.R. Parts 341-349; *see generally* *W. Ref. Sw., Inc. v. FERC*, 636 F.3d 719, 723-24 (5th Cir. 2011). The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, regulates greenhouse gas emissions from mobile and stationary sources. *See Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2435 (2014). None of these statutes governs the issue of whether oil pipelines may cross the international border.

An oil pipeline project no doubt must comply with any applicable domestic regulatory scheme, but the imposition of such requirements through other statutory provisions does not constitute a system for granting cross-border permits. And compliance with statutory and regulatory requirements related to domestic pipeline projects is clearly not a sufficient basis for any company to claim permission to build a physical connection between the United States and a foreign country without further evaluation. As Congress has recognized, granting permission for a pipeline project to cross the border involves an overarching and much more complex assessment of national interest, *see* Payroll Tax Act, § 501(b)(2), and mere compliance with unrelated regulatory requirements does not suffice, or even speak to that entirely separate issue. Nor, as a more general matter, does the existence of the Clean Air Act preclude the President

from exercising his Article II powers to achieve foreign policy objectives that may “relat[e] to greenhouse gas emissions.” Pls’ Opp. at 28-29.

TransCanada also cites statutes governing the landing of submarine cables (the Kellogg Act, 47 U.S.C. § 34), the export of electric energy (the Federal Power Act, 16 U.S.C. § 824a(e)), and the export and import of natural gas (the Natural Gas Act, 15 U.S.C. § 717b(a)) as evidence of Congress’ intent to limit the Executive’s authority over oil pipelines. According to TransCanada, Congress has eliminated the President’s unilateral power over those facilities, limited the President’s authority over submarine cables to only operational considerations, and “vested regulatory authority over natural gas pipelines and electricity facilities in administrative agencies and not in the President.” *See* Pls’ Opp. at 34.

These statutes likewise are no help to TransCanada because even if Congress had circumscribed the Presidential permitting authority through them for facilities within the purview of those statutes, the lack of any comparable statute governing oil pipelines would only confirm the President’s broad authority over oil pipelines in a *Youngstown* analysis. But Congress in fact has not limited or eliminated the President’s permitting authority in the very statutory schemes on which TransCanada relies. Rather, the Kellogg Act affirms the President’s broad authority over submarine cables by requiring an applicant to obtain a Presidential permit based upon the Executive’s determination that granting the permit would “maintain[] the rights or interests of the United States or of its citizens in foreign countries, or promote the security of the United States.” 47 U.S.C. § 35; *see also* Defs’ Mem. at 25. In fact, given this explicit authorization, the President’s authority over submarine cables “is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

Congress also has not objected to, much less eliminated, the Executive’s longstanding exercise of permitting authority over the construction, maintenance or operation of natural gas pipeline and electrical transmission facilities at the U.S. border. It did not disturb the Presidential permitting requirement when enacting the Natural Gas Act and the Federal Power



Act, nor has it done so during any of its amendments to the Natural Gas Act and the Federal Power Act. *See* Defs’ Mem. at 27-28; Exec. Order No. 10485, 18 Fed. Reg. 5,397 (Sept. 3, 1953), as amended by Exec. Order No. 12038, 43 Fed. Reg. 4,957 (Feb. 3, 1978); *see also* 10 C.F.R. § 205.320(b) (directing applicants for Presidential permits to the Department of Energy’s separate regulatory provisions concerning export authorizations). The Congressional Research Service article cited TransCanada, too, confirms this distinction. *See Presidential Permit Review for Cross-Border Pipelines and Electric Transmission*, Aug. 6, 2015, at 8-12 (Pls’ Ex. 28, ECF No. 53) (discussing the Presidential permitting process under Executive Order 10485).<sup>5</sup>

Indeed, precisely because there is no statutory scheme governing the border crossings of natural gas pipelines, electrical transmission lines, and oil pipelines, there is a pending congressional bill seeking to establish such a scheme. *See* North American Energy Infrastructure Act, S. 1228, 114th Cong. (2015) (Defs’ Ex. 28, ECF No. 42-8); H.R. 3301, 113th Cong. (2014). The House committee report explains that “[t]he current approval process for oil and natural gas pipelines and electric transmission facilities are set forth in a series of Executive Orders created in an ad hoc fashion over multiple Presidential administrations . . . . *Since Congress has yet to exercise its authority to regulate these projects, it has been left to the President to authorize these approvals under the President’s inherent constitutional authority to conduct foreign affairs.*” H.R. Rep. No. 113-482 at 5 (2014) (emphasis added) (attached as Ex. A).

Finally, and again contrary to TransCanada’s contention, the opinions in *United States v. Western Union Telegraph Co.*, 272 F. 311, 317 (S.D.N.Y. 1921), *aff’d* 272 F. 893 (2d Cir. 1921), *rev’d and dismissed by stipulation of the parties*, 260 U.S. 754 (1922), do not stand for the

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<sup>5</sup> Executive Order No. 10485 delegates the President’s permitting authority to the Secretary of Energy. After obtaining favorable recommendations from the Secretaries of State and Defense, the Secretary of Energy may grant a permit if it is in the “public interest” and may impose “such conditions as the public interest may in [the Secretary’s] judgment require.” Exec. Order No. 10485, § 1. Additionally, in any case in which the various heads of agencies cannot agree as to whether issuing a permit is in the public interest, the application is forwarded to the President for resolution. *Id.* §1(b).



proposition that “far less extensive statutes” than those currently applicable to oil pipelines could eliminate the President’s permitting authority. Pls.’ Opp. at 29. In that case, the President denied Western Union a permit to lay a telegraph cable between Miami and Barbados on antitrust grounds because the cable was to be connected with a British company’s cable from Barbados to Brazil, where the British company had monopoly. *Western Union*, 272 F. at 311-12. Undeterred by the denial, Western Union proceeded to lay the cable and was stopped by a naval warship about three miles from the coast of Miami. *See* 272 F. at 893; Unauthorized Landing of Submarine Cables in the United States, H.R. Rep. 67-71 (1921) (Defs’ Ex. 30, ECF No. 42-9 (Apr. 1, 2016)) at 3-4. Western Union then attempted to connect the cable to three of its existing cables running from Key West to Cojimar, Cuba, and thus establish a direct line (by way of Cojimar) between Florida and Brazil. 272 F. at 893.

The district court held that two of the Key West cables were authorized by the Act of May 5, 1866, 14 Stat. 44, which specifically granted Western Union’s predecessor the sole privilege of laying and operating telegraphic cables from Florida to Cuba. The court further held that all of the cables were authorized by the Post Roads Act, which granted telegraph companies “the right to construct, maintain, and operate lines of telegraph” through the public domain, over and along any of the military or post roads, “and over, under, or across the navigable streams or waters of the United States.” Act of July 24, 1866, 14 Stat. 22.<sup>6</sup> This statute, the district court found, permitted Western Union to transmit messages “to the marginal waters under a federal franchise.” *Western Union*, 272 F. at 323.<sup>7</sup> The Second Circuit affirmed, agreeing that the Post Roads Act controlled. *See* 272 F. at 894.

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<sup>6</sup> TransCanada incorrectly asserts that the district court also found authority in the Interstate Commerce Act. *See* Pls’ Opp. at 30. Even though Western Union argued that the Interstate Commerce Act provided a basis for laying the cable, the district court did not rely on it.

<sup>7</sup> Because “waters within one marine league [or approximately 3.45 miles] of the shores have been frequently termed ‘the navigable waters of the United States,’” 272 F. at 320, the district court evidently believed that the franchise would extend to where Western Union’s cable was buoyed approximately three miles from the coast of Miami.

The *Western Union* decisions provide no support for TransCanada here, because they plainly turn on statutes that either expressly authorized the laying of the foreign submarine cables or were construed to confer a “federal franchise” that extended to coastal submarine cables. TransCanada can point to no statute that grants federal approval for oil pipeline projects, much less one that purports to authorize the construction of cross-border oil pipeline facilities. Moreover, Congress made clear immediately—while the *Western Union* case was pending in the Supreme Court—that the courts had misconstrued the Post Roads Act. Without repealing or otherwise amending the Post Roads Act, Congress enacted the Kellogg Act to require Presidential permission for the laying and operation of submarine cables that would directly or indirectly connect the United States with any foreign country. *See* 47 U.S.C. § 34; H.R. Rep. 67-71 (Def. Ex. 30, ECF No. 42-9) at 3-4.<sup>8</sup>

Finally, to the extent more is needed, the *Western Union* decisions were effectively vacated by the Supreme Court. Following the parties’ agreement that the case had been rendered moot by the passage of the Kellogg Act, *see United States v. Western Union*, No. 47, Joint Suggestion & Stipulation (Oct. 13, 1922) (attached as Ex. B), the Supreme Court reversed the Second Circuit and remanded the case to the district court with instruction to dismiss the bill in equity. *Western Union*, 260 U.S. 754 (1922). This practice reflected the Supreme Court’s view that when a case before it becomes moot, “the decree below, which in substance rejected the rights asserted by the complainants, ought not to be allowed to stand,” *Commercial Cable Co. v. Burleson*, 250 U.S. 360, 362-63 (1919) (cited in stipulation), and was “commonly utilized in

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<sup>8</sup> Even after the passage of the Post Roads Act in 1866, Congress continued to enact special laws to authorize the laying of international cables by specific companies. *See, e.g.*, Act of March 29, 1867, 15 Stat. 10; Act of Aug. 15, 1876, 19 Stat. 201; Act of Feb. 20, 1877, 19 Stat. 232; Act of July 25, 1882, 22 Stat. 173; Act of Aug. 8, 1882, 22 Stat. at 371. These acts would have been unnecessary if the Post Roads Act had provided blanket approval for the laying of foreign cables.

precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences.” *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950).<sup>9</sup>

## II. CONGRESS’ ACQUIESCENCE IN THE PRESIDENT’S PERMITTING AUTHORITY EXTENDS TO BOTH THE GRANT AND DENIAL OF PERMITS

TransCanada next argues that even if Congress had acquiesced in the Executive’s exercise of permitting authority, at most such acquiescence would extend to “limited operational regulation designed to facilitate cross-border pipelines,” but not to the denial of a permit based on the Executive’s independent determination of national interest. Pls’ Opp. at 31-35. This is so, according to TransCanada, because the Executive routinely has granted oil pipeline permits upon imposing “narrow, operational regulation.” *Id.* at 35.<sup>10</sup> But even if the eventual outcome of the President’s past permitting decisions was generally or entirely to allow the construction of cross-border facilities, that does not define the scope of Presidential authority acquiesced in by Congress.<sup>11</sup> TransCanada itself recognized this in previous litigation, when it argued to a district

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<sup>9</sup> TransCanada’s reference to Justice Jackson’s supposed hand-written notation about *Western Union*, see Pls’ Opp. at 30, proves nothing. According to an article TransCanada cites, among Justice Jackson’s files is a slip of paper on which the Justice wrote: “The President has no power, in absence of legislative authority[,] to prohibit landing of a submarine cable. Opinion of A. N. Hand[,] *United States v. Western Union Telegraph Co.*[,] 272 Fed 311.” Adam J. White, *Justice Jackson’s Draft Opinions in the Steel Seizures Cases*, 69 Alb. L. Rev. 1107, 1110 (2006) (Pls’ Ex. 24, ECF No. 53). The notation, which could merely be Justice Jackson’s summary of the *Western Union* decision, hardly constitutes clear or persuasive authority on the issue at hand.

<sup>10</sup> TransCanada incorrectly asserts that Defendants have identified only one oil pipeline permit prior to President Johnson’s issuance of Executive Order No. 11423. See Pls’ Opp. at 34. In addition to attaching two oil pipeline permits (predating the Executive Order) to its opening brief, see Defs’ Ex. 12 & 13 (ECF No. 42-5 (Apr. 1, 2016)), Defendants also referred to many oil pipeline permits issued between 1918 and 1966 and documented in the Digest of International Law. See Defs’ Mem. at 4-5 & Ex. 9 (ECF No. 42-4 (Apr. 1, 2016)) at 920-21.

<sup>11</sup> TransCanada cites *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), for the proposition that this Court could review the Executive’s past practice to determine the Executive’s authority. The case, however, is simply a *Youngstown* category three case, where Congress did exercise its constitutional power to enact laws in conflict with the President’s Executive Order establishing military commissions. Here, in contrast, Congress has not so exercised its constitutional power, and there is no dispute that the Executive has long exercised authority over border-crossing facilities with congressional acquiescence.

court that the President “retains full discretion to approve *or deny* cross-border energy facilities.” Defs’ Ex. 21, ECF No. 42-6 (TransCanada’s *NRDC* MTD) at 17-18 (emphasis added).

TransCanada’s argument has no merit for two additional reasons.

First, it is well established that the United States Government has absolute authority over any intrusion into its sovereign territory. *See Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, J.) (“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”). Justice Jackson explained that in the “zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain . . . congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.” *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Thus, in the absence of congressional legislation providing consent to such intrusion, the President clearly has the independent responsibility and authority to determine whether a proposed physical extension into the United States is in the interest of the United States at any given time. *See Foreign Cables*, 22 Op. Att’y Gen. at 25-26; *see also United States v. La Compagnie Francaise Des Cables Telegraphiques*, 77 F. 495, 496 (S.D.N.Y (2d Cir.) 1896) (“[W]ithout the consent of the General Government, no one, alien or native, has any right to establish a physical connection between the shores of this country and that of any foreign nation. Such consent may be implied as well as expressed, and whether it shall be granted or refused is a political question, which, in the absence of congressional action, would seem to fall within the province of the executive to decide.”). This is particularly true when the subject matter implicates complex foreign policy interests, including potential national security concerns, as the construction of cross-border conduits surely does. And in exercising this independent responsibility, the President is not limited to approving cross-border infrastructure, of any nature and by any foreign actor, subject to only minor regulatory conditions and without regard to whether approval is in the national interest. Indeed, because

the power to permit access includes the power to deny access, even when the Executive grants a cross-border oil pipeline permit, it consistently has retained a right to revoke the permit at will.<sup>12</sup>

Second, the Executive has repeatedly made clear, and Congress has understood, that the ability of the Executive to require cross-border permits included the authority to deny them. As early as 1875 President Grant made clear to Congress that his plan to condition the landing of submarine cables rested his authority “upon his power to prevent [the] landing altogether, if deemed by him inimical to the interests of this Government, its people, or their business.” *Foreign Cables*, 22 Op. Att’y Gen. at 18; *see* President Ulysses Grant’s Seventh Annual Message to Congress, *reprinted in* Papers Relating to the Foreign Relations of the United States, Vol. 1, 44th Cong. 1st Sess., H.R. Ex. Doc. 1, Pt. 1, (Dec. 6, 1875) (Defs’ Ex. 2, ECF No. 42-3 (Apr. 1, 2016)), at XIII-XIV. And Congress understood that the President could withhold consent if he determined that the landing would not serve the national interest. While the *Western Union* case was pending in the Supreme Court, a congressional report urged swift action to preserve the President’s power to prevent the landing of unauthorized foreign cables:

Should the decision of the circuit court of appeals be affirmed by the Supreme Court of the United States and Executive authority in the premises thus be nullified, this Government would be in the very deplorable situation, unique among civilized nations, of having no power of control over the landing of submarine cables, palpably a matter of world-wide interest and far-reaching importance . . . . If this Nation is to be saved from humiliation and its interests and welfare are to be protected, similar concerns desiring to establish cable

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<sup>12</sup> *See, e.g.*, Permits issued to Lake Head Pipeline Co. by President Kennedy, Oct. 18, 1962, at 2 and by President Johnson, Jan. 22, 1968, at 2 (Defs’ Exs. 12 & 13, ECF No. 42-5, Apr. 1, 2016) (“this permit may be terminated at the will of the President of the United States”); Permit issued to Dome Pipeline Corp., Dec. 23, 1972, at 2 (“this permit may be terminated at the will of the Secretary of State of the United States”) (attached as Ex. C); Permit issued to Polysar Hydrocarbons, Inc., Aug. 13, 1986, Art. I (same) (attached as Ex. D); Permit issued to Nova Petrochemicals, Inc., March 21, 1991, at 2 (same) (attached as Ex. E); Permit issued to Enbridge Energy, L.P. regarding the Alberta Clipper Pipeline, Aug. 3, 2009, at 2 (same) (attached as Ex. F). TransCanada itself has accepted this explicit condition in the Keystone I permit (attached as Ex. G), because it proceeded to build the Keystone I pipeline and has been transporting crude oil from Alberta into the United States, *see* Compl. ¶¶ 21-24.

connections with our shores should be required to submit to such conditions as will protect our national rights.

H.R. Rep. No. 67-71, at 3-4 (Defs' Ex. 30, ECF No. 42-9). The resulting Kellogg Act not only affirmed the requirement of a Presidential permit, but also accorded the President broad discretion: the President may grant a permit if such action would assist in "maintaining the rights or interests of the United States or of its citizens in foreign countries, or [would] promote the security of the United States," 42 Stat. 8 (1921); 47 U.S.C. § 35, or deny a permit if not.

By 1968, when President Johnson issued Executive Order No. 11423 to delegate his permitting authority over oil pipelines to the Department of State, that Order similarly stated that the Secretary of State was to examine whether, in the Secretary's judgment, any oil pipeline border crossing (as well as a wide range of other cross-border facilities) would serve the "national interest." Exec. Order No. 11423, § 1(d), (e). Significantly, Congress has not sought to modify or otherwise repudiate the national interest standard in the close to five decades that followed. *Cf. Kaplan v. Corcoran*, 545 F.2d 1073, 1077 (7th Cir. 1976) ("Since the promulgation of Executive Order 10096 on January 23, 1950, there has been Congressional acquiescence in the order by the failure of Congress to modify or disapprove it.").<sup>13</sup> Given this history, Congress clearly has acquiesced in the Executive's exercise of discretion to determine whether to grant or deny any border crossing in the national interest.

Moreover, Congress has specifically recognized the President's authority with respect to the Keystone XL project. While TransCanada's first Keystone XL application was pending, Congress enacted Section 501 of the Payroll Tax Act to require "the President, acting through the

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<sup>13</sup> Indeed, in 1972, when Congress enacted the International Bridge Act to affirm the President's permitting authority over international bridges, it did not disturb the standard as applied to international bridges by Executive Order No. 11423. *See* 33 U.S.C. § 535b ("No bridge [which will connect the United States with any foreign country] may be constructed, maintained and operated . . . unless the President has given his approval thereto."); *see also Detroit Int'l Bridge Co. v. Gov't of Canada*, 133 F. Supp. 3d 70, 101-02 (D.D.C. 2015) (noting that although the International Bridge Act requires Presidential approval, it is only Executive Order No. 11423 that sets forth the standards for the President's issuance of international bridge permits).

Secretary of State,” to “grant a permit under Executive Order No. 13337” within 60 days of the Act, but the Act further provided that “the President shall not be required to grant the permit . . . if the President determine[d] that the Keystone XL pipeline would not serve the national interest.” 125 Stat. at 1289. In the event that the President decided to deny the permit, the Act required him to submit a report providing “a justification for determination, *including consideration of economic, employment, energy security, foreign policy, trade, and environmental factors.*” *Id.* at 1290 (emphasis added). In referencing Executive Order No. 13337 (which amended Executive Order No. 11423), the “national interest” to be determined by the President, and the non-exhaustive list of factors that the President was to balance, the Payroll Tax Act unequivocally confirmed that the President’s permitting authority includes the authority to deny the permit.

Indeed, the vetoed Keystone XL Pipeline Approval Act of 2015 also acknowledged the Executive’s broad authority in this area. That legislation sought to directly approve the project, but did not seek to narrow the President’s authority and discretion in reviewing other cross-border oil pipeline projects. Specifically, the Senate majority report affirmed that “the President has, for more than a century, asserted authority to approve energy and telecommunication facilities that cross international borders pursuant to the President’s constitutional authority over foreign affairs,” that the President has delegated the permitting authority over oil pipelines to the Secretary of State, and that the permitting decision would be “based upon the Secretary’s determination of whether issuance of the permit would serve the national interest.” S. Rep. No. 114-1, at 1 (2015) (Defs’ Ex. 36, ECF No. 42-9 (Apr. 1, 2016)).

In sum, Congress clearly has acquiesced in the Executive’s exercise of discretion to determine whether to grant or deny any border crossing in the national interest, and nothing suggests that Congress viewed the President’s authority as limited solely to granting the permit after ensuring compliance with “narrow operational regulations.”



### **III. TRANSCANADA’S CHALLENGE TO THE ALLEGEDLY UNPRECEDENTED NATURE OF THE EXECUTIVE’S PERMITTING DECISION IS UNREVIEWABLE**

Finally, TransCanada argues that Congress could not have acquiesced in the President’s denial of a permit for the Keystone XL project because the decision is “unprecedented” for a number of reasons, including the “delay” it took the Executive to render the decision and the specific factors that the Executive considered. Specifically, TransCanada claims that the denial was an “extreme departure from historical practice” because it was based on foreign policy considerations having nothing to do with the Keystone XL pipeline crossing the border into the United States, when the Executive has conceded that the Keystone XL project would actually lower energy prices, increase employment, and increase energy security. *See* Pls’ Opp. at 35-36.

As an initial matter, the time involved for the Executive to reach a decision has no bearing on the scope of the Executive’s discretion in making the “national interest” determination.<sup>14</sup> If anything, the timing of the determination reflects the complexity of the matter, which generated more than four and a half million comments throughout all stages of the Department of State’s review of the two Keystone XL permit applications. *See* Ex. B to Compl., Record of Decision and National Interest Determination for Keystone XL Pipeline (Nov. 6, 2015) (hereinafter “ROD”) at 4, 5.<sup>15</sup>

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<sup>14</sup> Defendants do not address TransCanada’s factual allegations on the Presidential permitting process because they are not relevant to the legal question before the Court with respect to the proper separation of powers.

<sup>15</sup> At the time of the Payroll Tax Act, the State of Nebraska enacted a law establishing a process to approve a new route for the proposed Keystone XL pipeline due to nearly unanimous opposition from Nebraska officials and residents to the initially proposed route. *See* Defs’ Mem. at 7. That state law directed the Nebraska environmental agency to work with the Department of State and TransCanada to find a route that would avoid the environmentally sensitive terrain of Nebraska’s Sand Hills region. *Id.* As the Department of State reported to Congress, the Executive could not responsibly move forward at the time given the lack of information regarding the potential alternative route. *See* Department of State Report to Congress Under the Temporary Payroll Tax Cut Continuation Act of 2011, Section 501(b)(2) (Defs’ Ex. 22, ECF No. 42-7 (Apr. 1, 2016)) at 3-4.



Moreover, there is nothing “unprecedented” about the Executive’s exercising its longstanding authority over oil pipeline border crossings to determine whether granting a permit would or would not serve the national interest.<sup>16</sup> TransCanada cannot dispute that the Executive has considered the environmental impacts associated with permitting decisions on cross-border oil pipeline infrastructure. *See* Pls’ Opp. at 8; *see, e.g.*, Defs’ Ex. 32, ECF No. 42-9 (Apr. 1, 2016) (Record of Decision for the Alberta Clipper oil pipeline) at 3 (noting “concerns raised about higher than average levels of greenhouse gas (GHG) emissions associated with oil sands crude,” but determined at that time that “on balance [such concerns] [did] not outweigh the benefits to the national interests identified”).

In any event, TransCanada cannot transform its disagreement with the merits of the President’s national interest determination into a question of Presidential authority. As Defendants explained in their opening brief, whether a proposed cross-border project would serve the national interest, including what impact it would have on the foreign policy objectives and national security concerns of the United States, and how to balance a multitude of considerations, are quintessential questions for the political departments, and in the absence of congressional legislation, are committed to the Executive Branch. *See* Defs’ Mem. at 33-35. The Executive’s decision here was the culmination of a wide range of considerations related to the determination of national interest, involving complex factors such as energy security; environmental, cultural, and economic impacts; foreign policy; and compliance with relevant state and federal regulations. *See* ROD at 9-31 (detailing considerations); Defs’ Mem. at 29-31. The Executive determined that denying the Keystone XL permit was, among other concerns, important to avoid adversely impacting our ability to encourage other countries to take ambitious

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<sup>16</sup> The Court in *Medellín* used the term “unprecedented” to describe the unique nature of the Presidential directive at issue in that case, where the Court noted that no President had attempted to issue a directive to state courts, much less one that “reach[ed] deep into the heart of the State’s police powers and compel[led] state courts to reopen final criminal judgments and set aside neutrally applicable state laws.” *Medellín*, 552 U.S. at 532.

action to combat an urgent global environmental threat—climate change—that has serious implications for national and international security, in light of the impending December 2015 climate change negotiations among more than 190 nations.

The Fifth Circuit has said that “in the chess game that is diplomacy[,] only the executive has a view of the entire board and an understanding of the relationship between isolated moves.” *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974). While TransCanada contends that the permit decision is too attenuated from U.S. foreign policy objectives, the Executive disagreed. That judgment “is not susceptible of review by the Judicial Department” because “the very nature of executive decisions as to foreign policy is political, not judicial.” *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111-12 (1948). As TransCanada itself has aptly argued when defending the Keystone I Presidential permit, the “essence of the Presidential Permit decision is an unreviewable ‘judgment call.’” Defs’ Ex. 19, ECF No. 42-6 (Apr. 1, 2016) (TransCanada’s *Sisseton* MTD) at 19.

### CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion to dismiss or, in the alternative, for summary judgment and deny TransCanada’s cross motion for summary judgment.

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Respectfully submitted

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 2, 2016, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Jean Lin  
JEAN LIN