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## Presidential Permitting for Pipelines: Constitutionality and Reviewability

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# PRESIDENTIAL PERMITTING FOR PIPELINES: CONSTITUTIONALITY AND REVIEWABILITY

Joan Campau\*

## ABSTRACT

*Federal oversight of cross-border pipelines occurs during the presidential permitting process. Pursuant to Executive Order 13337, the Department of State is authorized to review applications and grant permits to projects that “serve the national interest.” Scholars and litigants have questioned the constitutionality of this process and reviewability under the Administrative Procedure Act (“APA”). This Note argues that the permitting process is constitutional and derives legitimacy from both the executive powers explicitly enumerated in the Constitution as well as an implicit sanction from the legislative branch. Further, this Note argues that APA review is appropriate for at least one component of the process. Specifically, the State Department’s environmental analysis as required by the Department’s own regulations is a “final agency action” subject to judicial review under the APA.*

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## INTRODUCTION

People require passports to legally cross international borders; pipelines require presidential permits.<sup>1</sup> Executive Order 13337 (“EO 13337”) delegates authority to the State Department to grant such permits and creates the framework under which major federal review of oil pipelines occurs.<sup>2</sup> The Trump Administration’s interest in accelerating this decision-making process is thus particularly controversial in light of increased debate about our nation’s energy supply.<sup>3</sup>

Whether and how the presidential permitting process is subject to judicial review has been the subject of lawsuits from Native American tribes and environmental groups as well as the source of legal commentary.<sup>4</sup> Litigants and scholars have questioned both the constitutionality of the presidential permitting scheme,<sup>5</sup> and the reviewability of the permitting process under the Administrative Procedure Act (“APA”).<sup>6</sup>

This Note argues that, as courts have recognized, the presidential permitting process is constitutional and derives its legitimacy from both the powers of the executive branch as articulated in the Constitution and from the legislature’s implicit approval of the process. This Note further argues that the State Department’s en-

1. See Exec. Order No. 11423, 33 Fed. Reg. 11,741 (Aug. 16, 1968); see also Exec. Order No. 13337, 69 Fed. Reg. 25,299 (Apr. 30, 2004).

2. See Exec. Order 13337, *supra* note 1.

3. See, e.g., Christopher M. Mathews, Rebecca Ballhaus, & Anne Steele, *Trump Administration Grants Permit to TransCanada for Keystone XL Pipeline*, WALL STREET J., (Mar. 24, 2017, 11:32 AM), <https://www.wsj.com/articles/trump-administration-grants-permit-to-transcanada-for-keystone-pipeline-1490357077?mod=searchresults&page=1&pos=13>; Elise Labott & Jeremy Diamond, *Trump Administration Approves Keystone XL Pipeline*, CNN, (Mar. 24, 2017, 11:28 AM), <http://www.cnn.com/2017/03/23/politics/keystone-xl-pipeline-trump-approve/index.html>.

4. See, e.g., *Sisseton-Wahpeton Oyate v. U.S. Dep’t of State*, 659 F. Supp. 2d 1071 (D.S.D. 2009); *Nat. Res. Def. Council v. Dep’t of State*, 658 F. Supp. 2d 105 (D.D.C. 2009); *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147 (D. Minn. 2010); *White Earth Nation v. Kerry*, No. 14-4726 (MJD/LIB), 2015 U.S. Dist. LEXIS 165014 (D. Minn. Dec. 9, 2015); *Indigenous Env’tl. Network v. U.S. Dep’t of State*, CV-17-29-GF-BMM, 2017 U.S. Dist. LEXIS 193546 (D. Mon. Nov. 22, 2017); Kathy Parker, Note and Comment, *Keystone XL: Reviewability of Transboundary Permits in the United States*, 24 COLO. J. INT’L ENVTL L. & POL’Y 231 (2013); Andrea Giampoli, Note, *The “New Beginning:” Private Causes of Action Under the International Oil Pipeline Permitting System*, 14 RUTGERS RACE & L. REV. 155 (2013).

5. See, e.g., *Sierra Club*, 689 F. Supp. 2d at 1162 (“Plaintiffs assert that . . . the President has no constitutional or statutory authority to issue presidential permits allowing for the importation of tar sands crude oil from Canada.”); Giampoli, *supra* note 4, at 169 (“Executive Order 13337 is Unconstitutional.”).

6. See, e.g., *Sierra Club*, 689 F. Supp. 2d at 1156 (“Defendants also assert that the Permit is not subject to judicial review under the APA.”); *White Earth Nation*, 2015 U.S. Dist. LEXIS 165014, at \*19 (noting that a question before the court was whether plaintiffs’ claims “fail because the claims are not based on an agency action or a final agency action - a required element of an APA claim”).

vironmental analysis conducted during the permitting process, as required by the Department's own regulations, is a "final agency action" subject to judicial review under the APA. When properly confined to this environmental analysis decision, rather than the broader determination of whether or not to grant the presidential permit, APA review is proper. Recent federal district court decisions support this assertion and provide a good model for plaintiffs who seek to balance the goals of the permitting process against other concerns – a function with which they have been empowered under the APA.

Part I of this Note provides an overview of some recent pipeline controversies while Part II gives the legal background within which these clashes occur. Part III rebuts constitutional challenges to the presidential permitting process and Part IV addresses reviewability of the permitting decision under the APA.

## I. THE CHANGING LANDSCAPE OF PIPELINE PERMITTING AND CONSTRUCTION

Controversy over pipeline location and construction is hardly new. These debates are unsurprising in part because the stakes are high on many fronts: among other things, pipelines are expensive, long term investments; they affect the availability of oil; they implicate property rights; and they can pose risks to wildlife through climate change, habitat disruption, and spills.<sup>7</sup> Environmental groups regularly spearhead legal challenges to pipelines and for years, Native American tribes have sued the government for injunctive relief in the face of what they assert are insufficient reviews of environmental, cultural, and historical concerns in areas subject to pipeline development.<sup>8</sup>

The Trump Administration's dramatic change in the pipeline approval and construction process has intensified concerns among many in the environmental community.<sup>9</sup> Major permitting applications that languished for several years under review in the Obama Administration (such as the Alberta Clipper and Keystone XL lines) were approved within the first twelve months of the 45<sup>th</sup> President's tenure in office.<sup>10</sup> Many groups are concerned about what they consider to be "fast

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7. See, e.g., Matthew Brown, *Trump Administration Defends Keystone XL Pipeline in Court*, ASSOCIATED PRESS (May 24, 2018), <https://www.usnews.com/news/business/articles/2018-05-24/disputed-keystone-pipeline-project-focus-of-court-hearing> (noting that the Keystone XL pipeline, discussed more fully below, is projected to cost \$8 billion, would transport 830,000 barrels of crude oil per day, and has been challenged by those concerned about climate change, spills, and property rights).

8. See, e.g., *Sisseton-Wahpeton*, 659 F. Supp. 2d at 1071; *Nat. Res. Def. Council*, 658 F. Supp. 2d at 105; *Sierra Club*, 689 F. Supp. 2d at 1147; *White Earth Nation*, 2015 U.S. Dist. LEXIS 165014; *Indigenous Envtl. Network*, 2017 U.S. Dist. LEXIS 193546.

9. See, e.g., Danielle Droitsch, *Trump Fast Tracks Review Process for Keystone XL Pipeline*, NAT. RESOURCES DEF. COUNCIL: EXPERT BLOG (Jan. 25, 2017), <https://www.nrdc.org/experts/danielle-droitsch/trump-fast-tracks-review-process-keystone-xl-pipeline>.

10. See, e.g., Nia Williams, *U.S. Issues Presidential Permit to Enbridge Cross-Border Crude Pipeline*, REUTERS (Oct. 16, 2017, 3:19 PM), <https://af.reuters.com/article/commoditiesNews/>

track” approval, and legal review of the permitting process has taken on new importance.<sup>11</sup>

The Trump Administration’s approval of the Keystone XL pipeline has generated extensive media attention and controversy.<sup>12</sup> Proponents argue that the Keystone XL will increase jobs, reduce dependency on Middle Eastern oil, and lower energy prices.<sup>13</sup> Critics, on the other hand, believe that the pipeline is unlikely to deliver on many of these goals and will significantly impact the environment.<sup>14</sup> Against this backdrop, and following many rounds of consideration, the Obama Administration denied the presidential permit application for the Keystone XL citing a lack of adequate time for review.<sup>15</sup> In his very first week in office, however, President Trump issued a Memorandum inviting TransCanada, the owner of the pipeline, to reapply.<sup>16</sup> The Memorandum directed the State Department to decide on the application within sixty days and to utilize, to the “maximum extent permitted by law,” the existing Final Supplemental Environmental Impact Statement (“FSEIS”) and supporting documentation to comply with environmental regulations.<sup>17</sup> Within two months, the State Department granted the permit.<sup>18</sup> This haste was remarkable because presidential permit applications usually receive significant and lengthy review.<sup>19</sup> Aspects of that decision have since been challenged in federal court and in granting judicial review under the APA, the District Court of Montana took special note of the President’s active involvement in the process.<sup>20</sup> The federal government’s motion to dismiss was denied and the case proceeded.<sup>21</sup>

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idAFL2N1MR1LS; *State Department Grants Permit for Alberta Clipper Pipeline*, TWIN CITIES PIONEER PRESS (Oct. 16, 2017, 11:08 PM), <https://www.twincities.com/2017/10/16/state-department-grants-permit-for-alberta-clipper-pipeline/>; Labott & Diamond, *supra* note 3; Mathews et al., *supra* note 3.

11. Droitsch, *supra* note 9.

12. See, e.g., Labott & Diamond, *supra* note 3; Mathews et al., *supra* note 3.

13. *Keystone XL Pipeline: Why Is It So Disputed?*, BBC NEWS (Jan. 24, 2017), <http://www.bbc.com/news/world-us-canada-30103078>.

14. *Id.*

15. See Office of the Spokesperson, *Denial of the Keystone XL Pipeline Application*, U.S. DEP’T OF STATE, (Jan. 18, 2012), <https://2009-2017.state.gov/r/pa/prs/ps/2012/01/181473.htm>; Mathews et al., *supra* note 3.

16. Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (Jan. 24, 2017).

17. *Id.* An FSEIS updates and supplements an initial “Environmental Impact Statement” (EIS). The EIS is required under the National Environmental Policy Act and describes impacts that major federal actions are likely to have on the human environment. *National Environmental Policy Act Review Process*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (last visited Jan. 14, 2018).

18. See Labott & Diamond, *supra* note 3; Mathews et al., *supra* note 3.

19. See *infra* Part II.

20. See *Indigenous Env’tl. Network v. U.S. Dep’t of State*, CV-17-29-GF-BMM, 2017 U.S. Dist. LEXIS 193546, at \*11 (D. Mon. Nov. 22, 2017) (holding that plaintiffs’ claim under the APA was

A few months later, in October of 2017, the Trump Administration's State Department granted approval for the Alberta-Clipper crude oil pipeline, also known as Enbridge Energy's Line 67.<sup>22</sup> Authorizing an increased volume of oil shipment from Edmonton, Alberta, to Superior, Wisconsin, the approval ended a five-year review process initiated during the Obama Administration.<sup>23</sup> During the lengthy deliberations, the Obama State Department allowed the company to implement a "workaround" plan that would connect the Alberta Clipper to a nearby pipeline and continue pumping while the Administration conducted a thorough review of the proposed expansion.<sup>24</sup> This Obama-era interim approval (which the State Department determined did not require an application for a *new* presidential permit)<sup>25</sup> was controversial and was challenged unsuccessfully in the District Court of Minnesota, as discussed below.<sup>26</sup> Within the first nine months in office, however, concerns over the workaround plan became moot as President Trump granted final approval for the overall plan.<sup>27</sup> A review process for the pipeline expansion that had taken several years under President Obama was finalized in just months under President Trump.<sup>28</sup>

As pipeline owners continue to contemplate the modification and development of their operations,<sup>29</sup> whether and how the presidential permitting process is subject to judicial review is of paramount concern for environmental groups and tribes seeking input into the process.

## II. A BRIEF OVERVIEW OF THE PRESIDENTIAL PERMITTING PROCESS

Oil pipelines that cross international borders often implicate, among other things, national concerns about foreign policy, the environment, and the economy.

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a reviewable "final agency action" in part because "the President conceded in his [January 2017 Memorandum] that the State Department should consider the FSEIS as part of its obligation to satisfy all applicable requirements of NEPA.").

21. *Id.* at \*34.

22. Williams, *supra* note 10.

23. *Id.*

24. *Id.*

25. White Earth Nation v. Kerry, No. 14-4726 (MJD/LIB), 2015 U.S. Dist. LEXIS 165014, at \*11-12 (D. Minn. Dec. 9, 2015).

26. *See id.* at \*23.

27. Williams, *supra* note 10; *see also* Dep't of State, Record of Decision and National Interest Determination, Enbridge Line 67 (Sept. 27, 2017). As discussed below, this decision has subsequently been challenged. *See infra* Part IV.

28. Williams, *supra* note 10.

29. *See, e.g.*, Office of Governor Rick Snyder, *New Agreement Requires Increased Safeguards for Michigan Waters, Sets Final Schedule on Future of Enbridge's Line 5 Petroleum Pipeline*, MICHIGAN.GOV (Nov. 27, 2017) [http://www.michigan.gov/snyder/0,4668,7-277-80388\\_80397-453202--,00.html](http://www.michigan.gov/snyder/0,4668,7-277-80388_80397-453202--,00.html) (documenting an agreement to replace the segment of Enbridge's Line 5 at the St. Clair River crossing between Michigan and Canada).

Although many pipeline regulatory decisions are left to the states,<sup>30</sup> a key point of *federal* involvement, especially for environmental issues, occurs during the presidential permitting process.<sup>31</sup>

Presidential permits are granted pursuant to Executive Order 13337.<sup>32</sup> Signed by President George W. Bush in 2004, EO 13337 amended Executive Order 11423 (“EO 11423”) as signed by President Lyndon B. Johnson in 1964.<sup>33</sup> EO 11423 dictated that “the proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities connecting the United States with a foreign country” and specifically included “oil pipelines” on that list of facilities.<sup>34</sup> To this end, and by “the authority vested in [him] as President of the United States and Commander in Chief of the Armed Forces,” the Executive Order proceeded to detail the process by which presidential permits are to be solicited and granted.<sup>35</sup>

Functionally, the presidential permitting process is handled by the State Department.<sup>36</sup> The Secretary of State is “designated and empowered to receive all applications for permits for the construction, connection, operation, or maintenance, at the border of the United States of . . . pipelines.”<sup>37</sup> Having received such an application, EO 13337 then directs the Secretary to “request the views” of, among others, the Secretary of the Interior and Administrator of the Environmental Protection Agency.<sup>38</sup> Although the EOs do not explicitly require an environmental analysis under the National Environmental Protection Act (“NEPA”),<sup>39</sup> the State Department’s own regulations require a review of the environmental impacts.<sup>40</sup> The Department has historically conducted a NEPA analysis as part of the

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30. *State Programs Overview*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN. (Dec. 8, 2017) <https://www.phmsa.dot.gov/working-phmsa/state-programs/state-programs-overview>; ADAM VANN ET AL., CONG. RESEARCH SERV., R42124, PROPOSED KEYSTONE XL PIPELINE: LEGAL ISSUES 1 (Jan. 20, 2012).

31. See VANN ET AL., *supra* note 30; see also *id.*, *supra* note 30, at 12.

32. See Exec. Order 13337, *supra* note 1.

33. *Id.*; see Exec. Order 11423, *supra* note 1. The relevant differences between the Executive Orders are discussed more fully below.

34. Exec. Order 11423, *supra* note 1.

35. *Id.*

36. See *id.*

37. *Id.*

38. Exec. Order 13337, *supra* note 1.

39. See 42 U.S.C. § 4332(c) (2012).

40. See 22 C.F.R. § 161.7(c)(1) (2017); see also *infra* Part IV.

process.<sup>41</sup> Among other things, NEPA requires federal agencies to document their consideration of the environmental impacts of all “major federal actions.”<sup>42</sup>

At the end of this review process, the Secretary of State ultimately must determine whether issuing a permit would “serve the national interest.”<sup>43</sup> The Secretary then notifies the other agency heads with whom she consulted about the application (e.g. the Secretary of the Interior and the Administrator of the Environmental Protection Agency, among others).<sup>44</sup> The agency heads, in turn, have fifteen days to register any disagreement regarding the Secretary’s finding.<sup>45</sup> If no disagreement exists, the Secretary “shall issue or deny the permit in accordance with the proposed determination.”<sup>46</sup> If there is divergence of opinion, the Secretary must “refer the application . . . to the President for consideration and a final decision.”<sup>47</sup> The President, however, has never been called upon to perform this “tie-breaking function.”<sup>48</sup>

### III. CONSTITUTIONAL CHALLENGES TO THE PERMITTING PROCESS

Commentators have questioned the constitutionality of the presidential permitting process.<sup>49</sup> Among other things, they argue that references to the Constitution within the EOs are too vague to legitimize the exercise of power; that nowhere in the Constitution (or statute) is the President *explicitly* granted the authority to regulate oil pipelines; that the powers of the Commander in Chief as referenced in the EOs are inapplicable unless our country is currently engaged in combat; and that instead Congress retains the right to regulate foreign commerce.<sup>50</sup>

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41. VANN ET AL., *supra* note 30, at 1 (“[p]rior to making the national interest determination, the State Department conducts a review under the National Environmental Policy Act (NEPA)”).

42. 42 U.S.C. § 4332(c) (2012). Under NEPA, agencies engaged in a “major federal action” that may significantly affect the environment are required to draft and publish in the Federal Register a report documenting likely impacts of the project and any alternatives the agency considered. The public is then given an opportunity to comment on the report and the agency is obligated to publish responses to those comments before issuing a final decision on the project. *See National Environmental Policy Act Review Process*, *supra* note 17; *see also* 40 C.F.R. § 1508.18 (2017) (defining a “major federal action”).

43. Exec. Order 13337, *supra* note 1.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Parker, *supra* note 4, at 245.

49. *See, e.g.,* Giampoli, *supra* note 4, at 169-70.

50. *See id.*; *see also* *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1162 (D. Minn. 2010) (“Plaintiffs assert that . . . the President has no constitutional or statutory authority to issue presidential permits allowing for the importation of tar sands crude oil from Canada.”); VANN ET AL., *supra* note 30, at 6-7 (highlighting authorities which point to Congressional power to regulate foreign commerce).



These arguments, however, are at odds with both constitutional doctrine and case law discussing EO 13337.<sup>51</sup> Legitimate presidential power may stem from either the Constitution or an act of Congress.<sup>52</sup> Both of these requirements are present for EO 13337, as federal courts have recognized.<sup>53</sup> Part A provides a brief overview of the jurisprudence defining the limits of presidential authority generally. Part B then discusses the constitutional authority for presidential permits and Part C argues that there is also Congressional ratification for this process. Finally, Part D discusses the manner in which courts have recognized the constitutionality of presidential permits.

### A. *Historical Parameters of Presidential Powers*

Arguably the most significant United States Supreme Court case to define the parameters of executive power is *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>54</sup> In *Youngstown*, President Truman issued an executive order directing the Secretary of Commerce to seize and operate the steel mills in an effort to quell a strike by the steelworkers during the Korean War.<sup>55</sup> The Supreme Court found that the President had attempted to justify this action not through “any specific statutory authority” but rather relied “generally upon all powers vested in the President by the Constitution and laws of the United States and as President of the United States and Commander in Chief of the Armed Forces.”<sup>56</sup> Justice Black, writing for the plurality, found that “[t]he President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”<sup>57</sup> Ultimately, the Court found that neither was present in that case and therefore held that the President’s seizure of the mills was unconstitutional.<sup>58</sup>

In a much-cited concurring opinion in *Youngstown*, Justice Jackson identified three situations in which the President may find his constitutional authority questioned.<sup>59</sup> First, “[w]hen the President acts pursuant to an express or implied au-

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51. See, e.g., *Sierra Club*, 689 F. Supp. 2d at 1163 (“Defendants’ assertion that the President’s authority to issue the border-crossing Permit comes by way of his constitutional authority over foreign affairs and authority as Commander in Chief is well recognized.”).

52. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

53. See, e.g., *Sierra Club*, 689 F. Supp. 2d at 1163 (noting the President’s constitutionally-derived power to issue permits and that “Congress’s inaction suggests that Congress has accepted the authority of the President to issue cross-border permits.”).

54. 1-3 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 3.01 (2017) (identifying it as the “most important” case and a “landmark” decision).

55. *Youngstown*, 343 U.S. at 579.

56. *Id.*

57. *Id.* at 585.

58. *Id.* at 589.

59. *Id.* at 635 (Jackson, J., concurring).

thorization of Congress, *his authority is at its maximum.*<sup>60</sup> If the president lacks authority under this scenario, “it usually means that the Federal Government as an undivided whole lacks the power.”<sup>61</sup> Second, there is a “twilight” zone of possible concurrent executive and Congressional authority. In this zone, the “President acts in absence of either a congressional grant or denial of authority,” and “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”<sup>62</sup> Finally, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”<sup>63</sup>

In the case of EO 13337, the President acts under both his explicit constitutional powers as well as power authorized by Congress through implication. The few courts that have examined decisions made pursuant EO 13337 have recognized the constitutional legitimacy of this authority.<sup>64</sup>

### B. Constitutional Power

The presidential permitting process enjoys solid constitutional footing. Unlike in *Youngstown*, where the government ineffectively attempted to rely broadly on “the aggregate” of the President’s Article II powers,<sup>65</sup> EO 13337 and EO 11423 cite to specific provisions in the Constitution for their permitting authority.<sup>66</sup> That is: in addition to the general “executive” control of the President and his authority as the “Commander in Chief,” the “foreign relations” power is also critically invoked as a basis for the presidential permitting process.<sup>67</sup>

EO 11423 cites to several constitutional provisions which authorize the President’s actions. The very first sentence of the Order states that the “proper conduct of the *foreign relations* of the United States” demands “executive permission” for border crossing facilities.<sup>68</sup> Dating back at least to the early twentieth century, the Supreme Court has recognized that constitutional powers over foreign affairs and domestic affairs are distinct, “both in respect to their origin and their nature.”<sup>69</sup> In particular, the federal government, rather than the states, is charged with interna-

60. *Id.* (emphasis added).

61. *Id.* at 636-37.

62. *Id.* at 637.

63. *Id.*

64. *See infra* Part D.

65. *Youngstown*, 343 U.S. at 587 (noting the government’s reliance on the “executive” power, the mandate to see that “[l]aws be faithfully executed,” and the President’s authority as the “Commander in Chief”).

66. Exec. Order 11423, *supra* note 1; Exec. Order 13337, *supra* note 1.

67. Exec. Order 11423, *supra* note 1.

68. *Id.* (emphasis added).

69. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936).

tional relations and the President “is the sole organ” of the federal government in that realm.<sup>70</sup> There is strong evidence that the Constitution vests the executive branch with primary responsibility for the aspect of foreign relations that includes pipeline border crossings.<sup>71</sup>

As additional authority, EO 11423 cites to the power “vested in me as President of the United States and Commander in Chief of the Armed Forces of the United States.”<sup>72</sup> Given the critical nature of reliable fuel supplies to a well-functioning military and other national security concerns, this should come as no surprise. In amending EO 11423, EO 13337 incorporated these existing justifications by alluding again to the “authority vested in me as President by the Constitution and the laws of the United States of America.”<sup>73</sup>

Thus the presidential permitting process, as outlined in EO 11423 and EO 13337, rests solidly on constitutional legitimacy derived not only from the President’s “executive” powers” and those of the “Commander in Chief,” but also from his special role as the ‘sole organ’ of foreign relations.

### C. Congressionally Authorized Power

In addition to the constitutional provisions cited above, Executive Order 13337 derives further legitimacy from its reference to the “laws of the United States of America.”<sup>74</sup> Again, in contrast to the illegitimate exercise of power seen in *Youngstown*, Congress *has* provided implicit sanction to the presidential permitting process.

In *Youngstown*, the Court found that rather than congressional silence, when given the opportunity to authorize a similar seizure, “Congress had refused to adopt that method of settling labor disputes.”<sup>75</sup> That is, rather than acting in a “twilight” zone of unclear authority, President Truman’s seizure of the steel mills fell into Justice Jackson’s third category where “the President takes measures in-

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70. *Id.* at 319 (establishing that that “[a]s a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America” and determining that “in international relations the President is the sole organ of the Federal Government.”).

71. *But cf.* VANN ET AL., *supra* note 30, at 6-7 (highlighting authorities which point to Congressional power to regulate foreign commerce and suggesting that this power may supersede that of the President in the event of a conflict). Notably, as discussed below, this conflict has never materialized.

72. Exec. Order 11423, *supra* note 1.

73. Exec. Order 13337, *supra* note 1.

74. *Id.*

75. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952) (noting that when the “Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency.”).

compatible with the expressed or implied will of Congress” and “his power is at its lowest ebb.”<sup>76</sup>

Not so in the case of EO 13337, where Congress *has* acted numerous times,<sup>77</sup> and the result is an implicit sanction to the presidential permitting process. The very first “legislative foray into the permitting of the border crossing facilities” gave congressional recognition to the legitimacy of the presidential permits and demonstrated acquiescence to the process.<sup>78</sup> In Title V of the Temporary Payroll Tax Cut Continuation Act of 2011, Congress directed the president to grant a presidential permit for the Keystone XL Pipeline unless he determined that it “would not serve the national interest.”<sup>79</sup> In other words, Congress acknowledged the authority of EO 13337 and passed a measure, signed into law, that gave deference to the permitting process. Relying on that deference, the president used the authority that Congress recognized as legitimate and determined that the pipeline was not in the national interest.<sup>80</sup> The State Department felt that there was not enough time for review and preliminarily denied the application.<sup>81</sup> Congress implicitly sanctioned the presidential permitting process by passing legislation that directed the president to work within the framework to grant or deny the Keystone XL permit, and the president used the approved process to deny the application.

Since then, Congress has many times attempted to enact other legislation that would alter the president’s authority to grant permits or remove altogether the presidential permitting process.<sup>82</sup> These efforts have *all failed*.<sup>83</sup> A Congressional Research Service Report from April 2017 catalogues many of these bills, noting that some tackled the Keystone XL Pipeline specifically, while others sought to address EO 13337 more generally.<sup>84</sup> Notably, with majorities in both the House and Senate, Republican lawmakers in the 114<sup>th</sup> Congress renewed their focus on the pipeline, passing in both chambers the Keystone XL Pipeline Approval Act.<sup>85</sup> This bill would have authorized construction of the pipeline without a presidential permit.<sup>86</sup> However, President Obama vetoed the bill<sup>87</sup> and an attempt to override

76. *Id.* at 637

77. See LINDA LUTHER & PAUL W. PARFOMAK, R44149, CONG. RESEARCH SERV., PRESIDENTIAL PERMIT REVIEW FOR CROSS-BORDER PIPELINES AND ELECTRIC TRANSMISSION, 15-16 (2017) (documenting attempted Congressional action relative to the permitting process).

78. VANN ET AL., *supra* note 30, at 2.

79. Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, § 501(a), (b). If the President took no action, the permit would automatically be granted in 60 days. *Id.* § (c).

80. Office of the Spokesperson, *supra* note 15.

81. *Id.*

82. See LUTHER & PARFOMAK, *supra* note 77, at 15-16.

83. See *id.* at 16.

84. *Id.* at 15-16.

85. *Id.*; Keystone XL Pipeline Approval Act, S.1, 114th Cong. § 2 (2015).

86. See Keystone XL Pipeline Approval Act, S.1, 114th Cong. § 2 (2015).

the veto was unsuccessful.<sup>88</sup> Other Congressional efforts to wrest authority back from the executive branch by demolishing the permitting process more generally were even less successful.<sup>89</sup> The Promoting Cross-Border Energy Infrastructure Act,<sup>90</sup> introduced in the summer of 2017, would “eliminate the Presidential Permit requirement for cross-border crude oil . . . infrastructure.”<sup>91</sup> True to historical precedent, however, this bill has also failed to make it through both chambers.<sup>92</sup>

Congress has thus had multiple opportunities to address, modify, or exert authority over the presidential permitting process. The only instance in which they have successfully done so was in 2011, when they directed the executive branch to work *within* the presidential permitting framework to address the Keystone XL Pipeline, notably leaving significant discretion with the president.<sup>93</sup> The President ultimately used that discretion to deny the Keystone XL application.<sup>94</sup>

Whether over concerns about separation of powers or the specifics of each piece of legislation, Congress’ inability to pass legislation demonstrates reluctance to intervene in the existing permitting process. Scholars have suggested that Congress may have authority over foreign commerce that supersedes that of the President regarding cross-border pipelines.<sup>95</sup> To date, however, Congress has repeatedly failed to exercise that power. This demonstrates a lack of true congressional will to alter the status quo and creates a situation in which repeated *inaction* from Congress generates an implied presidential power.<sup>96</sup> Together with the constitutional authority noted above, and judicial recognition of the president’s authority discussed below, Congress’s express utilization of the process, followed by its repeated inaction, places EO 13337 on solid constitutional ground.

87. Press Release, Veto Message to the Senate: S.1, Keystone XL Pipeline Approval Act, THE WHITE HOUSE (Feb. 24, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/02/24/veto-message-senate-s-1-keystone-xl-pipeline-approval-act>.

88. LUTHER & PARFOMAK, *supra* note 77, at 16. Admittedly, this is an indication that more than a simple majority but less than two-thirds of Congress believed they had this authority. See *How Laws are Made*, KIDS IN THE HOUSE, <https://kids-clerk.house.gov/grade-school/lesson.html?intID=17> (last visited May 28, 2018).

89. LUTHER & PARFOMAK, *supra* note 77, at 16; see, e.g., American Energy Renaissance Act of 2015, H.R. 1487, 114th Cong. (2015-16); North American Energy Infrastructure Act, S. 1228, 114th Cong. (2015-16).

90. Promoting Cross-Border Energy Infrastructure Act, H.R. 2883, 115th Cong. (2017-18).

91. ADAM VANN & PAUL W. PARFOMAK, CONG. RESEARCH SERV., R43261, PRESIDENTIAL PERMITS FOR BORDER CROSSING ENERGY FACILITIES i (2017).

92. Promoting Cross-Border Energy Infrastructure Act, H.R. 2883, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/2883> (last visited May 4, 2018).

93. See LUTHER & PARFOMAK, *supra* note 77, at 15-16.

94. See *id.* at 15.

95. See, e.g., VANN ET AL., *supra* note 30, at 12 (noting that “if Congress chose to assert its authority in the area of border crossing facilities, this would likely be considered within its Constitutionally enumerated authority to regulate foreign commerce.”).

96. See *id.* at 637.

### D. *Judicial Recognition of Constitutionality*

Many authorities confirm the inherent legitimacy of the presidential permitting process, placing it into Justice Jackson's first basket of scenarios in which presidential authority is at its "maximum."<sup>97</sup> The executive Orders themselves reference several constitutional provisions, including the executive power, the authority of the "Commander in Chief," and proper control of "foreign relations."<sup>98</sup> Further, Congress's repeated failure to overhaul the process (and initial directive to the president to work *within* the framework) confirms that the president acts well within his authority when making permitting decisions. The few courts to rule on the issue have recognized this legitimacy.<sup>99</sup>

In *Natural Resources Defense Council v. United States Department of State*, ("NRDC") the NRDC sought declaratory and injunctive relief against the State Department.<sup>100</sup> It argued that the State Department had violated NEPA by issuing a presidential permit for a trans-border pipeline between the United States and Canada based on a deficient Environmental Impact Statement ("EIS").<sup>101</sup> In that case, the District Court for the District of Columbia found that the president was exercising his "inherent discretionary power under the Constitution to issue cross-border permits."<sup>102</sup> Agreeing with defendants on this point, the court held that the president acted through his "inherent constitutional authority over *foreign affairs*."<sup>103</sup>

This reasoning was expanded in *Sierra Club v. Clinton*.<sup>104</sup> In that case, plaintiffs similarly argued that the State Department violated NEPA by issuing a presidential permit for the Alberta Clipper pipeline based on a deficient EIS.<sup>105</sup> Plaintiffs also argued that the presidential permitting process was unconstitutional, suggesting that absent any statutory authority to regulate pipelines, oil transportation is an aspect of foreign commerce which was within the purview of Con-

97. *Youngstown*, 343 U.S. at 635-37; see Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, §§ 501(a), (b) (directing the president to work within the presidential permitting framework to evaluate a permit application).

98. See Exec. Order 13337, *supra* note 1 (referencing "the authority vested in me as President by the Constitution and the laws of the United States of America"); Exec. Order 11423, *supra* note 1 (referencing "executive permission" related to "foreign relations" and the "authority vested in me as President of the United States and Commander in Chief of the Armed Forces").

99. See *Nat. Res. Def. Council v. Dep't of State*, 658 F. Supp. 2d 105, 109, 111 (D.D.C. 2009); *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1162-63 (D. Minn. 2010); *Sisseton-Wahpeton Oyate v. U.S. Dept. of State*, 659 F. Supp. 2d 1071, 1081-82 (D.S.D. 2009).

100. *Nat. Res. Def. Council*, 658 F. Supp. 2d at 106.

101. *Id.* at 105-07.

102. *Id.* at 111.

103. *Id.* at 109 (emphasis added).

104. *Sierra Club*, 689 F. Supp. 2d at 1147.

105. *Id.* at 1151-52.

gress.<sup>106</sup> Defendants countered that trans-border pipelines implicate the president's constitutional power over foreign affairs and national security and are thus appropriately permitted by the executive branch.<sup>107</sup> The District Court of Minnesota agreed with defendants, holding that it is "well recognized" that "the President's authority to issue the border-crossing Permit comes by way of his constitutional authority over foreign affairs and authority as Commander in Chief."<sup>108</sup> In support of this assertion, the court cited both *NRDC* as well as numerous opinions by the Attorney General.<sup>109</sup> The court in *Sierra Club* provided further evidence of the constitutionality of the presidential permitting process by highlighting "Congress's inaction" and noted that it "suggests that Congress has accepted the authority of the President to issue cross-border permits."<sup>110</sup>

A similar justification was utilized in *Sisseton-Wahpeton Oyate v. United States Department of State* ("*Sisseton*").<sup>111</sup> Here again, Native American tribes sued under NEPA, the National Historic Preservation Act ("NHPA"), and the APA.<sup>112</sup> Although the District Court of South Dakota determined that plaintiffs' complaint lacked redressability, and by extension standing, the court noted that, assuming *arguendo* the plaintiffs could show standing, they would still hold that the president had granted the permit under his "inherent constitutional authority to manage foreign affairs."<sup>113</sup> The court then went on to note that because "Congress has failed to create a federal regulatory scheme for the construction of oil pipelines, and has delegated this authority to the states . . . the President has the sole authority to allow oil pipeline border crossings."<sup>114</sup>

The few courts to address the issue have thus solidified the constitutionality of the presidential permitting process in their opinions, commenting on both constitutional bases and congressional inaction. The reviewability of the permitting decision under the APA, however, remains a significant hurdle for would-be plaintiffs.

#### IV. REVIEWABILITY UNDER THE APA

While the question of constitutionality has been almost uniformly dismissed by the few district courts that have addressed presidential permits, debate contin-

106. *Id.* at 1162.

107. *Id.*

108. *Id.* at 1163.

109. *Id.*; see also VANN ET AL., *supra* note 30, at 7-10 (documenting an evolving set of Attorney General opinions which over time reflected increased presidential autonomy and authority to make decisions on cross-border matters).

110. *Sierra Club*, 689 F. Supp. 2d at 1163.

111. *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071 (D.S.D. 2009).

112. *Id.* at 1079.

113. *Id.* at 1081.

114. *Id.*

ues on the reviewability of presidential permits under the APA.<sup>115</sup> Although courts split on this issue, the most recent judicial analysis of the presidential permitting decision provides a good framework for evaluation.<sup>116</sup> When the decisions are properly isolated, plaintiffs seeking review of the process do have recourse under the APA.

Part A identifies the two threshold questions that might limit APA review of presidential permitting decisions. Part B discusses how courts addressing presidential permits have historically struggled to define precisely which “decision” has been submitted for APA review. Part C discusses the implications of broadly defining of the permitting “decision.” Part D argues that it is more appropriate to narrowly define the “decision” under APA review to only include the environmental analysis as required by the State Department’s own regulations. For environmental and tribal plaintiffs seeking input into the pipeline decision making process, it is critical to establish the authority of the judiciary to evaluate presidential permits under the APA.

### A. Threshold Questions for APA Review

The Administrative Procedure Act waives sovereign immunity that would otherwise preclude an individual from suing the federal government.<sup>117</sup> Arguably one of the most important aspects of America’s system of checks and balances, it “protects the very essence of constitutional democracy and the rule of law.”<sup>118</sup> Relevant to present purposes, the APA allows individuals to solicit judicial review of “final agency action.”<sup>119</sup> Two critical questions thus arise. First, what constitutes a “final” decision? Second, when has that final decision been made by an “agency”? Plaintiffs suing under the APA to force review of the presidential permitting process have struggled to overcome these threshold questions. As argued below, APA review is more easily obtained if the parameters of the “decision” under scrutiny are narrowly defined to include what courts already consistently recognize as a “final agency action.”

The first question (“finality”) was addressed by the Supreme Court in *Bennett v. Spear*.<sup>120</sup> The Court held that: “two conditions must be satisfied for an agency decision to be ‘final’: First, the action must mark the ‘consummation’ of the agen-

115. See, e.g., *Indigenous Env'tl. Network v. U.S. Dep't of State*, CV-17-29-GF-BMM, 2017 U.S. Dist. LEXIS 193546, at \*13-15 (D. Mon. Nov. 22, 2017) (concluding that contrary to federal defendants’ arguments, the issuance of the presidential permit was a final agency action reviewable under the APA).

116. See *id.*

117. See STEIN ET AL., *supra* note 54, § 45.02; VANN ET AL., *supra* note 30, at 26.

118. David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1, 2 (2010).

119. Administrative Procedure Act, 5 U.S.C. § 704 (2016).

120. *Bennett v. Spear*, 520 U.S. 154 (1997).



cy's decisionmaking process . . . [a]nd second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'<sup>121</sup> In that case, a Biological Opinion issued in relation to the Endangered Species Act was considered a "final" decision because it had "direct and appreciable legal consequences."<sup>122</sup>

The second question (whether or not a decision has been made by an "agency") is more complicated. For purposes of the APA, an "agency" is defined as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency" but the term explicitly does not include, *inter alia*, Congress, the courts, the territorial governments, or the government of the District of Columbia.<sup>123</sup> In *Franklin v. Massachusetts*,<sup>124</sup> the Supreme Court found, in effect, that, like Congress and the courts, the president is also not an "agency" and thus the "President's actions are not reviewable under the APA."<sup>125</sup> The case dealt with apportionment of congressional representatives.<sup>126</sup> The parties asked the Court to rule on submission of the census form from the Commerce Secretary to the President and from the President to Congress.<sup>127</sup> First the Court held that the Secretary's submission of the report to the President was not "final" because it did not trigger any "direct consequences" and only became final after the president submitted an account to Congress.<sup>128</sup> The Court went on to find that the decision of the *President* to present the report to Congress, although final, was also not reviewable under the APA for a different reason.<sup>129</sup> The Court held: "[o]ut of respect for the separation of powers and the unique constitutional position of the President . . . [a]s the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements."<sup>130</sup> Critically, the Court distinguished between the two activities, noting that the con-

121. *Id.* at 177-78 (internal citations omitted).

122. *Id.* at 178. Notably, the Supreme Court distinguished the issuing of the Biological Opinion (which it considered "virtually determinative" of agency action) from the decision in *Franklin* (discussed below) which the Court characterized as "purely advisory" and "in no way affect[ing] the legal rights of the relevant actors." *Id.* at 170, 178.

123. 5 U. S. C. §§ 555(1), 701(b)(1); *see also* *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992).

124. *Franklin*, 505 U.S. at 788.

125. *Id.* at 789.

126. *Id.* at 790.

127. *Id.* at 788.

128. *Id.* at 798. Thus, they found that the Secretary's action "serves more like a tentative recommendation than a final and binding determination." *Id.* "[T]he Secretary cannot act alone." *Id.* at 800. This is in direct contrast to the situation in the presidential permitting process, in which the Secretary is empowered to grant or deny a permit without any further action by the president, thereby making a "final" decision. *See* Exec. Order 13337, *supra* note 1; *see also* *Parker*, *supra* note 4 at 256.

129. *Franklin*, 505 U.S. at 800-01.

130. *Id.*

stitutional shield from review applied only to the activities of “the President, not the Secretary.”<sup>131</sup>

### B. Which “Decision” is Under Review for Presidential Permits?

As was made clear in *Franklin*, precisely which decision the court considers is critical to the analysis of whether it is reviewable under the APA. The few courts addressing this in the context of EO 13337 have struggled and often conflated what I argue ought to be considered two distinct decisions: a) the determination to grant or deny a presidential permit pursuant to the Executive Order and b) the environmental review which, critically, is required by the State Department’s own guidelines on NEPA.<sup>132</sup>

Some commentators have argued that both decisions ought to be reviewable.<sup>133</sup> Recent case law confirms that APA review of the latter (i.e. only the environmental review rather than the broader decision of whether to grant the permit) provides a more effective toehold for plaintiffs seeking review of the process. As I argue below, specifically restricting a claim to only seek review of the environmental analysis (rather than review of the decision of whether to grant the permit) may be a successful litigation strategy for plaintiffs suing under the APA.

### C. Reviewability of the Permit Granting Determination

Although commentators have argued that the entire permitting process ought to be reviewable,<sup>134</sup> the few courts that addressed this issue have held that the broad decision of whether to grant a presidential permit is unreviewable under the APA because such a decision is either: a) “presidential” in nature or b) lacking finality.<sup>135</sup> These commentators nevertheless argue that the decision of whether or not to grant a permit perhaps is not inherently presidential and ought to be re-

131. *Id.* at 800.

132. *See* 22 C.F.R. § 161.7(c)(1) (2017); *see also* VANN ET AL., *supra* note 30, at 26-27 (noting that “evidence appears to support the notion that an EIS is an agency action separate from the State Department’s issuance of a Presidential permit under Executive Order 13337”).

133. *See, e.g.*, Parker, *supra* note 4. Parker argues that:

[w]here DOS issues the decision and the permit, both the Environmental Impact Statement (“EIS”) and the decision to issue the permit should be judicially reviewable. Only when the President actually settles interagency disputes and issues the final decision should the action be considered Presidential in nature and unavailable for judicial review under the APA.

*Id.* at 233.

134. *See, e.g.*, Parker, *supra* note 4, at 233.

135. *See, e.g.*, *Sisseton-Wahpeton Oyate v. U.S. Dep’t of State*, 659 F. Supp. 2d 1071, 1080 (D.S.D. 2009); *Nat. Res. Def. Council v. U.S. Dep’t of State*, 658 F. Supp. 2d 105, 109 (D.D.C. 2009); *White Earth Nation v. Kerry*, No. 14-4726 (MJD/LIB), 2015 U.S. Dist. LEXIS 165014, at \*20-21 (D. Minn. Dec. 9, 2015).

viewable unless the president steps in to resolve a conflict.<sup>136</sup> The argument is that unlike in *Franklin*, where the Secretary provided a recommendation to the President, who ultimately took action, EO 13337 empowers the Secretary to issue or deny the permits herself, except in the rare cases where an agency disputes the decision.<sup>137</sup> That is: “[o]nly in exceptional circumstances would the permitting decision fall to the President.”<sup>138</sup> Otherwise, the State Department takes the agency action that “is effectively final.”<sup>139</sup>

This argument, while academically persuasive, has failed to date in the courtroom.<sup>140</sup> In evaluating the reviewability of the decision to grant a presidential permit, courts have found that either the State Department’s actions are not “final”; that it was in fact the “president” (rather than an “agency”) who acted; or both.<sup>141</sup> If the question at bar is judicially unreviewable, the case will not be able to survive a motion to dismiss.<sup>142</sup>

The federal District Court of South Dakota addressed the issue in 2009.<sup>143</sup> In *Sisseton*, the court began by identifying precisely which decision they felt was under the APA microscope: “[a]t issue here is the issuance of the Presidential Permit pursuant to Executive Order 13337.”<sup>144</sup> Concluding, unsurprisingly, that “the action here was presidential action,” it granted a motion to dismiss.<sup>145</sup> As a final nail in the coffin, the court further held that “[t]he President is not obligated to approve any applications for permits and, until he does, there is no final action.”<sup>146</sup> Thus the review of the permit decision was found to be doubly unreviewable: first lacking finality until approved by the president and then ultimately completed by an entity which is not an “agency” subject to APA review.

Similarly in *NRDC*, the court granted a motion to dismiss finding the decision at issue unreviewable under the APA “because the State Department is acting for the President in issuing presidential permits pursuant to Executive Order 13,337.”<sup>147</sup> Although it found that the State Department’s decision to grant the

136. See Parker, *supra* note 4, at 255.

137. *Id.* at 255-56.

138. *Id.* at 258.

139. *Id.*

140. See, e.g., *Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1080-81 (holding that the issuance of the presidential permit was not “final” until approved by the president which in turn meant that it was not completed by an agency).

141. See, e.g., *id.*

142. See, e.g., *id.* at 1083 (granting the motion to dismiss after finding APA review unavailable to plaintiffs).

143. *Id.* at 1071.

144. *Id.* at 1080-81.

145. *Id.* at 1081, 1083.

146. *Id.*

147. *Nat. Res. Def. Council v. U.S. Dep’t of State*, 658 F. Supp. 2d 105, 109 (D.D.C. 2009) (internal citations omitted).

permit was “final,”<sup>148</sup> it was unreviewably “presidential” because nothing “curtails the President’s authority to direct whether the State Department . . . issues a presidential permit.”<sup>149</sup> Plaintiffs’ attempts to differentiate the environmental analysis from the permitting analysis failed and the court granted the motion to dismiss because the broad “decision” was unreviewable under the APA.<sup>150</sup> More recently in *White Earth Nation v. Kerry*, the District Court of Minnesota again held that “the State Department’s issuance of a Presidential Permit pursuant to Executive Order 13337 was Presidential action and therefore not subject to review under the APA.”<sup>151</sup>

In each of these cases, the court treated the *permit issuance* as the decision for review under the APA. In each case, it was deemed presidential and thus unreviewable. While some continue to argue that these courts “did not correctly apply *Franklin* in determining whether [State Department] decisions pursuant to E.O. 13337 are ‘presidential,’”<sup>152</sup> review may otherwise be achieved by reframing the parameters of the question.

#### D. Reviewability of the Environmental Analysis Determination

More successful plaintiffs have sought review of a different “decision” – the State Department’s environmental analysis as required by its own regulations. When separated from the permit decision, jurisprudence is evolving, and recent courts have found that the environmental analysis *is* subject to APA review, enabling plaintiffs’ claims to survive a motion to dismiss.<sup>153</sup>

In EO 13337 the President “designated and empowered” the Secretary of State to receive permitting applications, further requiring that the Department

148. *Id.* (holding that “[t]o the extent that it has immediate legal effect, issuance of a presidential permit, to be sure, is a final action”).

149. *Id.* at 111.

150. In their Memorandum in Opposition to the Motion to Dismiss, plaintiffs attempted to differentiate the environmental analysis from the permitting analysis, challenging only the former as a violation of NEPA. Plaintiff NRDC’s Memorandum in Opposition to Motions to Dismiss of Defendant and Defendant-Intervener at 1, *Nat. Res. Def. Council v. U.S. Dep’t of State*, 658 F. Supp. 2d 105 (D.D.C. 2009) (No. 08-1363 (RJL)). An additional strategy, as I suggest in part D, *infra*, would include a suit against the State Department directly for failure to follow their own published regulations.

151. *White Earth Nation v. Kerry*, No. 14-4726 (MJD/LIB), 2015 U.S. Dist. LEXIS 165014, at \*20-21 (D. Minn. Dec. 9, 2015).

152. *See, e.g., Parker, supra* note 4, at 255.

153. *See, e.g., Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1160 (D. Minn. 2010); *Indigenous Envtl. Network v. U.S. Dep’t of State*, CV-17-29-GF-BMM, 2017 U.S. Dist. LEXIS 193546, at \*9 (D. Minn. Nov. 22, 2017); *but see* Plaintiff NRDC’s Memorandum in Opposition to Motions to Dismiss of Defendant and Defendant-Intervener at 1, *Nat. Res. Def. Council v. U.S. Dep’t of State*, 658 F. Supp. 2d 105 (D.D.C. 2009) (No. 08-1363 (RJL)) (unsuccessfully petitioning the court to review the environmental decision rather than the permitting decision). In contrast to more recent cases, this 2009 court treated the entire permitting process as a unified (and unreviewable) whole. *See Nat. Res. Def. Council v. U.S. Dep’t of State*, 658 F. Supp. 2d 105, 109 (D.D.C. 2009).

“shall” conduct a subsequent analysis to determine whether the permit would serve the national interest.<sup>154</sup> This mirrored the delegation contained in EO 11423.<sup>155</sup> Thus, the President delegated primary responsibility for evaluating permit applications to the Secretary of State.

The Secretary of State, in turn, promulgated a rule that an Environmental Assessment should be prepared to determine whether a full EIS is required before deciding whether to grant a presidential permit.<sup>156</sup> The rule, published in the Code of Federal Regulations, broadly suggests that “issuance of permits for construction of . . . pipeline[s]” normally requires analysis.<sup>157</sup>

The promulgation of this rule sets up a situation that *requires* the State Department to conduct an environmental analysis, a responsibility separate from delegated presidential authority.<sup>158</sup> The failure to do so (or an inadequate analysis) should trigger distinct APA liability which ought to be reviewable.<sup>159</sup> Indeed, federal courts recognize that published regulations can “have the force and effect of law” and that agencies are to be held accountable to their own regulations.<sup>160</sup> Separate and apart from their presidentially-delegated obligations under EO 13337, plaintiffs have an opportunity under the APA to hold the State Department responsible for compliance with their own regulations. That is: the promulgation of this rule creates an independent requirement to conduct an environmental analysis, which is reviewable under the APA. This shift from a consideration of the whole permitting decision to focus only on accountability for the environmental analysis is a game-changing distinction in the case of the presidential permitting process.

154. Exec. Order 13337, *supra* note 1.

155. See Exec. Order 11423, *supra* note 1.

156. 22 C.F.R. § 161.7(c)(1) (2017); see *National Environmental Policy Act Review Process*, *supra* note 17 (providing a description of the NEPA review process).

157. 22 C.F.R. § 161.7(c)(1) (2017) (specifically referencing EO 11423, which was later incorporated into and amended by EO 13337).

158. See VANN ET AL., *supra* note 30, at 27.

159. See *id.* (“If the State Department failed to complete a NEPA review while that rule was still in effect, it could be liable under the APA for acting contrary to its own regulations.”).

160. *Nationwide Build. Maint., Inc. v. Reich*, 14 F.3d 1102, 1105 (6th Cir. 1994) (internal citations omitted); see also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1972) (allowing APA review where there is clearly “law to apply”); *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (holding that the “law to apply” for the purposes of “judicially manageable standards may be found in formal and informal policy statements and regulations as well as statutes”); *Ctr. for Auto Safety v. Dole*, 846 F.2d 1532, 1534 (D.D.C. 1988). The court here held that even *non-enforcement* of agency regulations may be reviewable under the APA because “[j]ust as Congress can provide the basis for judicial review of nonenforcement decisions by spelling out statutory factors to be measured by the courts, so an agency can provide such factors by regulation.” *Id.* They went on to quote *Service v. Dulles*, 354 U.S. 363, 388 (1957): “[w]hile it is of course true that under [the relevant statute] the Secretary was not obliged to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, . . . and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.” *Id.*

This proposal is not without limitations. If the Environmental Analysis is conducted and adequate, little remains to be challenged under this theory. Nevertheless, the majority of plaintiffs in these cases chiefly expressed concern that the environmental impacts of a proposed pipeline were not adequately considered.<sup>161</sup> This proposal addresses those concerns.<sup>162</sup>

At least one commentator has suggested that the State Department regulations are only a “nod to NEPA” and that the requirement to conduct such an analysis is tenuous because “E.O. 11423 predates NEPA and E.O. 13337 makes no mention of the law.”<sup>163</sup> She admits, however, that “because of [the State Department’s] prior conduct and its regulations requiring EISs for permits, not performing an EIS in such circumstances would likely be arbitrary and capricious if a court reviewed the decision.”<sup>164</sup> She continues that “the quality of the input [the Department of State] provides to [the president]” should, intuitively, be reviewable, although “[t]hat [the Department of State] performs an EIS at all seems to be a matter of agency grace.”<sup>165</sup> By contrast, I argue that the rule itself mandates that the agency conduct an environmental analysis which is in turn reviewable.

Although courts are wary of reviewing the “presidential” decision of whether to grant the permit, they have been willing to grant APA review of the agency’s environmental analysis.<sup>166</sup> In *Sierra Club*, Defendants attempted to steer the court into the murky land of questionably reviewable “presidential” action related to the permit decision.<sup>167</sup> The court, however, found more persuasive the plaintiffs’ argument that under consideration was in fact “the State Department’s issuance of the [Final Supplemental Environmental Impact Statement (FEIS) as] a ‘final agency action.’”<sup>168</sup> They held:

That the [permit] allows for the border crossing, however, does not insulate the State Department’s analysis (or alleged lack thereof) of the environmental impacts of the entire pipeline project from judicial review under the APA. Nor does it convert the State Department’s preparation of the FEIS into a presidential action. Thus . . . the State Department’s

161. See, e.g., *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1151 (D. Minn. 2010) (noting that plaintiffs sued under NEPA); *Indigenous Envtl. Network v. U.S. Dep’t of State*, CV-17-29-GF-BMM, 2017 U.S. Dist. LEXIS 193546, at \*1 (D. Mon. Nov. 22, 2017) (documenting plaintiffs’ claims under NEPA and ESA).

162. Challenging the extent of the consideration required by law (i.e. what precisely is required for a full environmental assessment) is beyond the scope of this note.

163. Parker, *supra* note 4, at 254.

164. *Id.*

165. *Id.* at 255.

166. See, e.g., *Sierra Club*, 689 F. Supp. 2d at 1156-57 (granting review of the State Department’s environmental analysis).

167. See *id.*

168. *Id.*

FEIS constitutes a final agency action reviewable by this Court under the APA.<sup>169</sup>

When separated from the permit decision, the court held that the environmental assessment required by the State Department's own regulations, independent of any delegated presidential authority, was reviewable and the court denied the motion to dismiss.<sup>170</sup> Plaintiffs' claims effectively cleared both the "presidential" hurdle and the "finality" hurdle.

In 2017, in *Indigenous Environmental Network v. U.S. Department of State*, when the permitting decision was separated from the environmental review decision, the District Court of Montana again allowed APA review.<sup>171</sup> It held that "the State Department's obligation to study the environmental impacts of its decision fundamentally does not stem from the foreign relations power. The State Department's own NEPA regulations recognize the issuance of a Presidential Permit represents a 'major Departmental action' subject to Congress's mandates in NEPA."<sup>172</sup> The court "rejected the idea that an agency could shield itself from judicial review under the APA for any action by arguing that it was 'Presidential,' no matter how far removed from the decision the president actually was."<sup>173</sup> It concluded: "[n]o agency possesses discretion whether to comply with procedural requirements such as NEPA."<sup>174</sup>

The court also summarily rejected defendants' argument that there was an inadequate standard against which to evaluate the State Department's actions.<sup>175</sup> This would have placed it in a special category of unreviewable administrative action that is "committed to agency discretion by law."<sup>176</sup> Instead, the court held that NEPA provided an appropriate standard against which they could reasonably judge the State Department's actions.<sup>177</sup> Again: the court recognized that "Plain-

169. *Id.*

170. *Id.* at 1163.

171. *Indigenous Envtl. Network v. U.S. Dep't of State*, CV-17-29-GF-BMM, 2017 U.S. Dist. LEXIS 193546, at \*10-11 (D. Mon. Nov. 22, 2017).

172. *Id.* (emphasis added). The Court was not persuaded by the argument that the State Department's NEPA regulations predate EO 13337; they recognized that in amending EO 11423, EO 13337 was issued "to expedite the processing of permits for cross-border pipelines. Nothing in Executive Order 13337 abrogates the State Department's NEPA regulations." *Id.* The court further noted that in his January 2017 memorandum directing the Secretary to utilize the existing FSEIS "the President conceded . . . that the State Department should consider the FSEIS as part of its obligation to satisfy all applicable requirements of NEPA." *Id.* at \*11.

173. *Id.* at \*14 (citing *Protect Our Communities Found. v. Chu*, 2014 U.S. Dist. LEXIS 42410, 2014 WL 1289444 at \*6 (S.D. Cal. 2014)).

174. *Id.* at \*15.

175. *Id.* at \*16.

176. *See id.*

177. *Id.* The court was also un-persuaded by arguments that concerns of "foreign policy" or "national security" could shield the decision from review. *See id.* at \*17.

tiffs seek . . . to enforce the State Department's compliance with its own regulations."<sup>178</sup> As such, the environmental analysis was considered reviewable "final agency action" and plaintiffs' claims withstood a motion to dismiss.<sup>179</sup>

Although scholars have argued that both questions should be subject to judicial scrutiny under the APA, where courts have conflated the permitting decision and the Environmental Analysis, they do not find the decision reviewable.<sup>180</sup> Where, however, the Environmental Analysis is separated from the permitting decision, courts have allowed review, finding the determination to be a "final agency action."<sup>181</sup> Thus, a good toehold for plaintiffs seeking review of the entire process is to follow the model described in *Indigenous Environmental Network* and challenge the environmental analysis – as required by the State Department's own regulations – rather than risk dismissal by lumping together the decision to grant a permit and the environmental determination.

## CONCLUSION

The presidential permitting process is contentious. Given the current Administration's willingness to expedite review of permit applications, the ability of third parties to weigh in on the process takes on heightened significance. This Note has argued that the process itself, as outlined in EO 13337 and EO 11423, is constitutional and that certain aspects of it qualify as a "final agency decision" subject to judicial review under the APA. Specifically, the environmental analysis required by the State Department's own published regulations provides a critical opportunity for plaintiffs to offer input into the process. Our system of checks and balances is especially relevant when decisions that affect the nation's energy infrastructure, environment, economy, and foreign relations are on the line. Citizen input enhances the integrity of the system and should be judicially protected in these cases.

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178. *Id.* at \*22 (emphasis added).

179. *Id.* at \*34.

180. *See* *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1081 (D.S.D. 2009); *Nat. Res. Def. Council v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 109-10 (D.D.C. 2009); *White Earth Nation v. Kerry*, No. 14-4726 (MJD/LIB), 2015 U.S. Dist. LEXIS 165014, at \*19-21 (D. Minn. Dec. 9, 2015).

181. *See* *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1157 (D. Minn. 2010); *Indigenous Envtl. Network v. U.S. Dep't of State*, CV-17-29-GF-BMM, 2017 U.S. Dist. LEXIS 193546 at \*13-14, 34 (D. Minn. Nov. 22, 2017).