MARK STEGER SMITH
Assistant U.S. Attorney
U.S. Attorney's Office
2601 Second Avenue North, Suite 3200
Billings, MT 59101
Ph: (406) 247-4667; Fax: (406) 657-6058
mark.smith3@usdoj.gov

PAUL E. SALAMANCA
Deputy Assistant Attorney General
MARC G. MARIE
Counsel to the Assistant Attorney General
MARISSA A. PIROPATO (MA BAR 65160)
LUTHER L. HAJEK (CO Bar 44303)
United States Department of Justice
Environment and Natural Resources Division
999 18th St., South Terrace, Suite 370
Denver, CO 80202
Ph: (303) 844-1376; Fax: (303) 844-1350
marissa.piropato@usdoj.gov
luke.hajek@usdoj.gov

Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK, *et al*., Plaintiffs, v. PRESIDENT DONALD J. TRUMP, *et al.*, Defendants.	CV 19-28-GF-BMM **DEFENDANTS' MEMORANDUM IN RESPONSE TO THE COURT'S OCTOBER 16, 2020 ORDER**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

On December 20, 2019, this Court ordered the parties to provide supplemental briefing in response to a series of questions relating to the authority of the President and Congress to issue permits for cross-border facilities under the inherent foreign affairs power and the Foreign Commerce Clause of the Constitution, respectively. *See* Dec. 20, 2019 Order, ECF No. 74. In response to that order, Defendants submitted a brief discussing, among other things, the historical practice for issuing cross-border permits for oil pipelines and other facilities. *See* Defs.' Resp. to the Court's Questions in Its Dec. 20, 2019 Order, ECF No. 81.

On October 16, 2020, the Court ordered additional supplemental briefing on: (1) the historical practice of executive action relative to cross-border permits for oil pipelines; and (2) Congress's more recent action relative to a series of cross-border applications for the Keystone XL Pipeline, in particular. *See* Oct. 16, 2020 Order, ECF No. 147. Specifically, the Court ordered the parties to answer a series of questions on these topics designed to inform the Court's consideration of President Trump's issuance of the instant cross-border permit for the Keystone XL Pipeline on the spectrum of more nuanced *Youngstown* analysis exemplified by the Supreme Court's opinion in *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015).

Justice Jackson set forth the now familiar *Youngstown* framework in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952 (Jackson, J., concurring). Under that framework, an exercise of presidential power may fall into one of three categories. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635. Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. . . ." *Id.* at 637-38.

A review of the actions identified by the Court places most within the second category of the *Youngstown* spectrum. Typically, presidents have acted unilaterally to issue cross-border permits for oil pipelines under their inherent authority over foreign affairs and as Commander in Chief, without specific authorization or denial of authority from Congress, and without seeking its concurrence. And Congress has historically acquiesced—and never opposed—the executive branch's decision to issue a cross-border permit for such a project. Congress has never exercised permitting authority for a cross-border oil pipeline

(or any other type of cross-border conduit), nor has it enacted a statutory scheme for permit consideration that would constrain the President's prospective authority to act on such applications. Rather, Congress has consistently deferred to the process established within the executive branch for reaching a national interest determination and permitting decision consistent with the President's exercise of broad discretion.

Congress's recent attempts to prod the executive toward expeditious approval of the cross-border permit for the Keystone XL Pipeline did not diminish the President's well-established authority in this space and in fact provided the first implicit congressional authorization for unilateral issuance of presidential permits of this sort. The most recent instance, where Congress sought to authorize the pipeline's border crossing through legislation, which President Obama vetoed, does not fundamentally change the clear, longstanding hierarchy in this area. To the contrary, by assuming that new legislation was required to overcome executive opposition to the permit, Congress implicitly acknowledged the broad scope of the President's existing discretion to make this decision. Thus, Congress's Keystone-specific actions are consistent with the century-old practice of leaving the final decision on such matters to the President and frame the 2019 presidential permit as **category one action** under *Youngstown*.

Indeed, none of the actions identified by the Court presents even a single example of inter-branch conflict on the President's unilateral authority to issue a permit of this sort. Congress has never displaced the President's authority to issue permits, required consultation with Congress as to a pending application, compelled the President to follow a prescribed process in responding to a future application, or enjoined the President from reaching a particular decision on a given project or application. As described below, variations in the nature and context of the executive actions identified by the Court place each at a slightly different point along the spectrum of more nuanced *Youngstown* analysis. However, each is consistent with either category one action or category two action defined by congressional authorization, or acceptance of the President's broad discretion to approve or deny permits for cross-border oil pipelines.

Finally, even if the Court were to disagree that the recent presidential actions on the Keystone XL pipeline fall within category one of *Youngstown*, at the very least they would fall within category two based on Congress's continued acquiescence to the President's exercise of authority in this area. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 469 (1915). In separation-of-powers cases, the Supreme Court "has often 'put significant weight upon historical practice.'" *Zivotofsky*, 576 U.S. at 23 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014)). Although past practice does not, by itself, create constitutional power, a

"long-continued practice, known to and acquiesced in by Congress, would raise a presumption that [it] had been made in pursuance of [congressional] consent or of a recognized . . . power of the Executive." *Midwest Oil Co.*, 236 U.S. at 474; *see also Mistretta v. United States*, 488 U.S. 361, 401 (1989). Although Congress has taken a more active role in cross-border permitting in the context of the Keystone XL pipeline, a review of these recent episodes "establishes no more than that some Presidents [may] choose[] to cooperate with Congress, not that Congress itself has exercised" permitting authority or derogated the President's inherent authority over such matters. *Zivotofsky*, 576 U.S. at 1088.

ARGUMENT

1. Where on the Youngstown spectrum do each of the following individual executive actions lie?

a. Issuance of pre-1968 cross-border pipeline permits

Between 1918 and 1966, successive presidents permitted at least eight separate cross-border oil pipelines without congressional involvement or response. This historical practice of acquiescence signified implicit congressional recognition of the President's authority to consider, and act on, applications of this sort without obtaining concurrence from Congress. As such, these permits are examples of category two actions under the *Youngstown* framework, with each successive permit at a stronger position on the category two spectrum. The recognition of this authority is a logical extension of the branches' approach to

authorizing border crossings for other types of infrastructure, including submarine cables, dating back to 1869. *See* Moore, *Dig. Int'l Law*, Vol. II, at 461 (1906), ECF No. 81-1 ("It thus appears that from 1869 to August, 1893, during the terms of [Presidents] Grant, Hayes, Garfield, Arthur, Cleveland (first term), and Harrison, it was held by the Presidents and their Secretaries of State that the Executive has the power, in the absence of legislation by Congress, to control the landing, and, incidentally, regulate the operation of foreign submarine cables in the protection of the interests of this Government and its citizens.") (quoting Foreign Cables, 22 Op. Att'y. Gen. 13, 25 (1898)). Examples of presidential permits for cross-border oil pipelines before 1968 include:

1. An oil pipeline under the Saint Clair River issued on June 10, 1918.
2. A pipeline under the Detroit River issued on February 5, 1919.
3. An oil pipeline under the Saint Clair River issued on April 28, 1953.
4. An oil pipeline under the Rio Grande issued on July 30, 1953.
5. A crude oil pipeline under the Niagara River issued on October 18, 1962.
6. A crude condensate pipeline from Cut Bank, Montana, to Alberta, Canada, issued on October 18, 1962.
7. A crude oil pipeline from a point near North Troy, Vermont, to a point in Quebec, Canada, issued on January 13, 1965.
8. A crude oil pipeline from a point in Toole County, Montana, to a point in Alberta, Canada, issued on April 10, 1966. (31 Fed. Reg. 6204.)

Whiteman, *Dig. Int'l Law*, Vol. 9, at 920-21 (1968) (brackets omitted), ECF No. 81-4).

State Department records reflect at least three other instances where a president authorized a cross-border oil pipeline during this period without involving Congress. In 1953, 1962, and 1968, Presidents Eisenhower, Kennedy, and Johnson, respectively, issued three separate Presidential permits to the Lakehead Pipeline Company for cross-border oil pipelines. *See* ECF Nos. 81-5, 81-6 & 81-7. For fifty years, Presidents exercised their inherent authority to authorize border crossings for oil pipelines without action by Congress and without delegating the responsibility for issuing such permits to an agency official. *See* Whiteman, *Dig. Int'l Law*, Vol. 9, at 920-22.

b. Issuance of Executive Order 11,423, Providing for the Performance of Certain Functions Hereto Performed by the President with Respect to Certain Facilities Constructed and Maintained on the Borders of the United States, 33 Fed. Reg. 11,741 (Aug. 20, 1968)

Through the issuance of Executive Order 11,423, President Johnson delegated the authority to issue cross-border permits for oil pipelines to the Secretary of State. *See* Providing for the Performance of Certain Functions Heretofore Performed by the President with Respect to Certain Facilities Constructed and Maintained on the Borders of the United States, Exec. Order No. 11,423, 33 Fed. Reg. 11,741 (Aug. 20 1968). The order was consistent with

Congress's historical recognition of the President's primacy over such matters and with specific congressional requirements for Federal Register publication of delegations of presidential authority within the executive branch. 3 U.S.C. § 301 (requiring federal register publication of delegation to agency heads of "any function which is vested in the President by law"). In providing the rationale and basis for the delegation, the order cited the President's inherent authority over foreign affairs and constitutional role as Commander in Chief. *See* Exec. Order No. 11,423, 33 Fed. Reg. at 11,741 (preamble). The order directs the Secretary of State to seek input from various other Department heads and to determine whether to approve or deny the permit, consistent with the Secretary of State's determination of the national interest. *Id.* § 1(b). By contrast, the order makes no mention of Congress. Thus, the order is premised on Congress's implicit endorsement of the President's unilateral authority to issue cross-border oil pipeline permits. Operating from this premise, the order intended to "provide a systematic method in connection with the issuance of permits for the construction and maintenance of other such facilities connecting the United States with a foreign county." *Id.* (preamble). This recognized the fact that, given Congress's historical acquiescence to unilateral executive action over such matters, any such framework would naturally emanate from and operate within the executive branch.

The order retained the presidential character of permit issuance by providing that any dispute between the Secretary of State and other department heads about whether to approve or deny the permit would be resolved by the President. *See Natural Res. Def. Council v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 111 (D.D.C. 2009) ("That the President chose to retain ultimate authority to settle any interagency dispute signals his belief that the issuance of presidential permits is ultimately presidential action."). The order's delegation of authority could be revoked at any time. 3 U.S.C. § 301. Congress did not act in response to the order's formal assertion of unilateral presidential authority to issue cross-border permits, serving to reinforce Congress's acquiescence to the President's unilateral authority over such matters. Thus, this episode is similar to the issuance of presidential permits before 1968 and consistent with category two action taken pursuant to the President's "independent powers" under the Constitution and in the absence of a congressional grant or denial of authority. *Youngstown Sheet & Tube*, 343 U.S. at 637 (Jackson, J., concurring).

c. Executive Order 13,337, Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States, 69 Fed. Reg. 25,299 (April 30, 2004)

Executive Order 13,337 is substantially identical to Executive Order 11,423 under the traditional *Youngstown* framework. Executive Order 13,337 streamlines the issuance process established under the prior Executive Order. *See* Issuance of

Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States, Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (April 30, 2004). Following more than three decades of congressional acquiescence to the first systematic delegation of permit issuance within the executive branch, Executive Order 13,337 is, however, a stronger category two action under a more nuanced *Youngstown* analysis. As with Executive Order 11,423, Executive Order 13,337 did not elicit a response from Congress.

d. State Department's denial of TC Energy's application following Congress' passage of the Temporary Payroll Tax Cut Continuation Act ("TPTCCA"), Pub. L. No. 112-78, 125 Stat. 1280 (Dec. 23, 2011)

In 2012, the State Department, acting under the delegation set forth in these executive orders, recommended that TC Energy's initial application for a cross-border permit for the Keystone XL pipeline be denied. The President concurred with the State Department's recommendation. The denial came in response to the enactment of the Temporary Payroll Tax Cut Continuation Act ("TPTCCA"), which provided that TC Energy's pending application would be approved by operation of law within sixty days of enactment if the executive branch failed to render a decision through its insular process. Pub. L. No. 112-78, § 501(a)-(b), 125 Stat. 1280, 1290 (December 23, 2011). This provision implicitly authorized the President to issue or deny the permit consistent with the President's

determination of whether the permit would be in the national interest, consistent with nearly 100 years of practice and the executive branch's self-directed process for considering cross-border permits for oil pipelines. By signing the TPTCCA into law and then rendering an expeditious decision on the pending permit as the law envisioned, the President engaged in classic **category one action**. The President "chose[] to cooperate with Congress" in exercising his presentment and permitting authority, but he "was left to execute" by Congress according to his broad discretion and the pre-established process within the executive branch. *Zivotofsky*, 576 U.S. 1059, 1091. The State Department's denial did signal an apparent policy disagreement with Congress on whether granting the permit would serve the national interest, or at least on whether additional study was advisable before such a determination could be made. The denial was consistent, however, with the historical understanding, dating back nearly a century, that the President has the final word on cross-border oil pipeline permit applications.

With President Obama's blessing, the TPTCCA marked the first assertion of legislative authority to grant a cross-border permit of this type. But Congress would not have enacted this provision if had not assumed that it was working against a baseline of presidential unilateral approval authority in the first instance. Moreover, TPTCCA did not seek to cabin the President's broad discretion to grant or deny the permit. To the contrary, it deferred to the President's unilateral

authority and provided for statutory approval only in the event the President failed to exercise his discretion in an expeditious manner. The provision effectively incentivized the President's timely consideration of the application, which had been pending since 2008. At the time of TPTCCA's passage and the subsequent denial of the application, the State Department was seeking additional information to assess alternate pipeline routes that would bypass the Sand Hills area of Nebraska. Prior to the TPTCCA's passage, the State Department had indicated that assessment of alternate routes could be completed by the first quarter of 2013. In view of the fact that TPTCCA called for a presidential decision approximately one year sooner than was planned within the executive branch, the State Department denied the permit, citing insufficient time to determine that approval would serve the national interest given the routing issues under study. The denial did not preclude a subsequent permit application for the project, or preclude the President from exercising his approval authority on any such application without Congress's input, consistent with historical practice.

Although Congress took steps in the TPTCCA to accelerate the exercise of executive discretion over a discrete permit application, the TPTCCA nevertheless continued Congress's longstanding deference to the intra-branch process for considering a permit's potential impact on the national interest, and to the President's ultimate decision on permit issuance. By the express terms of Section

501 (a), the TPTCCA was also limited to the consideration of the "Keystone XL pipeline project application filed on September 19, 2008." Pub. L. No. 112-78, 125 Stat. 1280. Thus, the provision did not extend to any future applications for a cross-border permit for the Keystone XL project or any other project. The TPTCCA did include a reporting requirement that applied should the President reach a national interest determination at odds with Congress's revealed view of the matter. In effect, the TPTCCA incentivized the President to reach a timely conclusion on the national interest question and acted as an information forcing mechanism should the President reach a different conclusion than Congress. Later in 2012, a report was delivered to Congress following the denial of the application. The 112th Congress did not respond to the decision or to the report. By signing the TPTCCA into law and exercising his broad discretion in a timely manner as contemplated by the statute, the President took category one action pursuant to his inherent authority and supported by implicit congressional authorization.

e. President Barack Obama's veto of The Keystone XL Pipeline Approval Act. Veto Message to the Senate: S. 1, Keystone XL Pipeline Approval Act, 2015 WL 758544 (2015)

President Obama's veto of a legislative approval for the Keystone XL's cross-border permit is the first example of inter-branch conflict, however temporary, on the national interest merits of an individual pipeline. The President exercised the veto power in response to the 114th Congress's attempt to enact a

law to approve a discrete cross-border permit. *See* Veto Message to the Senate: S. 1, Keystone Pipeline Approval Act ("Veto Message"), 2015 WL 758544 (2015). The bill proposed that a cross-border permit for Keystone XL pipeline be approved without additional National Environmental Policy Act ("NEPA") analysis. *See* S.1., 114th Cong., Keystone XL Pipeline Approval Act ("Approval Act") § 2(a)-(b) (Jan. 6, 2015), ECF No. 81-9. But the bill did not propose a regulatory or permitting scheme for cross-border oil pipelines generally and did not seek to diminish the President's discretion to authorize such border crossings. To the contrary, the Senate majority report supporting the bill 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." S. Rep. No. 114-1, at 1 (2015), ECF No. 81-10. And the Approval Act did not become law and therefore cannot be viewed as a source of contrary law under the *Youngstown* framework, including under a more nuanced spectrum approach.

By passing a bill to approve the permit, Congress sought once again to elicit executive action on the Keystone project's border crossing by taking action that registers support for the permit and forces the executive to act in response. *See* Approval Act. In enacting the TPTCCA, Congress effectively hastened the President's exercise of discretion by providing that the permit would be granted by

operation of law 60 days after enactment unless the President acted first through the executive branch's insular process. In passing the Approval Act, Congress sought to further expedite approval and eliminate the need for action following enactment by having the President act on his view of the national interest question upon presentment. In this sense, the Approval Act was functionally equivalent to the TPTCCA because it placed the onus on the President to take affirmative action to deny a discrete authorization. It follows that, on the *Youngstown* spectrum, the President's veto of the Approval Act was equivalent to the executive branch's denial of TC Energy's prior permit application following the TPTCCA's passage. Both reflected the President's preeminent role in determining whether granting a permit would be in the national interest. Critically, neither precluded the President from taking unilateral action to issue a cross-border permit for the Keystone XL pipeline or similar, future projects.

It is not happenstance that Congress relies on the President to obtain approval of a discrete crossing or to alter a permitting process that is driven by the executive branch. It reflects the real consequences of historical practice establishing the President as the primary decision maker in this area. Absent the President's consent to establish an alternative process for issuing cross-border permits—something Congress has never proposed—Congress's only recourse is to take action to compel the President to attend to discrete applications before the

executive. In the case of the Approval Act, this took the form of presenting to the President for his signature a bill to authorize Keystone XL's border crossing and that included a legislative determination of adequacy under the National Environmental Policy Act.

The disagreement between President Obama and the 114th Congress is qualitatively different from the type of inter-branch dispute required to alter a longstanding arrangement and acceptance of Presidential authority under the *Youngstown* framework. In his veto message to the Senate, President Obama cited the bill's "attempts to circumvent longstanding and proven processes for determining whether or not building and operating a cross-border pipeline serve the national interest." Veto Message, 2015 WL 758544, at *1. The legislative approval, the veto message continued, "conflicts with established executive branch procedures and cuts short thorough consideration of issues that could bear on our national interest . . . ." *Id.* In short, the President and the Congress disagreed on the national interest merits of the permit application, with the President seeking more time to study the question consistent with the executive branch's process for doing so. Congress recognized, however, the role that presidents have played in issuing cross-border permits for oil pipelines; nor did Congress contend that President Obama could not issue a permit on his own without seeking the view of Congress. Nor, for its part, did the veto message signal that legislation was an

invalid method of permit approval. The President took issue with the short-circuiting of the process that had been established by one of his predecessors, not by Congress, to determine whether the permit was in the national interest and merited the President's approval. Thus, the President's veto signaled a disagreement with Congress's attempt to disrupt the process that had long been followed by the executive branch for considering applications for cross-border permits for oil pipelines. The veto and the Senate's failure to override the veto left that process undisturbed.

Even if the Senate had overridden President Obama's veto and approved a permit over his objection, it would not have created an alternative permitting scheme or otherwise required the President to seek congressional input before issuing future cross-border permits. It would simply have made a discrete exception to the existing scheme, which it otherwise would have left in place. Consistent with this two-track approach, following President Obama's veto of the legislative approval, the State Department continued to study the application pending before the executive. Ultimately, in March of 2015, the State Department denied the application, concluding that issuance would not be in the national interest. In so doing, it demonstrated the Obama administration's view that Congress's failed attempt to grant a statutory approval for a cross-border permit for

the Keystone XL did not displace the President's approval authority as applied to the Keystone XL project.

f. President Donald Trump's issuance of the 2019 permit

Following the State Department's denial of its prior application, the permittee resubmitted its application at President Trump's invitation. *See* Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (Jan. 24, 2017), ECF No. 97-3. In 2019, President Trump issued a permit for the pipeline's border crossing. *See* Authorizing TransCanada Keystone Pipeline, L.P., To Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, 84 Fed. Reg. 13,101, 13,101 (Mar. 29, 2019) ("Permit"). The Presidential Memorandum memorializing the permit stated that the permittee was granted permission "to construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada at Phillips County, Montana, for the import of oil from Canada to the United States." Permit (preamble). President Trump's unilateral action authorizing the border crossing is in keeping with his authority under the foreign affairs power, as well as his authority as Commander in Chief, to issue presidential permits of this type without congressional input.

Moreover, the 2019 Permit is consistent with the numerous congressional expressions of support for substantially similar applications for Keystone XL's

border crossing. Notwithstanding Congress's attempt to craft a legislative approval for the border crossing at Phillips County over President Obama's objection, Congress has never asserted that the President lacks the inherent authority to issue cross-border permits for oil pipelines. The State Department's continued consideration of the application after President Obama's veto and the 2019 Permit issuance itself demonstrate executive branch consensus on this point across administrations. Thus, the 2019 Permit was a category one action reflecting a new President's exercise of the foreign affairs power to reach a different national interest determination than his predecessor and issue a cross-border permit consistent with over a century of unbroken practice and implicit congressional authorization.

Plaintiffs may argue that the issuance of the Permit was inconsistent with a congressional enactment, and thus fell within category three of the *Youngstown* framework, but any such argument is baseless. As discussed in section 2, *infra*, the TPTCCA did not endorse any particular process for the approval of cross-border permits for oil pipelines, either for the Keystone XL Pipeline or pipelines generally. Further, Congress's proposal of the Approval Act demonstrated that the TPTCCA has no continuing vitality; instead, it shows that Congress assumed that, in the absence of additional legislation, the President has full discretion to make such determinations. Moreover, President Obama's veto of the Approval Act

further underscores the President's preeminent role in authorizing cross-border oil pipelines.

2. Address the following additional questions that will inform the Court's Youngstown analysis:

a. Did TPTCCA endorse the EO 13,337 process generally?

In enacting TPTCCA, Congress deferred to EO 13,337's interagency process for considering whether issuing a permit would be in the public interest and to the accompanying delegation of authority to issue the presidential permit. By extension, the TPTCCA deferred to the fact that the ultimate determination to grant or deny the permit rested with the President. The TPTCCA's purpose was to elicit a decision from President Obama on TC Energy's permit application on an expedited basis and, in the event that President Obama denied the permit, inform Congress and the public about the reasons for the denial. In keeping with this purpose, the TPTCCA sought a discrete presidential decision within the then-existing decision making framework for reviewing and acting on cross-border pipeline applications within the executive branch. It did not seek to create a new process, nor did it purport to ratify the existing process, either for TC Energy's application or for cross-border permitting generally. Purporting to do either of these would have disturbed longstanding practice, potentially serving to delay the speedy determination sought by Congress on the particular application at issue by raising the specter of encroachment on presidential authority. Rather, in keeping

with the President's ultimate authority to approve or deny such applications, Congress sought only to ensure that TC Energy's application would be acted on in a timely and transparent manner. This meant directing the President (with his agreement) to leverage an existing delegation and a proven, bespoke deliberative process within the executive branch to exercise presidential discretion within a definitive time frame, with permit approval by operation of law as a backstop against further delays. Though the TPTCCA did implicitly acknowledge the President's historic role, Congress's objective was not to endorse or ratify those processes, but rather to prompt the executive branch to act on the pending application through the process then in place for reaching national interest determinations for cross-border pipeline permits.

b. Did TPTCCA endorse the EO 13,337 process only for Keystone?

TPTCCA represented Congress's desire for a speedy, transparent disposition of TC Energy's permit application and its support of a permit application which had long been mired in delays. The legislation directed the President to exercise his discretion to issue the permit within a stated period of time, and to provide the rationale for any denial. The legislation did not represent an endorsement or ratification of the EO 13,337 process, which involved delegations of authority and assigned tasks within the executive branch in support of a presidential determination implicating foreign affairs and territorial integrity. Instead,

Congress deferred to the framework already established within the executive branch. Notwithstanding Congress's deference to the President's authority and chosen process for making national interest determinations on cross-border permit applications, the enactment of TPTCCA evidenced Congress's view that the pending application merited attention and that, given the apparent benefits of the project and the potential that any faults in the application could be cured by the applicant, any denial should be supported by a written explanation of the President's rationale for finding that the project was not in the national interest.

c. Assuming TPTCCA endorsed the EO 13,337 process for Keystone, how could TC Energy obtain a permit once President Obama denied the permit?

As mentioned above, TPTCCA was not an endorsement of the EO 13,337 process, but rather an acknowledgment of the preexisting process for reaching a decision regarding cross-border pipeline permits that was established by prior Presidents. Notably, the TPTCCA did not alter the President's approval authority and applied only to the September 19, 2008 permit application. In exercising their approval authority over cross-border permits, presidents are not bound by prior denials—including their own—on a particular application or project. Nothing in TPTCCA purports to preclude a future president from reaching a different determination on that specific application or on a future application for the same project. Indeed, any attempt to do so would have been at odds with the Congress's

evident support for the application and the project. Further, the State Department's consideration of TC Energy's subsequent permit application, which was filed in May of 2012 and denied in 2015, confirms the executive branch's understanding that TPTCCA did not suspend the President's approval authority relative to the Keystone XL Pipeline.

Finally, the presidential permit issued for the border crossing in 2019 followed TC Energy's resubmittal of its permit application in 2017, five years after the State Department's denial of the application subject to the TPTCCA. The TPTCCA ensured resolution of this earlier application in a timely manner, but otherwise deferred to the President's approval authority and ultimate determination on whether the permit was in the national interest. An enactment that defers to the President's broad discretion over the application to which the statute expressly applies does not by implication wholly eliminate the discretion of future presidents considering whether to grant future permit applications. Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001). Relatedly, it is unlikely that a Congress that enacted a law to grant a statutory permit by operation of law in the absence of unilateral action by the executive would have intended, in the event the executive denied the permit, to impose a wholly new requirement that the next President engage in the time-consuming process of obtaining congressional concurrence before issuing a permit

in response to a new application. In sum, whatever strictures the TPTCCA imposed on President Obama's consideration of the 2008 application did not operate to enjoin President Trump's consideration and authority to approve a different application nearly a decade later.

d. How should the Court interpret the passage of the Keystone XL Pipeline Approval Act?

The passage of the Keystone XL Approval Act demonstrates, above all, that the 114th Congress viewed the Keystone XL Pipeline as a worthy project of national significance. It also signaled the Congress's apparent view that the executive—the political branch with primacy over cross-border permitting of oil pipelines—had not properly attended to resolving the national interest question in the two-plus years of the application's pendency. While divining impacts to the *Youngstown* analysis is complicated by the fact that the bill never became law—which is essential for Congress to exercise its will in the legislative realm—nothing in the bill undermines the President's authority to unilaterally grant a permit for the Keystone XL Pipeline, or any other project, without first seeking Congress's view or concurrence.

In short, even if the bill had become law, it did not depart from historical understandings of the President's inherent authority relative to such matters, or the President's ability to exercise it without reference to congressional input. Notably, despite the clear policy dispute with the President, the Approval Act is a narrowly

focused bill aimed at issuance of the application then before the executive, not a comprehensive reworking of the historical permitting scheme that purports to constrain future presidents in their consideration of, and action on, future applications consistent with the President's foreign affairs power and authority as Commander in Chief.

The Approval Act is notable, however, as Congress's first attempt to issue a permit through statutory approval. As such, it was Congress's first attempt to exercise the foreign commerce power relative to cross-border pipeline issuance. Since Congress wanted the cross-border permit approved, it stands to reason that Congress did not intend to suspend or constrain the President's unilateral authority to approve the pending application following further study after the veto. Since the State Department continued working toward a national interest determination following the President's rejection of the bill, the executive clearly did not understand the bill's mere passage to impact or alter the President's authority to grant the pending application at a later date through the executive's insular process. In sum, the Approval Act was Congress's assertion and recognition of a second, independent path to permit issuance, with the President as the final arbiter of the national interest in both cases.

CONCLUSION

Accordingly, the issuance of the 2019 Permit was within the President's authority, as demonstrated by Congress's implicit acknowledgment and recent endorsement of the executive branch's authority in this area.

Respectfully submitted this 16th day of November, 2020,

MARK STEGER SMITH
Assistant U.S. Attorney
U.S. Attorney's Office
2601 Second Avenue North, Suite 3200
Billings, MT 59101
Ph: (406) 247-4667; Fax: (406) 657-6058
mark.smith3@usdoj.gov

PAUL E. SALAMANCA
Deputy Assistant Attorney General

MARC G. MARIE
Counsel to the Assistant Attorney General

/s/ Luther L. Hajek
MARISSA A. PIROPATO
LUTHER L. HAJEK (CO Bar 44303)
United States Department of Justice
Environment and Natural Resources Division
999 18th St., South Terrace, Suite 370
Denver, CO 80202
Ph: (303) 844-1376; Fax: (303) 844-1350
marissa.piropato@usdoj.gov
luke.hajek@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 5,761 words, excluding the tables, caption, signature, certificate of compliance, and certificate of service.

/s/ Luther L. Hajek
LUTHER L. HAJEK
U.S. Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2020, a copy of the foregoing was served on all counsel of record via the Court's CM/ECF system.

/s/ Luther L. Hajek
LUTHER L. HAJEK
U.S. Department of Justice