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Issuance of the Keystone XL Permit: Presidential Prerogative or Presidential "Chutzpah"

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ARTICLES

ISSUANCE OF THE KEYSTONE XL PERMIT: PRESIDENTIAL PREROGATIVE OR PRESIDENTIAL “CHUTZPAH”¹

Hope M. Babcock*

“In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”²

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* Professor, Georgetown Law Center. She thanks Georgetown for its generous support of her scholarship through the issuance of a summer writing grant.

2. THE FEDERALIST No. 51 (James Madison).

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INTRODUCTION

President Trump’s issuance of a presidential permit for the Keystone XL Pipeline in defiance of congressionally endorsed procedures set out in governing executive orders and a statute incorporating those orders may seem insignificant when compared to other examples of his dubious use of presidential power, such as reprogramming congressionally appropriated moneys to construct a wall at the country’s southwestern border.³ Nonetheless, it is as institutionally and constitutionally troubling as these more substantial presidential aggregations of power in what his actions say about his lack of respect for Congress.⁴ Of dubious need, the Keystone XL Pipeline may contribute unregulated and unassessed serious harms to the environment, as it will escape review under federal environmental laws designed to protect the environment. This article does not take issue with the concept of a presidential permit, but opposes its use to circumvent applicable laws when, as here, Congress has affirmed procedures that would mandate that review.

3. See Jonathan Stevenson, *A Different Kind of Emergency*, N.Y. REV. OF BOOKS, May 23, 2019, <https://perma.cc/P367-XJYU> (last visited Nov. 2, 2019).

4. See Jamie Raskin, *Congress Isn’t Just a Co-Equal Branch. We’re First Among Equals*, WASH. POST, May 12, 2019, <https://perma.cc/T6AV-RKVH> (quoting Thaddeus Stevens “‘The sovereign power of the nation rests in Congress, and its members stand around the president ‘as watchmen to enforce his obedience to the law and the Constitution’”).

This article uses President Trump's issuance of the Keystone XL Pipeline permit to illustrate the dangers of an imperial presidency, one in which the exercise of discretionary authority, based on neither the text of Article II of the Constitution nor a statute, will in all likelihood be unchecked by Congress, the courts, or popular opinion.⁵ To understand the dimensions of this concern, Part I of this article briefly describes the process and requirements for a presidential permit. Part II identifies key facts surrounding issuance of the Keystone XL Pipeline permit, the chronology of its issuance, and commonly given reasons supporting or opposing the permit. Part II includes a discussion of non-legal arguments favoring permit issuance, such as its projected economic and national security benefits and the promotion of beneficial relations with a border country, as well as those against its issuance, such as its projected environmental harm and the dangerous precedent it may set as a way to avoid environmental accountability for presidential activities that may have a significant adverse effect on the environment.

Part III looks more closely at the constitutional arguments justifying the permit's issuance, finding potential support in the President's prerogative powers as well as in his constitutionally assigned role as Commander-in-Chief of the Army and Navy,⁶ his duty to oversee foreign relations,⁷ and to take care that the laws are faithfully executed.⁸ Part IV identifies the extent to which Article II cabins the President's authority to issue the Keystone XL Pipeline permit and how its issuance may violate the separation of powers doctrine. The arguments that the courts, Congress, and the public will check any abuse of power by the President and that this use of presidential power is supported by precedent are set out in Part III and then critiqued in Part IV.

The last part of the article, Part V, broadens the perspective on the issuance of the Keystone XL Pipeline permit. More specifically, the Part discusses how its issuance reflects an accretion of presidential power and questions the wisdom of potentially unbalancing the balance of powers between the two branches of government in the current political environment. Much of the Part's discussion centers on then-Professor Elena Kagan's⁹

5. John P. Roche, *Executive Power and Domestic Emergency: The Quest for Prerogative*, 5 W. POL. Q. 592, 593 (1952) (asking "[t]o what extent does an analysis of the American constitutional tradition buttress the assertion that there is, incorporated in the initial phraseology of Article II of the Constitution, an independent grant of executive power?").

6. U.S. CONST., art. II, § 2, cl. 1.

7. *Id.* art. II, § 2, cl. 2.

8. *Id.* art. II, § 3, cl. 5.

9. Professor Kagan became an Associate Justice of the Supreme Court following her confirmation by the United States Senate on August 5, 2010.

strong support for a dominant president, what she calls a “presidential administration,”¹⁰ and those who disagree with that idea.

The article concludes the President may have stepped beyond the limits of his Article II enumerated and discretionary constitutional powers by issuing the Keystone XL Pipeline permit. In treading on Congress’ constitutional authority, President Trump’s action risks the creation of an uncheckable imperial presidency, beyond even what Justice Kagan envisioned. This type of presidency may do serious permanent damage to the constitutional structure of our government, outlasting, in the specific situation, President Trump’s days in office.

I. THE PIPELINE APPROVAL PROCESS

The route of the Keystone XL Pipeline, which crosses the United States-Canadian border, triggers the need for a presidential permit.¹¹ Until recently, two executive orders governed the presidential permitting process for cross-border facilities, like pipelines.¹² These orders were still in effect when President Trump issued the permit for the pipeline. President Lyndon B. Johnson issued the first of these, Executive Order 11,423, in 1968. It stated “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, including pipelines, conveyer belts, and similar facilities for the exportation or importation of petroleum and petroleum products.”¹³ E.O. 11,423 identified the Department of State (“State Department”) as the agency tasked with the job of implementing the “presidential permit program for specified cross-border facilities, including oil pipelines.”¹⁴

Although other permits are required for pipelines once in the United States, and the State Department’s authority to issue presidential permits is restricted to border areas and nearby facilities, because the State Department’s approval of cross-border pipelines is “the lynchpin necessary for the pipeline project to move forward within the United States,” it has assumed a “lead role in much of the reviewing process,”¹⁵ which involves about a

10. See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

11. Edwin Slade, *The Keystone Pipeline Addition: Assessing the Potential Benefits of Reduced Gasoline Prices and Increased National Security*, 46 CREIGHTON L. REV. 27, 32 (2012).

12. President Trump rescinded both these executive orders with the issuance of E.O. 13,867 on April 10, 2019. Exec. Order No. 13,867, 84 Fed. Reg. 15,491, 15,492 (April 10, 2019).

13. Kathy Parker, *Keystone XL: Reviewability of Transboundary Permits in the United States*, 24 COLO. J. INT’L ENVTL. L. & POL’Y 231, 243 (2013) (internal quotation marks omitted).

14. J.B. Ruhl & James Salzman, *Presidential Exit*, 67 DUKE L.J. 1729, 1753 (2018).

15. Slade, *supra* note 11, at 32.

dozen federal agencies, affected states, and their agencies.¹⁶ President Trump explained he rescinded this executive order and E.O. 13,337 because the review process set out in those orders “unnecessarily complicated the Presidential permitting process, thereby hindering the economic development of the United States and undermining the efforts of the United States to foster goodwill and mutually productive exchanges with its neighboring countries.”¹⁷

President George W. Bush issued the second Executive Order, E.O. 13,337, in 2004, amending E.O. 22,423 only with respect to cross-border oil pipeline facilities. It required “the State Department to issue a presidential permit ‘if the Secretary of State finds that issuance of a permit to the applicant would serve the national interest.’”¹⁸ E.O. 13,337 amended E.O. 11,423 by adding the Environmental Protection Agency (“EPA”) to the list of agencies the Secretary of State must consult and requiring those agencies to respond to the Secretary of State within 90 days of receiving the information they need to review the applications.¹⁹ The process called for the Secretary of State, after he received the “views” of the designated officials, to “issue or deny a permit based on a National Interest Determination (“NID”).”²⁰ “While there are no official requirements that the Secretary of State must follow when making an NID, the Department of State considers factors from previous NID determinations and any other factors that are relevant to the project.”²¹ Among the factors the State Department considered in the NID were the project’s environmental impacts, potential diversification of the country’s oil supply, the project’s economic benefits, and broader foreign policy goals, like climate change.²²

The decision on the permit lay within the Secretary of State’s discretion,²³ but any agency the Secretary of State was required to consult could ask that the President make the final decision.²⁴ Thus, E.O. 13,337 authorized the State Department to issue a presidential permit for a cross-border

16. *Id.* The Executive Order requires the Secretary of State to request the views of several agency heads, including, but not limited to the Secretary of Defense, the Secretary of the Treasury, and the Secretary of the Interior. *Id.*

17. Exec. Order No. 13,867, 84 Fed. Reg. at 15,491.

18. Ruhl & Salzman, *supra* note 14, at 1753.

19. Slade, *supra* note 11, at 32; *see also* Parker, *supra* note 13, at 243.

20. Slade, *supra* note 11, at 32–33.

21. *Id.* at 33.

22. *Id.*

23. *Id.*

24. *Id.*; *see also* Joan Campau, Note, *Presidential Permitting for Pipelines: Constitutionality and Reviewability*, 8 MICH. J. ENVTL. & ADMIN. L. 273, 290 (2018) (stating “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”).

facility, but the final decision to issue a permit was retained by the President whenever another agency disputed the Secretary of State's decision.²⁵

The combined effect of the two executive orders was "to designate and empower the Secretary of State to receive permits 'for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to and from a foreign country.'"²⁶ Collectively, E.O. 11,423 "established a default rule that no oil pipeline may cross into the United States without a presidential permit"; while E.O. 13,337 "imposes a high burden on pipeline applicants to convince the State Department that the border crossing would serve the national interest," on top of which "the State Department has imposed rigorous environmental and other assessment steps in connection with satisfying that burden."²⁷

E.O. 11,423 cited the "'proper conduct of the foreign relations of the United States'" as the President's source of authority for permit issuance; E.O. 13,337 relied on both the "'Constitution and the Laws of the United States of America, including Section 301 of title 3, United States Code.'"²⁸ Section 301, in turn, authorizes the President to delegate his permitting authority in any matter to "the head of any department or agency of the executive branch."²⁹ While neither the Constitution nor Congress directly grants the President the power to regulate commerce, "the President's 'inherent' authority in the area has long been recognized."³⁰ Thus, the Secretary of State's authority to issue presidential permits is based on both the President's inherent "authority to regulate foreign commerce and on the President's statutory authority to delegate his authority."³¹

The State Department's process of issuing a presidential permit was comprehensive and "straightforward."³² The State Department prepared an Environmental Impact Statement ("EIS"), followed by a determination by

25. Parker, *supra* note 13, at 238.

26. *Id.* at 243–44.

27. Ruhl & Salzman, *supra* note 14, at 1755.

28. *Id.* at 1753 (stating "Executive Order 11423 references no specific constitutional or statutory authority, asserting instead that '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'"); Parker, *supra* note 13, at 244 (noting that whereas E.O. 11423 cites only the "proper conduct of the foreign relations of the United States" as a source of authority, E.O. 13337 cites the "Constitution and the Laws of the United States of America, including Section 301 of title 3, United States Code").

29. Parker, *supra* note 13, at 244.

30. *Id.*

31. *Id.*; *but see* Ruhl & Salzman, *supra* note 14, at 1758 (providing "Indeed, President Trump's executive order did not expressly reference the Antiquities Act as its authority, declaring instead that is it based on 'the authority vested in me as President by the Constitution and the laws of the United States of America'").

32. Parker, *supra* note 13, at 244–45.

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State whether the project is “within the national interest.”³³ Although E.O. 13,337 did not specifically require that the State Department comply with the National Environmental Policy Act³⁴ (“NEPA”),³⁵ the State Department’s NID rules include consideration of environmental factors,³⁶ and the State Department’s internal regulations require a review of the environmental impacts of its proposed actions.³⁷

As part of its NID determination, the State Department considered “many factors including energy security; environmental, cultural, and economic impacts; foreign policy; and compliance with relevant federal regulations.”³⁸ E.O. 13,337 paragraph (b)(ii) required that the State Department consults with eight federal agencies, including the Departments of Energy, Transportation, Justice, Interior, Commerce, and the EPA before making any decision about the permit.³⁹ Depending on the outcome of those conversations, the Secretary of State issued a decision that outlined whether the project was within the national interest, and granted or denied the permit.⁴⁰ Paragraph (i) of E.O. 13,337, required the Secretary of State to refer the application “to the President for consideration and a final decision” on the permit, if any reviewing agency disagreed with the Secretary of State’s findings.⁴¹ Reviewing agencies had 15 days to register their disagreement with the Secretary of State’s findings.⁴² Under the regime in place when President Trump issued the Keystone XL Pipeline permit, this was the only presidential involvement in the permitting process and even then, such involvement only arose under very limited circumstances.⁴³

Thus, the two rescinded executive orders not only delegated presidential permitting authority to the State Department, but also established the

33. *Id.*

34. 42 U.S.C. §§ 4331–4335 (2018).

35. Slade, *supra* note 11, at 33 (stating “Along with evaluating the NID factors, the Secretary must ensure compliance with other relevant federal laws. DOS reviews compliance with the National Environmental Policy Act (‘NEPA’), the National Historic Preservation Act (‘NHPA’), the Endangered Species Act (‘ESA’), and Executive Order 12,898, addressing environmental justice”); *see also* Campau, *supra* note 24, at 278–79.

36. Parker, *supra* note 13, at 244–45.

37. Campau, *supra* note 24, at 278–79.

38. Parker, *supra* note 13, at 244 (internal quotation marks and citations omitted).

39. *Id.* at 244–45.

40. *Id.* at 245.

41. *Id.* (internal citations and quotation marks omitted).

42. Campau, *supra* note 24, at 279 (citing 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. 25229 (2004)).

43. *But see* Ruhl & Salzman, *supra* note 14, at 1754 (stating “[t]he reality of presidential permits for oil pipelines is that they are presidential permits. The president issues them through the State Department, but Executive Order 13,337 explicitly provides that the president retains the authority to make the final decision on whether or not to issue the presidential permit. Environmental assessment laws such as NEPA and the ESA apply to federal agencies, but do not apply to the president acting as the president”).

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“framework under which major federal review of oil pipelines occurs.”⁴⁴ That framework only involved the President in the permitting process when there was a conflict between the State Department’s findings and the findings of a reviewing agency. In the case of the Keystone XL Pipeline permit, which was issued under the now-rescinded executive orders, since there was no request to forward the Secretary of State’s decision to deny the permit to the President before President Trump acted, the decision on the permit’s issuance remained with the Secretary of State. However, since the executive orders were only a delegation of presidential authority with respect to the issuance of cross-border permits for energy facilities, the President can, and indeed did retract them.⁴⁵ However, they were still in effect when the Keystone XL Pipeline permit was issued by the President in violation of their terms.

II. BACKGROUND ON ISSUANCE OF KEYSTONE XL PIPELINE PRESIDENTIAL PERMIT

A. *Facts*

“The Keystone pipeline system consists of existing and proposed pipelines and related facilities that will carry crude oil from the tar sands in the West Canadian Sedimentary Basin” in Alberta, Canada “to refining markets in the United States.”⁴⁶ The pipeline will directly connect Canadian oil with refineries on the Gulf Coast of the United States, picking up domestic United States product from Montana and North Dakota oil fields in the Bakken formation.⁴⁷ The Keystone XL Pipeline will “enter the United States at Phillips County, Montana, continue through South Dakota and much of Nebraska, before ending at Steele City,” Nebraska.⁴⁸

The Keystone XL Pipeline is actually “a two-part proposed extension and expansion of the existing Keystone pipeline system.”⁴⁹ The original Keystone pipeline is owned by TransCanada Energy (“TransCanada”). It opened in June 2010 and has the capacity to carry about “591,000 barrels per day of crude tar sands oil from the Alberta oil sands to refineries in Illinois and Oklahoma.”⁵⁰ Keystone XL, also owned by TransCanada, is the second part of the system and “is a 1,179-mile proposed pipeline from Hardisty, Alberta to Steele City, Nebraska.”⁵¹ In Nebraska, the pipeline will

44. Campau, *supra* note 24, at 274.

45. Parker, *supra* note 13, at 245.

46. Slade, *supra* note 11, at 29.

47. *Id.* at 31.

48. *Id.*

49. *Id.* at 30.

50. Parker, *supra* note 13, at 234.

51. Slade, *supra* note 11, at 31.

combine with an existing segment of the original Keystone pipeline, which connects to a hub in Cushing, Oklahoma.⁵² From Cushing, parts of the new extension will transport the “oil to two delivery points in Port Arthur, Texas.”⁵³

The Keystone XL Pipeline, when built, will “create a more direct link between Canadian oil fields and U.S. refining markets than the existing Keystone pipeline.”⁵⁴ On its way to Steele City, the Keystone XL Pipeline may also connect to pipelines coming from oil fields in the Bakken formation in Montana and North Dakota. The planned new pipeline will carry an additional 830,000 barrels of oil per day to delivery points in Oklahoma and Texas at a construction cost of approximately seven billion dollars.⁵⁵ The pipeline is projected to “increase Canadian oil exports to the United States by approximately four percent” of current United States demand for oil.⁵⁶

B. Chronology

In September of 2008, TransCanada filed an application for a presidential permit with the State Department to build and operate the Keystone XL Pipeline.⁵⁷ The application covered the construction, connection, operation, and maintenance of oil pipeline facilities on the United States–Canadian border in Phillips County, Montana.⁵⁸

As a federal agency that was proposing to approve a project that might have a significant environmental impact, the State Department had to comply with NEPA, which meant preparing an EIS on TransCanada’s application for a presidential permit.⁵⁹ In the case of the Keystone XL Pipeline, the “EIS process was extensive.”⁶⁰ The agency consulted with “eight other federal agencies, as well as numerous state agencies and Indian tribes, [the State Department] conducted twenty scoping meetings in communities along the pipeline route, and then [held] twenty-one public comment meetings about the draft EIS.”⁶¹ As part of the approval process, the State De-

52. Parker, *supra* note 13, at 234.

53. *Id.*

54. Slade, *supra* note 11, at 31.

55. Parker, *supra* note 13, at 234; *see also* Slade, *supra* note 11, at 31.

56. Parker, *supra* note 13, at 234.

57. Slade, *supra* note 11, at 31.

58. Ruhl & Salzman, *supra* note 14, at 1752.

59. Slade, *supra* note 11, at 33.

60. *Id.*

61. *Id.*; *see also Id.* at 33–34 (stating “[w]ithin the United States, the Department of Transportation’s Pipelines and Hazardous Materials Safety Administration (‘PHMSA’) is responsible for pipeline construction, maintenance, and general regulations.”); *Id.* at 34 (noting “each state has the ultimate legal authority to approve pipeline construction within its state, including having final say over the route”).

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partment compelled TransCanada to “adopt project-specific special conditions.”⁶²

In November 2011, citing concerns about “Nebraska’s lack of a regulatory framework for determining pipeline routes and national concern about the pipeline’s proposed route over the Ogallala aquifer,” the State Department put off its decision on the application until after the 2012 presidential election.⁶³ The State Department wanted “to examine in-depth alternative routes that would avoid the Sand Hills in Nebraska” before moving forward with a NID for the permit.⁶⁴ Showing its impatience with the process, in 2011, Congress added a provision to a temporary payroll tax cut bill that gave the Obama administration 60 days to decide whether it was going to approve the presidential permit for the pipeline.⁶⁵ Obviating the need for further environmental review, the legislation stated that if the presidential permit was approved, its approval would constitute compliance with NEPA, even if there were any future changes to its route.⁶⁶ The State Department expressed its displeasure with the proposed legislation, saying it would cause the State Department to be out of compliance with NEPA.⁶⁷

The State Department had spent nearly three years preparing its final environmental impact statement (“FEIS”) for the project. They had held 20 scoping meetings to identify the potential environmental impacts the EIS should address, as well as consulted with federal and state agencies and Indian tribes, and conducted various public meetings to discuss the draft environmental impact statement (“DEIS”) in communities that might be affected by the pipeline’s route. The State Department prepared a supplemental DEIS (“SDEIS”) to address concerns raised by EPA during the review process, received comments from the public and EPA on the SDEIS,⁶⁸ and held yet more public meetings.⁶⁹

After completing the EIS, the State Department began its NID analysis. The State Department was on a path to complete the NID and make a

62. *Id.* at 33.

63. Parker, *supra* note 13, at 236. Prior to that, in July 2010, the EPA told the State Department that its EIS was inadequate and unduly narrow. The State Department postponed its final decision to give agencies more time to comment before a final assessment was released. Caitlin McCoy et al., *Keystone XL Pipeline*, Harvard Law School Environmental & Energy Law Program State Power Project (Feb. 13, 2018), <https://perma.cc/VS58-FXF8>.

64. Slade, *supra* note 11, at 35.

65. Parker, *supra* note 13, at 237.

66. Slade, *supra* note 11, at 35–36.

67. *Id.* at 36.

68. The State Department received over 280,000 comments on the supplemental draft EIS. *Id.* at 34.

69. Parker, *supra* note 13, at 246. A subsequent review by the Inspector General cleared the various parties involved in the EIS preparation process of any conflicts, but found that the State Department’s “limited technical resources, expertise, and experience impacted the implementation of the [review] process.” *Id.* at 237.

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decision about the project by the end of 2011, but the outcry from the environmental community and “Nebraskans concerned about the pipeline’s route through the fragile Sand Hills region of Nebraska,” persuaded the agency not to make a decision.⁷⁰ After Congress passed a bill, in December 2011, accelerating its NID process, the State Department recommended President Obama deny the permit, which he did in January 2012, saying there was not sufficient time to review the project.⁷¹ TransCanada resubmitted the application for a presidential permit on May 4, 2012 and agreed to supplement the application with any alternative routes states like Nebraska, given its concerns about the Sand Hills, might propose.⁷² The application shortened the pipeline’s length to 875 miles, avoided crossing the sensitive area of the Sand Hills as well as shortened the length of the pipeline crossing the Northern Plains Aquifer system which included the Ogallala formation.⁷³ Congress passed bills approving construction of the pipeline in the winter of 2015, which President Obama vetoed on the ground that the Executive Branch, not Congress, had approval authority, which the Senate was unable to override.⁷⁴ On November 6, 2015, the Obama Administration officially rejected the project “saying it [did] not serve the nation’s interest.”⁷⁵ And there matters stood until the 2016 presidential election.

Candidate Donald J. Trump vowed to reverse the State Department’s recommended decision.⁷⁶ Within days of taking office, now President Trump, “issued a presidential memorandum directing the State Department to revisit the matter.”⁷⁷ On March 24, 2017, the State Department announced issuance of the permit with President Trump’s approval, and “immediately became embroiled in litigation challenges.”⁷⁸

70. Slade, *supra* note 11, at 34–35.

71. Parker, *supra* note 13, at 237; *see also* Ruhl & Salzman, *supra* note 14, at 1752 (“Ultimately, after long delay, President Obama announced his agreement with Secretary of State John Kerry’s decision to deny the permit”). He, however, endorsed the construction of the southern segment (Phase III) of the project from Cushing, Oklahoma, to the Gulf. TransCanada later severed Phase III in its May 2012 application, deciding to proceed with it as a separate project. Phase III was completed in January 22, 2014 and began pumping oil to Port Arthur, Texas. McCoy et al., *supra* note 63.

72. Slade, *supra* note 11, at 36.

73. McCoy et al., *supra* note 63.

74. *Id.*

75. *Id.*

76. Ruhl & Salzman, *supra* note 14, at 1752.

77. *Id.* On January 24, 2017 President Trump signed an executive order to expedite approval of both the Keystone XL and Dakota Access Pipeline. McCoy et al., *supra* note 63.

78. Ruhl & Salzman, *supra* note 14, at 1752–53; *See* Complaint for Declaratory and Injunctive Relief, *Indigenous Envtl. Network v. U.S. Dep’t of State*, 317 F. Supp. 3d 1118 (D. Mont. March 27, 2017) (No. 4:17-cv-00029-BMM). In response to a motion to dismiss and summary judgment briefing, the district court vacated State Department’s decision to issue the 2017 permit and enjoined the government and TransCanada from undertaking any pipeline construction activities, although the district court later allowed to company to undertake limited preparatory work. *See* Order, *Indigenous Envtl. Network v. U.S. Dep’t of State*, 317 F. Supp. 3d 1118 (D. Mont. Nov. 8, 2018) (No. 4:17-cv-00029-BMM),

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On March 29, 2019, President Trump, through the Office of his Press Secretary, issued a presidential permit granting TransCanada permission to “construct, connect, operate and maintain pipeline facilities” extending 1.2 miles from the international border between Canada and the United States for the import of Canadian oil into the United States.⁷⁹ The language of the permit authorizes the pipeline’s construction across approximately 45 miles of lands managed by the Bureau of Land Management. Simultaneously, President Trump revoked the 2017 permit issued by the State Department, mooted pending litigation against that permit.⁸⁰ “A review process for the pipeline expansion that had taken several years under President Obama was finalized in just months under President Trump.”⁸¹ On March 29, 2018, President Trump issued a new permit for the Keystone XL Pipeline.

On April 10, 2019, a week after issuing the Keystone permit, President Trump issued E.O. 13,867 requiring the review of cross-border infrastructural permit applications be completed within 60 days of receipt of an application and revoking E.Os. 13,337 and 11,423.⁸² The new procedures gave the President sole authority to issue, deny or amend a permit and eliminated language in prior executive orders that the review process conducted by the Secretary of State should be consistent with existing laws.⁸³

“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 45th President’s tenure in office.”⁸⁴ Although the basis for President Obama’s denial of the Keystone XL Pipeline permit was inadequate time for its review, President Trump, in his first week in office had invited TransCanada to reapply and directed the State Department to make its decision on the application within 60 days, suggesting the State Department use, to “the ‘maximum extent permitted by law,’ the existing Final Supplemental Envi-

appeal filed; see also Supplemental Order Regarding Permanent Injunction, *Indigenous Envtl. Network v. U.S. Dep’t of State*, (D. Mont. Dec. 7, 2018) (No. 4:17-cv-00029-BMM), *appeal filed*.

79. 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, 13,101–03 (April 3, 2019).

80. *Id.* At that point, the Rosebud Sioux Tribe and the Fort Belknap Indian Community had litigation pending in the U.S. District Court for the District of Montana challenging the State Department’s decision to issue a permit for the pipeline, alleging violations of the Administrative Procedure Act, the National Environmental Policy Act, and the National Historic Preservation Act. McCoy et al., *supra* note 63.

81. Campau, *supra* note 24, at 277.

82. Exec. Order No. 13,867, 84 Fed. Reg. 15,491, 15,491–92 (April 10, 2019).

83. Although maintaining that it did not have to supplement its NEPA analysis as the U.S. District Court for the District of Montana required because of the new presidential permit for the project, it will do so anyway. McCoy et al., *supra* note 63.

84. Campau, *supra* note 24, at 275.

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ronmental Impact Statement (“FSEIS”) and supporting documentation to comply with environmental regulations.”⁸⁵

*C. Reasons Commonly Given to Support or Oppose
the Keystone XL Pipeline*

The overall assessment by many scholars who have looked at the proposed pipeline’s cost and benefits is that the environmental costs will exceed any benefits it might bring, such as reduced gas prices, improved national security, or new domestic jobs—the benefits cited by the project’s proponents.⁸⁶ But, it is unlikely the pipeline will decrease gas prices because oil that is now collecting in the Midwest and keeping prices low in that region will thin out once it’s transported to the Gulf coast where refineries are planning to export Canadian oil at higher prices and any oil not exported will be sold back to United States markets at higher prices.⁸⁷ World oil prices will not decrease in response to any increase in Canadian oil production because the amount of that increase is insignificant in relation to the amount of oil used worldwide.⁸⁸ And Canada’s intent to make money is clear from shipping its oil to the Pacific Coast where the price will be determined by the world oil market and not at any discounted rate.⁸⁹

With respect to enhanced national security, it is true that “[g]eopolitical factors dictate that the United States is less vulnerable to disruptions in oil supply from Canada” because Canada and the United States are engaged in the largest and most widespread trading relationship in the world, and the United States has broader defense arrangements with Canada than with any other nation.⁹⁰ Moreover, Canada is “a staunch ally of the United States.”⁹¹ However, the argument that the Keystone XL Pipeline will increase national security by improving energy security because Canadian oil will replace United States imports from unstable countries, like Venezuela, Nigeria, and Saudi Arabia, assumes Canadian oil will actually replace oil from those countries.⁹²

Even if the Keystone XL Pipeline is not built, the United States will probably still use Canadian oil as a replacement for its foreign imports from

85. *Id.* at 275–76.

86. *See e.g.* Slade, *supra* note 11, at 36; *but see* Parker, *supra* note 13, at 234 (“Connecting the tar sands oil in Canada to refineries in Oklahoma and Texas would provide new resources for markets on the East Coast. It also could increase the amount of refined petroleum products available for export”).

87. Slade, *supra* note 11, at 48.

88. *Id.*

89. *Id.*

90. *Id.* at 52.

91. *Id.*

92. *Id.* at 48–49. This also assumes that Canadian imports will reduce what is known as the oil vulnerability premium.

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Venezuela and Mexico.⁹³ These imports are declining as production in those countries declines.⁹⁴ United States' demand for refined oil products, like gasoline and diesel, is also declining.⁹⁵ Both market reactions are independent of United States domestic production or Canadian imports. Declining imports from other countries and declining domestic demand means existing Canadian crude oil imports are already set to meet United States' demand for oil without the additional product from the Keystone XL Pipeline.⁹⁶ Since United States' demand for refined oil products has little to no effect on domestic production, in a declining market, or Canadian imports, any decrease in demand for gasoline, and thus crude, would result in a decrease in imports from countries other than Canada, like those in the Middle East.⁹⁷ But, the United States will remain "vulnerable to expected oil disruptions from the Middle East because the Middle East holds the majority of the world's oil reserves,"⁹⁸ on which the rest of the world still depends with the result that "the global pricing markets will continue to keep the United States vulnerable to disruptions,"⁹⁹ regardless of an increase in imports of Canadian crude.

Offsetting these somewhat dubious economic and national security benefits are potential costs from building the Pipeline. "[P]ipelines 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."¹⁰⁰ Critics complain that "the costs to the environment, like carbon emissions, the hazards of oil extraction, and the potential for oil spills, are too great."¹⁰¹ They are concerned the pipeline might leak oil in sensitive ecosystems like the Sand Hills of Nebraska, that tar sand extraction is itself environmentally destructive, that the production of tar sands oil will increase the industry's carbon footprint, and the proposal does nothing to reduce this country's reliance on using fossil fuels to

93. *Id.* at 50.

94. *Id.*

95. *See also Id.* ("Using a realistic model of decreasing U.S. demand, in which vehicle efficiency increases and the United States consumes less oil, EnSys projects that U.S. imports from Canada are the same with or without the Keystone pipeline addition, assuming there is some pipeline expansion").

96. *Id.*

97. *Id.*

98. *Id.* at 52.

99. *Id.*

100. Campau, *supra* note 24, at 275.

101. Slade, *supra* note 11, at 37; *see also* Parker, *supra* note 13, at 235 (noting "[o]thers oppose the pipeline because it encourages development of tar sands in Canada. This requires a notoriously dirty process that, compared with standard oil development processes, will disproportionately contribute to climate change").

meet its energy needs.¹⁰² Moreover, the owner of the pipeline, TransCanada, has an unfortunate record of spills associated with its other pipelines, which provides some justification for project opponents who fear the “risk” of an “environmental disaster, such as catastrophic spills that would damage land, surface water, and groundwater.”¹⁰³ Other opponents of the pipeline, including some states and individuals, “oppose the pipeline” because its construction raises states’ rights and individual property rights issues.¹⁰⁴

Understanding that this country’s energy security will not necessarily improve as a result of the construction of the Keystone XL Pipeline and that oil prices will not necessarily decrease while serious environmental problems may occur tips the pipeline’s cost-benefit balance against construction.¹⁰⁵ However, the factual assertions on each side of the equation are less than firm.

III. CONSTITUTIONAL RATIONALES SUPPORTING ISSUANCE OF THE KEYSTONE XL PIPELINE PERMIT BY THE PRESIDENT¹⁰⁶

Besides bringing dubious benefits to the United States and risks of substantial environmental harm, there are questions about whether the President had the constitutional authority to issue the permit for the Keystone XL Pipeline’s construction. This Part of the article discusses three commonly given constitutional rationales supporting the President’s issuance of the Keystone XL Pipeline permit. They are, the power to issue the permit is: (1) within the President’s prerogatives to expand delegated constitutional power; (2) inherent in his authority under Article II of the Constitution to take care that the laws are faithfully executed; and (3) inherent in his authority over foreign affairs and the military. While each of these justifications is less than firm, Congress’ failure to object to the permit’s issuance may have sanctioned it *sub silentio*, raising a non-constitutional rationale for the permit’s legitimacy.

102. Slade, *supra* note 11, at 57. However, it should be noted that “TransCanada has agreed to reroute the pipeline to avoid the Sandhills region of Nebraska, under which lies the Ogallala Aquifer.” Parker, *supra* note 13, at 236.

103. Parker, *supra* note 13, at 236. On June 28, 2011, the Pipeline and Hazardous Materials Safety Administration issued a corrective action order to TransCanada for Keystone Pipeline System leaks. It issued another one on April 9, 2016, another on November 16, 2017 for a leak of 210,000 gallons of oil, and yet another corrective action order on Nov. 28, 2017 for Keystone Pipeline system leaks. McCoy et al., *supra* note 63.

104. Parker, *supra* note 13, at 235.

105. *Id.* at 236 (providing “opponents also argue that the negative environmental impacts of the pipeline construction alone simply outweigh any benefits”).

106. Earlier parts of the article address some of the non-legal rationales for issuing the Keystone XL Pipeline permit, such as energy security leading to improved national security, stable oil prices, economic and job growth, improved relations with Canada, and the rejoinders to those arguments, so they are not addressed in this part of the article.

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A. *Issuance of the Keystone XL Pipeline Permit Is Within the President's Prerogative Power*

“One school of constitutional theorists, accepting the view of prerogative so brilliantly expounded by Alexander Hamilton in 1793, has maintained that the President is endowed by the Constitution with a high degree of autonomy and discretion—with ‘the executive power of the United States’ not with ‘the executive power herein granted.’”¹⁰⁷ Both Madison and Jefferson argued there is no executive prerogative because the president, like Congress, “has only those powers enumerated in the Constitution.”¹⁰⁸ Their view of inherent, or prerogative executive power, “was heavily influenced by the authority belonging to a constitutional English monarch—one whose prerogatives had been successively curtailed over the centuries by the Magna Carta (1215), the Petition of Right (1628), and the Bill of Rights (1689).”¹⁰⁹ The argument against the need to include a prohibition against the suspending power in the Bill of Rights—that the “widespread understanding that the Constitution had not given the Chief Executive a suspending power of any kind, and that it was therefore unnecessary ‘to provide against the exercise of a power which did not exist’”¹¹⁰—affirmed that view.

President Lincoln was an early exponent of prerogative presidential power. He “infused presidential war powers into the Commander in Chief clause of Article II,” despite the fact the Constitution gives Congress, not the president the power to wage war.¹¹¹ According to John P. Roche, while it was “doubtful whether the Framers intended anything more than civil control over the military by this provision, Lincoln employed it as the rationale for broad substantive powers of presidential war-waging and, indeed, based the Emancipation Proclamation upon his authority as Commander-in-Chief.”¹¹² In *Ex parte Milligan*,¹¹³ a unanimous Supreme Court rejected Lincoln’s use of prerogative power to create military commissions for the

107. Roche, *supra* note 5, at 594; *see also Id.* at 598 (arguing “[t]he conception of domestic prerogative is found in the thought of Alexander Hamilton, and Abel Upshur could observe in 1840 that it had been ‘gravely asserted in Congress that whatever power is neither legislative nor judiciary, is of course executive, and, as such, belongs to the President under the Constitution’”).

108. *Id.* at 594.

109. Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 881 (1994); *see also Id.* at 891 (stating “[t]he Framers did not write on a clean slate, but on one which contained the indelible traces of four hundred years of English constitutional history. In a case like this, as Holmes once wrote, ‘a page of history is worth a volume of logic’”).

110. *Id.* at 889.

111. Roche, *supra* note 5, at 599.

112. *Id.*

113. 71 U.S. 2 (1866).

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trial of civilians when the non-military courts were open, holding his action was beyond his constitutional and statutory authority.¹¹⁴

Although the concept of a presidential prerogative was “an important strand in American constitutional law,” after Lincoln, the absence of domestic emergencies led to it not being used much until President Franklin Roosevelt.¹¹⁵ The few exceptions occurred in the late 19th Century in response to industrial crises where presidents relied on both delegated and inherent powers.¹¹⁶ For example, in *In re Neagle*,¹¹⁷ which authorized the United States Attorney General’s appointment of United States Marshalls as bodyguards for federal judges, Justice Miller contended that “there is a ‘peace of the United States’ and that the President is the keeper of the peace.”¹¹⁸ He acknowledged his decision “blew new breath into the corpse of the federal common law,” and that its political implications “were far-reaching, for it could serve as the rationale for almost any presidential intervention into domestic disorder.”¹¹⁹ In *In re Debs*¹²⁰ the Supreme Court unanimously upheld the use of an injunction to stop the Pullman strike, holding, “although there was no statutory authorization for his action,” the President, acting through the United States Attorney, was “legitimately exercising prerogative power in seeking the injunction, and that the United States Circuit Court was correct in granting it.”¹²¹

According to Clinton Rossiter, “[i]n the light of the Debs and Neagle cases, it might easily be argued that there are no judicial limits to the President’s real or alleged ‘inherent’ power to protect the peace of the United States.”¹²² This view was expressed more fully by President Teddy Roosevelt, explaining how his action during the coal strike

illustrated as well as anything that I did the theory which I have called the Jackson-Lincoln theory of the Presidency; that is, that occasionally great national crises arise which call for immediate and vigorous executive action, and that in such cases it is the duty of the President to act upon the theory that he is the steward of the people, and that the proper attitude for him to take is that he is bound to assume that he has the legal right to do whatever

114. Roche, *supra* note 5, at 600 (stating Milligan had received the death penalty for disloyal activities from a military commission established under “the sole authority of President Lincoln”). The majority found that even Congress could not limit the rights of individuals. *Id.*

115. *Id.* at 602

116. *Id.*

117. 135 U.S. 1 (1890).

118. Roche, *supra* note 5, at 603.

119. *Id.*

120. 158 U.S. 564 (1895).

121. Roche, *supra* note 5, at 603 (quoting Justice Brewer “The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care” (internal quotation marks omitted)).

122. *Id.* at 604.

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the needs of the people demand, unless the Constitution or the laws explicitly forbid him to do it.¹²³

President Taft, on the other hand, believed presidents, no different from Congress, had only the powers specifically set out in the Constitution. He rejected Teddy Roosevelt's concept of the president possessing common law responsibilities of "Protector of the Peace of the United States" as well as the holdings of the *Debs* and *Neagle* decisions.¹²⁴ The most exuberant modern user of prerogative power was President Franklin Delano Roosevelt, whose full-throated use of it reflected his "full acceptance of the assignment of Protector of the Peace," and, according to Roche, brought "the United States to the edge of unconstitutional presidential dictatorship."¹²⁵ Between the start of war in Europe to enactment of the War Labor Disputes Act, on June 25, 1943, FDR "seized eleven industrial facilities ranging from one plant of the North American Aviation Company to the whole soft-coal industry."¹²⁶ However, FDR relied on large delegations of power from Congress and not inherent executive power, distinguishing himself not only from Teddy Roosevelt, but also from Lincoln.¹²⁷ Yet, FDR cited general authority in the "Constitution and laws" as a basis for his actions, and not specific statutes.¹²⁸

John Roche concludes from his analysis of presidential use of prerogative powers in the case of domestic emergencies that it "has been and will continue to be shaped by the extent and intensity of the emergency. If a real emergency exists, it seems unlikely that the Supreme Court will declare a presidential action unconstitutional."¹²⁹ Indeed, "Supreme Court jurisprudence includes many examples where the Court has found an implied grant of constitutional authority."¹³⁰ Roche discounts the possibility of an "unconstitutional presidential dictatorship" because "Congress and the public must agree with presidential emergency actions if they are to be effective."¹³¹ The conclusion that "Congress and the President are the Siamese twins of American 'constitutional dictatorship,'" he says, is supported by "the silences of American constitutional history."¹³²

123. *Id.*

124. *Id.* at 604–05.

125. *Id.* at 605.

126. *Id.* at 607.

127. *Id.* at 605.

128. *Id.* at 610 (providing that "Roosevelt's assertion that he could overrule Congress on a statute is an example of political poker-playing rather than a constitutional precedent").

129. *Id.*

130. Alberto R. Gonzales, *Presidential Powers, Immunities and Pardons*, 96 WASH. U. L. REV. 905, 910 (2019).

131. Roche, *supra* note 5, at 611. The one exception to this is President Harry S. Truman's seizure of the steel mills. *See Id.*

132. *Id.*

However, there is no single rule on whether a statute will displace a presidential exercise of his prerogative power; rather, any determination on that issue “is highly dependent on the facts and the provisions of the particular statute.”¹³³ To the extent courts do not allow displacement of statutes, it is because courts generally do not favor governments using prerogative powers to subvert or ignore statutes.¹³⁴ Additionally, courts consistently decide against “conferral of coercive powers on government” when used against individual liberty.¹³⁵ President Trump’s permit for the Keystone XL Pipeline preempted pending litigation brought by environmental and tribal groups, an act of coercive power against individuals’ rights to seek redress for injuries in court. The successful use of presidential prerogative powers turns on the existence of an emergency, which is a fact specific determination. Here, the facts supporting an emergency are open to question. The application of these principles to President Trump’s issuance of a permit for the Keystone XL Pipeline make it unlikely that his was a justified use of his prerogative powers, to the extent they exist at all.

B. Issuance of the Keystone XL Pipeline Permit Is Within the President’s Duty to Take Care that the Laws Are Faithfully Executed

Supporters of the President’s issuance of the Keystone XL Pipeline permit contend that President Trump’s power to issue the permit falls within his Article II, Section 3 power to “take Care that the Laws be faithfully executed.” The question is whether he can use that power in defiance of Congress, as expressed in Section 501 of the Temporary Payroll Tax Cut Continuation Act of 2011.¹³⁶ Section 501 specifically states the President was to issue the permit through the Secretary of State under E.O. 13,377, and leaves intact the executive orders prescribing the process for their issuance, which he did not follow.¹³⁷

The President’s Article II power is not an ever-expanding one that is blind to the will of Congress. Viewed in a historical context, the Clause becomes “a succinct and all-inclusive command through which the Framers sought to prevent the Executive from resorting to the panoply of devices employed by English kings to evade the will of Parliament.”¹³⁸ In other

133. Benjamin B. Saunders, *Democracy, Liberty and the Prerogative: The Displacement of Inherent Executive Power by Statute*, 41 *FED. L. REV.* 363, 364 (2013).

134. *Id.* at 363.

135. *Id.*

136. Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, § 501, 125 Stat. 1280, 1289 (2011).

137. *Id.* § 501, 125 Stat. at 1289.

138. May, *supra* note 109, at 873; *see also Id.* (arguing the Framers would have been familiar with “the four hundred year struggle of the English people to limit the king’s prerogative and achieve a

words, the power to execute laws cannot be interpreted as the power to defy them.

Indeed, presidents have complied with the will of Congress until recently. From 1798 until 1981, while the president has questioned the validity of laws through veto messages and signing statements 135 times, in only 20 of those situations, did the president decide not to comply with the law.¹³⁹ The shortage of examples of presidential noncompliance “strongly reinforces the argument that the Founders did not intend the President to possess a power to suspend laws that he might think unconstitutional,”¹⁴⁰ or simply not like. It would be a “novel construction of the Constitution” to read into the command that the president see that the laws are “faithfully executed” a power to prevent their execution.¹⁴¹

Consistent with this view, the circumstances which might justify a president not complying with congressional edicts are quite limited. For example, non-compliance might be justified: (1) when the text of the Constitution, the Framers’ intent, or Supreme Court precedent makes it clear that the law in question is unconstitutional;¹⁴² (2) when the president has been unable to redress his problem with the law through the legislative process;¹⁴³ (3) the only way to test the law’s constitutionality in court is through its defiance;¹⁴⁴ and (4) the president has exhausted all efforts to ensure that judicial review actually happens.¹⁴⁵ Beyond this limited situation, what might be seen as a “narrow privilege of noncompliance could easily become a modern equivalent of the suspending power,”¹⁴⁶ an executive power the British Bill of Rights ended and the United States has never adopted.¹⁴⁷

With respect to President Trump’s issuance of the Keystone XL Pipeline permit, there is no hint of unconstitutionality in the governing law or the two executive orders. There has been no attempt by the President to redress any problems he has with those legal requirements, prior to issuing the permit, and, since the law and executive orders are constitutional on their face, there is no need to test their constitutionality. If there were, it

government under law rather than royal fiat,” which ended in the Bill of Rights of 1689, making it “illegal for the king to suspend or dispense with the laws or refuse their execution without Parliament’s consent. The effect was to transfer the suspending power from the executive branch to the legislature”).

139. *Id.* at 977 (“The first of these incidents did not occur until 1860, three-quarters of a century after the Constitution was framed”).

140. *Id.*

141. *Id.* at 899 (quoting *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838)).

142. *Id.* at 988.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. See discussion *infra* Part IV, and related notes.

could have been done by challenging President Obama's action under them, which the Trump Administration did not do nor made any attempt to do. Therefore, reliance on President Trump's duty to see that the laws are faithfully executed as a basis for his issuance of the permit may provide imperfect cover for what otherwise might be viewed as an *ultra vires* exercise of power.

C. *Issuance of the Keystone XL Pipeline Permit Is Within the President's Inherent Authority Over Foreign Affairs and as Commander-in-Chief*

Supporters of President Trump's issuance of a permit for the Keystone XL Pipeline also argue that the permit was within his Article II power as Commander-in-Chief and inherent power over foreign affairs, and that their exercise does not require congressional authorization.¹⁴⁸ Indeed, the first sentence of E.O. 11,423 states that "the 'proper conduct of the *foreign relations* of the United States' demands 'executive permission' for border crossing facilities."¹⁴⁹ E.O. 11,423 also cites the power vested in the President "as President of the United States and Commander in Chief of the Armed Forces of the United States," as authority for the President's issuance of permits for cross-border energy facilities.¹⁵⁰ "Given the critical nature of reliable fuel supplies to a well-functioning military and other national security concerns," the executive order's reliance on these authorities makes sense.¹⁵¹

"The Constitution grants the President, as Commander-in-Chief of the armed forces, some measure of power (largely undefined by judicial interpretation) that is immune from congressional restriction."¹⁵² As an example of this, "the Supreme Court in the *Prize Cases* approved President Lincoln's seizure of merchant ships bound for Confederate ports even though the seizure occurred before Congress had approved the blockade and recognized the belligerency of the Confederacy."¹⁵³ Courts have been particularly reluctant to limit a president's emergency powers when the use of

148. See, e.g., Defendant's Memorandum in Support of Motion to Dismiss Plaintiff's Complaint at 19–20, *Indigenous Envtl. Network v. Trump*, 2019 WL 3022289 (D. Mont. July 10, 2019); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 n.2 (1952) (Jackson, J. concurring) (stating presidents can "act in external affairs without congressional authority").

149. Campau, *supra* note 24, at 281.

150. *Id.* at 282.

151. *Id.*; *Id.* at 285 n.98 (E.O. 13,337 more generally references the authority vested in the president "as President by the Constitution and the laws of the United States of America").

152. *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, Note, 96 HARV. L. REV. 1102, 1112–13 (1983) [hereinafter *Presidential Emergency Power*].

153. *Id.* at 1113.

those powers involves foreign relations, finding implied powers, or construing statutory text to sustain presidential initiatives.¹⁵⁴

This reluctance to restrain presidents in emergency situations involving foreign matters leads to judicial deference when these circumstances arise. Courts generally refuse to question any declaration of emergency by a president given his attributed knowledge and foreign policy expertise, making him the best judge of the situation.¹⁵⁵ Another factor contributing to judicial restraint is that any challenge of this nature would, in all likelihood, present a political question, which courts prefer to avoid.¹⁵⁶

To succeed as a constitutional basis for the President's issuance of the Keystone XL Pipeline permit, however, there must be a factual basis for the exercise of the President's Article II powers as commander-in-chief and over foreign affairs. Thus, if President Trump could make a convincing case that issuance of the Keystone XL Pipeline is in the best interests of national security, because assuring a reliable source of fuel supplies implicates the country's national security and involves foreign affairs, then any court reviewing his action might give him deference. The problem is, as Part II of this article shows, neither interest was involved to any significant degree in his issuance of the Keystone XL Pipeline permit.¹⁵⁷ Indeed, "President Trump appears to be testing the American political system's tolerance for soft dictatorship through the cavalier—and potentially illegal—use of presidential emergency powers."¹⁵⁸

An additional argument potentially supporting President Trump's issuance of the Keystone XL Pipeline permit is that Congress has sanctioned his action.¹⁵⁹ As a general matter, Congress has acted numerous times with respect to the issuance of cross-border facilities, implicitly sanctioning the presidential permitting process for such facilities.¹⁶⁰ With respect to the

154. *Id.*

155. *Id.* at 1116.

156. *Id.*

157. See *supra* Part II, sub. C; Cf. Bruce Ackerman, *No, Trump Cannot Declare an 'Emergency' to Build His Wall*, N.Y. TIMES, Jan. 5, 2019, <https://perma.cc/D7WS-QZ9Q>.

158. Stevenson, *supra* note 3.

159. May, *supra* note 109, at 977–78 (stating "Felix Frankfurter once suggested that 'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President'") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)).

160. Campau, *supra* note 24, at 283 ("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"); see also *Id.* at 285 n.99 (citing in support of the proposition that Congress's failure to overhaul the permitting process and initial directive that the President work within the permitting process indicated the legitimacy of his permitting actions, *Natation Resource Defense Council v. U.S. 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. Department of State*, 659 F. Supp. 2d 1071, 1081–82 (D.S.D. 2009)).

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Keystone XL Pipeline, while Section 501 of the Temporary Payroll Tax Cut Continuation Act of 2011 “directed the president to grant a presidential permit for the Keystone XL Pipeline unless he determined that it ‘would not serve the national interest,’ ”¹⁶¹ it incorporated language from the applicable executive orders setting out the process for approval of cross-border permits, including the specific delegation of permitting authority to the State Department. Thus, it is difficult to infer that Congress sanctioned President Trump’s issuance of the Keystone XL Pipeline permit, when that action was in non-compliance with its clear intent that the process set out in the executive orders be followed.¹⁶²

Although there are credible arguments supporting the President’s issuance of the Keystone XL Pipeline permit, none is without flaws. An argument based on presidential prerogative powers, an expansive view of the Take Care Clause, or on the President’s powers as Commander-in-Chief and over foreign affairs is either not supported or conflicts with congressional intent. So too, prior confirmation of the president’s power to issue permits for cross-border energy facilities cannot be used to support a use of that authority that is inconsistent with the specific will of Congress. None of these problems, however, delivers a knockout punch to the argument in question, and perhaps each may gain strength from the other if the arguments are combined.

IV. CONSTITUTIONAL ARGUMENTS OPPOSING PRESIDENT TRUMP’S ISSUANCE OF THE KEYSTONE XL PIPELINE PERMIT¹⁶³

Although opponents to President Trump’s issuance of a permit for the Keystone XL Pipeline cite only two reasons supporting their position—issuance of the permit violates the separation of powers doctrine and exceeds the President’s powers under Article II of the Constitution—compared to the four rationales pipeline supporters have, they are not as easily refuted as those raised by pipeline permit supporters. Still, neither of them is a “slam dunk.”

161. *Id.* at 283.

162. *See Id.* at 283 (providing “In other words, Congress acknowledged the authority of EO 13,337 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”).

163. In addition to the arguments set out here are points made earlier in the article about the permit’s issuance, such as allowing unassessed, unregulated significant environmental harms to occur because environmental laws do not apply to the president, creates bad precedent as would be an outlier permit, and provides support for other instances of presidential excesses, like reprogramming border wall funding and various Immigration initiatives. These and the weaknesses in the non-constitutional arguments are discussed in Part II of the article and are not repeated here.

A. *The President's Issuance of the Keystone XL Pipeline Permit Violated the Separation of Powers Doctrine*

Article I, Section 8, Clause 3 of the Constitution gives Congress the power to regulate commerce with foreign nations and among the several states. Article I, Section 8, Clause 18 authorizes Congress to make all laws which are necessary and proper for exercising its enumerated and all other powers vested in the government of the United States or in any department of the government, while Article IV, Section 3, Clause 2 authorizes Congress to regulate property belonging to the United States. Thus, to the extent these powers are implicated in the issuance of the Keystone XL Pipeline permit, it is Congress, not the President, who can determine the terms for its issuance. And Congress, when it directed President Trump to issue the permit in the Temporary Payroll Tax Cut Continuation Act of 2011, incorporated the procedures for doing this set out in E.Os. 11,423 and 13,337.¹⁶⁴ These procedures, among other things, delegated the permit-issuing function to the State Department. When President Trump, as opposed to the Secretary of State, issued the permit and ignored the procedures governing the permit's issuance, requiring among other things compliance with existing laws, he "invaded the territory" of Congress, regardless of whether Congress objected to the invasion.¹⁶⁵

Congress' decision not to delegate power to the president, and instead delegate it to an agency, was deliberate.¹⁶⁶ Indeed, the powers of the president "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."¹⁶⁷ However, "just because Congress mentioned an agency head's regulatory authority does not mean that it necessa-

164. See Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, § 501, 125 Stat. 1280, 1289 (2011).

165. May, *supra* note 109, at 979 n.546 ("Writing for the Court in 1992, Justice O'Connor declared unequivocally that '[t]he Constitution's division of power among the three Branches is violated where one Branch invades the territory of another, whether or not the encroached-upon Branch approves the encroachment'" (quoting *New York v. United States*, 112 S. Ct. 2408, 2431 (1992))).

166. Thomas O. Sargentich, et al., *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 18 (2007); see also Alan B. Morrison, *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation*, 81 GEO. WASH. L. REV. 1211, 1216 (2013) (noting "[w]hat is significant is that Justice Jackson and others in the majority seemed to treat the failure to grant the President those powers as the functional equivalent of denying them to him. In other words, inaction equaled action, and congressional silence was the same as congressional legislation").

167. Catherine Amirfar & Ashika Singh, *The Trump Administration and the "Unmaking" of International Agreements*, 59 HARV. INT'L L.J. 443, 451 (2018) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, at 635 (1952)); see also *Presidential Emergency Power*, *supra* note 152, at 1114 (The reality is that in a time of crisis, any limits on the president's power to act are as likely to be determined by his "political relationship with Congress, his popular support, and the relative strengths of will of the occupants of the three branches of government" than by any "statutory arrangement").

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rily precluded presidential directives to the agency.”¹⁶⁸ Indeed, Justice Kagan “suggests that the President has so much power over executive agencies that it is most realistic to envision Congress as allowing presidential directives,”¹⁶⁹ citing as examples of that power, the unrestricted power to nominate officers of the United States, the power to remove them at will, and the power to subject them “to potentially far-ranging procedural oversight.”¹⁷⁰

If one agrees with Justice Kagan on this point, then it is “realistic to suppose that Congress also allows the President to have a fourth power—namely, directive authority to control regulatory decisions.”¹⁷¹ Justice Kagan goes so far as to argue that a president can displace congressionally delegated regulatory authority “based on legislative intent as well as institutional competence, with the latter constituting a policy-based defense of presidential directives to agencies as uniquely accountable and effective.”¹⁷² Arguably, Justice Kagan’s view of presidential power gives a president the power to act in the agency’s stead, as President Trump did when he exercised the State Department’s authority to issue the Keystone XL Pipeline permit. “Moreover, the ‘very subtlety’ of the line between *influence* through appointment, removal, and procedural oversight and *command* over the substance of regulatory action ‘provides reason to doubt any congressional intent to disaggregate them, in the absence of specific evidence of that desire.’”¹⁷³

But perhaps it makes more “sense to say as a general matter that when a statute confers statutory authority on an agency head, the use of the authority should not be utterly displaced by the President.”¹⁷⁴ Although “the President can supervise and guide agency policymaking, the President cannot go so far as to displace the agency head’s discretion to make decisions vested in that officer by law.”¹⁷⁵ In other words, the president has no authority to make a decision when Congress has delegated this authority to an

168. Sargentich et al., *supra* note 166, at 18; *see also* Morrison, *supra* note 166, at 1217–18 (“In addition to its general acquiescence argument, Justice Rehnquist’s opinion also invoked what might be called ‘specific acquiescence’ because ‘Congress has consistently failed to object to this longstanding practice of claim settlement by executive agreement, even when it has had an opportunity to do so.’ As seen by the Court, Congress had considered related legislation and failed to include anything that would limit the power to use the Settlement Commission”).

169. Sargentich et al., *supra* note 166, at 19.

170. *Id.*

171. *Id.*

172. *Id.* at 35.

173. *Id.* at 19–20 (emphasis added).

174. *Id.* at 21.

175. *Id.* at 7.

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agency head,¹⁷⁶ as President Trump did when he issued the permit for the Keystone XL Pipeline, where Congress had not displaced the authority to make that decision from the State Department.

A president stepping in and making a decision that Congress has delegated to an agency is different from a president telling an agency what he wants it to do. The latter is more an “expression of presidential priorities,” not a “displacement” of an agency head’s discretion.¹⁷⁷ “When Congress gives specific regulatory authority to an agency it creates, it confirms that this is the entity responsible for the functions under discussion.”¹⁷⁸ It would be paradoxical for Congress to create an agency to address a particular problem, then “overcome the agency’s role by giving the President power to decide what the agency will do.”¹⁷⁹

By issuing the Keystone XL Pipeline permit in defiance of Congress’ will, President Trump took an action when his power was at its “lowest ebb.”¹⁸⁰ While “Congressional opposition likely needs to be reflected in duly enacted laws or other constitutionally sufficient congressional action”

176. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 25 (1995) (noting that the generally accepted view is that “the President has no authority to make the decision himself, at least if Congress has conferred the relevant authority on an agency head”) (cited in Kagan, *supra* note 10, at 2250 n.8); *see also* Sargentich et al., *supra* note 166, at 7 (stating “the President can take the not entirely cost-free step of firing a recalcitrant agency head, assuming he or she is dealing with an at-will executive officer. Again, what the President cannot do is merely assume that his or her own will is necessarily controlling when the statute vests regulatory authority in an agency head”).

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177. Sargentich et al., *supra* note 166, at 7–8; *see also Id.* at 9, n.22 (“In the text both of the Constitution and of Congress’s statutes, it is the heads of departments who have legal duties vis-à-vis regulatory law. The President can ask about those duties and see that they are faithfully performed, but he and his department heads are to understand that the duties themselves are theirs. . . .”) (quoting Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 984 (1997)).

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178. *Id.* at 10; *but see* Kagan, *supra* note 10, at 2251 (arguing “that a statutory delegation to an executive agency official—although not to an independent agency head—usually should be read as allowing the President to assert directive authority, as Clinton did, over the exercise of the delegated discretion. This rule of statutory construction is based in part (though only in part) on policy considerations relating to the desirability of presidential control over administration”).

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179. Sargentich et al., *supra* note 166, at 10.

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180. Amirfar & Singh, *supra* note 167, at 445 n.12 (quoting Justice Jackson’s three categories of presidential power and saying, “The *Youngstown* categories are: (1) [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; (2) [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; and (3) [w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at his lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”); *see also* Morrison, *supra* note 166, at 1214 (“In the key portion [*Youngstown*], Jackson set up a tri-partite method of analysis in which he asserted that the powers of the President are at their apex when they are expressly or impliedly granted in the Constitution or in legislation, and at their nadir when they are expressly granted to another branch in the Constitution or expressly or impliedly limited by legislation. He then created a third or middle category in which there is no authoritative law, and in which the President’s authority is uncertain”).

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to fit within the *Youngstown* third category,¹⁸¹ the circumstances surrounding the Keystone XL Pipeline presidential permit did not involve “congressional inertia, indifference or quiescence,” which could arguably “enable, if not invite, measures on independent presidential responsibility.”¹⁸² Arguably, the President’s action came at the direction of Congress.¹⁸³ Even “a state of war is not a blank check for the President”; whatever power the “Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”¹⁸⁴

By violating the doctrine, President Trump has reduced the ability of the other two branches to act as a check on his actions.¹⁸⁵ Senator Charles E. Schumer’s complaint that President George W. Bush undermined Congress’ legislative prerogative in a fundamental way by “repeatedly insisting on unilateral action with respect to the war on terror rather than cooperating with Congress to modify laws that might be in need of changes or updates,”¹⁸⁶ resonates with the current Administration’s unilateral actions.¹⁸⁷ President Reagan was another president whose executive orders generated complaints that they violated the separation of powers doctrine because they ignored the fact that the Constitution gave Congress the power to make laws and then delegated that power to agencies, not presidents.¹⁸⁸ “In the

181. Amirfar & Singh, *supra* note 167, at 446.

182. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

183. See Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, § 501, 125 Stat. 1280, 1289 (2011).

184. Charles E. Schumer, *Under Attack: Congressional Power in the Twenty-First Century*, 1 HARV. L. & POL’Y REV. 3, 12 (2007) (quoting Justice O’Connor in *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)) (internal quotation marks omitted).

185. *Id.* at 6 (quoting THE FEDERALIST NO. 51, at 263 (James Madison) and saying “[a]s Madison wrote in *The Federalist No. 51*, the Republic would function well only within such a competitive and oppositional system: ‘[I]n all the subordinate distributions of power, . . . the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other’”); see also *Id.* at 24 (“Lindsey Graham once suggested that, ‘When a President gets out of bounds and doesn’t do as he or she should do constitutionally . . . it is up to us to put them [sic] back in bounds’”).

186. *Id.* at 8.

187. An example of such an action was President Trump’s declaration of a national emergency under the National Emergencies Act of 1976, on February 15, 2019, to support his unilateral decision to build a border wall between Mexico and the United States. Except no president had ever used this power to finance a project Congress explicitly refused to appropriate money for. In the words of Representative Jerrold Nadler, Chairman of the House Judiciary Committee, the President’s action was a “gross abuse of power that subverts key principles laid out in the Constitution.” While House Speaker Nancy Pelosi called this action a “power grab” and an “‘end run’ around Congress’s constitutional authority over federal spending.” Stevenson, *supra* note 3, at 2.

188. Kagan, *supra* note 10, at 2279–80; see also Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 387 (2003) (stating “[o]n issues of nonjudicial interpretation, President Reagan should be placed in history with the handful of past Presidents most renowned for promoting constitutional views indepen-

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framework of our Constitution,' Justice Black famously wrote, 'the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.'"¹⁸⁹

Furthermore, President Trump's actions, by usurping the authority of the State Department to issue presidential permits in this situation, effectively suspended Section 501 of the Temporary Payroll Tax Cut Continuation Act of 2011, which incorporated E.Os. 11,434, and 13,377 delegating the issuance of a permit to the State Department and setting out rules governing the processing of these permits. While the Constitution does not contain an explicit rejection of a presidential suspending power, "there is convincing evidence in the text of the Constitution and in the debates surrounding its adoption that most of the Founders endorsed the English Bill of Rights' principle that a statute may be suspended only by the lawmaking authority, and not by the Executive acting alone."¹⁹⁰ Given the Framers' almost "unbending opposition to an absolute veto and their concern that even a qualified veto might 'put too much in the power of the President,' it is virtually inconceivable that they intended the 'executive power' conferred by Article II to encompass a prerogative of suspending the laws."¹⁹¹ Therefore, no president has either the direct or implied power to negate an act of Congress¹⁹² or to usurp the delegated powers of an agency, as President Trump did with his issuance of the Keystone XL Pipeline permit.

B. President Trump's Issuance of the Keystone XL Pipeline Permit Exceeded His Authority under Article II of the Constitution

As a general matter, "absolute sovereignty in the United States resides in the people, and not the government," meaning the president only has

dent from, and in conflict with, those of the courts: Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin D. Roosevelt").

189. Kagan, *supra* note 10, at 2320 (quoting Justice Black in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)); *but see Id.* at 2290 (saying this view had substantially changed by the Clinton Administration where his executive orders "implied precisely this power—presidential directive authority over discretionary decisions assigned by Congress to specified executive branch officials" without having to remove any agency head as the president's order would displace any contrary agency order); *see also Id.* ("For the Clinton executive order to make this claim was to say something significant about the nature of the relationship between the agencies and the President—to say that they were *his* and so too were their decisions").

190. May, *supra* note 109, at 873.

191. *Id.* at 881; *see also Id.* at 1010 (stating "The President's duty to insure that the laws are 'faithfully executed,' the assumption in Article I, §9 that the suspending power belongs to Congress, the Convention's decision to give the President a qualified rather than an absolute veto, the Framers' concept of the 'executive power,' and the fact that not even the Antifederalists insisted upon including a ban against the suspending power in the Bill of Rights, all support the conclusion that the Constitution did not give the Executive a power to suspend the laws").

192. *Id.* at 892 (stating [t]he authority to void acts of Congress on the ground that they violate the Constitution was not delegated to the executive branch").

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limited powers—those “granted through the Constitution.”¹⁹³ A president’s power can go no further than the power of the people of the United States—the true sovereign—have surrendered to the government.¹⁹⁴ This distinguishes the president from “a single, king-like sovereign that retains unfettered power and thus the inherent authority to act without limitations.”¹⁹⁵

The Court’s handling of cases involving presidential immunity, affirms the limited nature of presidential power. Thus, any “safe harbor of presidential immunity protection” is limited to those circumstances where the president’s conduct “is supported by an express or implied grant of authority in the Constitution or by statute, based on legal advice by government lawyers, or grounded on court precedent.”¹⁹⁶

In a case involving putative defamatory statements by the President, the Court, in *Spaulding v. Vilas*,¹⁹⁷ “held that ‘public policy and convenience’ compelled recognition of immunity for suits arising from official acts” because not recognizing immunity for official acts would cause the presidents to be “apprehensive in exercising their discretion for fear of civil liability, particularly when [the] time called for bold action.”¹⁹⁸ The *Spaulding* Court based its decision on the structure of the Constitution, separation of powers, and “the nature of the President’s office,” making the President “uniquely situated such that absolute immunity is required.”¹⁹⁹ While the Court in *Spaulding* recognized that “absolute immunity traditionally only extended to acts in furtherance of an official’s duties,” it nonetheless extended that immunity to acts “within the ‘outer perimeter’ of his official duties.”²⁰⁰ Although this was “both an intentional and comparatively expansive grant of immunity,” it did not extend to actions “outside of the ‘outer perimeter’ of his official responsibilities.”²⁰¹ Thus, *Spaulding* acknowledges that not everything a president does is legitimate, and while a president can take action at the outer limits of his “official duties,” he cannot go beyond those limits and expect to enjoy the protections of his office.

193. Douglas B. McKechnie, @POTUS: *Rethinking Presidential Immunity in the Time of Twitter*, 72 U. MIAMI L. REV. 1, 26 (2017) (discussing presidential immunity from libelous speech flowing from his Article II powers).

194. *Id.*

195. *Id.*

196. Gonzales, *supra* note 130, at 913; *see also* McKechnie, *supra* note 193, at 4 (noting “[w]hile textually absent from the Constitution, the Supreme Court has determined that a President retains absolute immunity when he ‘acts within the “outer perimeter” of his official’ duties”).

197. 161 U.S. 483 (1896).

198. McKechnie, *supra* note 193, at 13 (providing “[i]n other words, when acting in his capacity as a chief executive, and within the limits of his authority, the head of a governmental agency should not be in fear that the motivation behind his actions will be the subject of a lawsuit”).

199. *Id.* at 14.

200. *Id.* at 14–15.

201. *Id.* at 15.

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The Supreme Court has applied this thinking, again in the context of defamatory speech, to speech in the context of the Fifth and Fourteenth Amendments, finding “where the government is inspired by animus—malice’s equivalent—its activities fall outside the boundaries of constitutionally permissible government action.”²⁰² “In particular, the liberty protected by the Due Process Clause of the Fifth Amendment limits malevolent government aims. The Amendment demarcates a border between constitutional, permissible government power and extra-constitutional, impermissible government power.”²⁰³

The fact that it is the president who engages in unprotected conduct is significant, because, as head of state and “in control of the executive power of the United States government,” his words reflect the “government’s intentions, interests, and goals.”²⁰⁴ Thus, when a president maliciously defames, it’s not simply an individual’s defamatory statement; his words gain “the imprimatur of state action.”²⁰⁵ When he does this, the president “transcends the ‘outer perimeter’ of his constitutional duties and finds himself beyond the legitimate functions of his office—he is in a no man’s land.”²⁰⁶ Based on the reasoning in these cases, one might argue, if it can be established President Trump travelled beyond the outer boundaries of his official duties when he issued a permit for the construction and operation of the Keystone XL Pipeline, his action is entitled to no special protection by virtue of his office as the acts themselves are not presidential acts.

Therefore, there are cognizable arguments that President Trump’s usurpation of the State Department’s mandatory duty to issue cross-border permits for energy facilities violated the separation of powers doctrine and exceeded his authority under Article II of the Constitution, as they were beyond the perimeters of his authorized power. However, both arguments rest on inferences—that Congress incorporated the governing executive orders of prior presidents in its 2011 statute setting out procedures for the issuance of a permit for the facilities in question, and that Supreme Court opinions on the president’s immunity for defamatory statements are applicable to his actions. In another context entirely, a court might find these arguments are “a slender reed”²⁰⁷ on which to rest arguments constricting a president’s exercise of his powers as Commander-in-Chief and over foreign affairs.

202. Of potential relevance to those who oppose President Trump’s actions with regard to the detaining of migrants and the construction on the border wall. *See* McKechnie, *supra* note 193, at 4 (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982)).

203. *Id.* at 23.

204. *Id.* at 25.

205. *Id.*

206. *Id.* at 25–26.

207. *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (Chief Justice Holmes writing for the majority).

V. ARGUMENTS IN FAVOR OF AND OPPOSING A DOMINANT PRESIDENT

The American public harbors high and rising expectations about what a President should be able to accomplish. The unity and “personality” of the presidential office long has made it the dominant focus of public attention devoted to the political world. As the role and scope of government have grown, as Congress repeatedly has failed to demonstrate sustained capacity for political leadership, and as modern media technologies have placed the President ever more in the spotlight, the public increasingly has looked to him for all manner of policy direction.²⁰⁸

The preceding analysis of the non-constitutional and constitutional reasons supporting and opposing President Trump’s issuance of a permit for construction and operation of the Keystone XL Pipeline is not a clear win for either side. While the non-constitutional arguments tilt the scale slightly toward those against issuance of the permit, the basis for many of them is speculative—for example, operation of the Pipeline *may* cause environmental damage and *may* not depress oil prices—and the constitutional arguments supporting issuance while more numerous than those opposing it, are based more on inference than those in opposition. To help determine whether President Trump’s issuance of the permit for the Keystone XL Pipeline was problematic, this Part of the article evaluates whether his action represents a troubling unchecked expansion of presidential power, which could permanently unbalance the structure of government. If it could, should we be concerned?

Justice Kagan might say no to the last question. She says we live in a time of “presidential administration,”²⁰⁹ in which administrative power has been consolidated in the president.²¹⁰ She identifies the “presidentialization of administration—the emergence of enhanced methods of presidential control over the regulatory state”—as the “most important development in the last two decades in administrative process” with important implications for “administrative substance.”²¹¹ President Obama’s climate change initiative,

208. Kagan, *supra* note 10, at 2310; *see also Id.* at 2332 (arguing “[t]he Presidency’s unitary power structure, its visibility, and its ‘personality’ all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate”).

209. *Id.* at 2246 (stating “[t]he history of the American administrative state is the history of competition among different entities for control of its policies . . . at different times, one or another has come to the fore and asserted at least a comparative primacy in setting the direction and influencing the outcome of administrative process. In this time, that institution is the Presidency. We live today in an era of presidential administration”).

210. Yumehiko Hoshijima, *Presidential Administration and the Durability of Climate-Consciousness*, 127 *YALE L.J.* 170, 177–78 (2017) (stating “presidential administration refers to a recent trend toward consolidation of administrative power in the presidency, especially through regulatory review at the Office of Management and Budget (OMB). By this account, Presidents have increasingly taken public ownership of—and exerted ‘directive authority’ over—administrative actions instead of leaving agencies to their own devices”).

211. Kagan, *supra* note 10, at 2383.

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which was obscured from congressional attention until it intersected with Congress' power over the budget,²¹² was an example of "presidentialization." Another example may be President Trump's reprogramming appropriated moneys to build an unauthorized border wall or, the instant example, his usurpation of the State Department's delegated authority to issue permits for cross-border energy facilities. The concern is that "executive power may be an inferior substitute for a well-functioning legislature that passes well-considered laws that reflect the democratic interest and fosters the vigorous democratic process" to address difficult problems.²¹³

One argument in favor of a dominant president is that they are elected, federal officials and judges are not, and are elected nationally, while Senators are elected only on a statewide basis and Representatives are from districts.²¹⁴ This gives the president "a nationwide constituency, to which he or she is uniquely accountable."²¹⁵ This may also immunize the president from capture by private sector special interests more than Senators and Congressmen "who live in a hothouse of pork barrel spending for constituents."²¹⁶ But, the teachings of public choice theory show that all public institutions, including the president, "tend to serve organized interests at the expense of the general public."²¹⁷ Despite having been elected by a national electorate, there is no reason to assume that a given president is "accountable to some diffuse, majoritarian interest of the public in general."²¹⁸

Another argument in favor of dominant presidents is that they can take action faster and more effectively than Congress because of Congress' size and need to act collectively.²¹⁹ Compared to agencies, a president's perspective is broader as they are responsible for the entire executive branch and can act unilaterally,²²⁰ and the scope of an agency's responsibilities is much more limited, given agencies have "less comprehensive, more paro-

212. Hoshijima, *supra* note 210, at 231 (arguing "the Obama Administration avoided such budgetary control as much as possible by hiding climate change spending throughout the federal budget"); *see also Id.* at 244 (providing "even though public opinion during the Obama Presidency overwhelmingly favored treating climate change as a serious public problem, there is something unsettling about the Obama Administration's practice—however well-intended—of deliberately hiding money throughout the federal budget to evade congressional scrutiny").

213. *Id.* at 244; *see also Id.* at 2331 (noting "[t]he presidential model must face the same challenge: how does it fare, on its own terms and in comparison with alternative approaches, in promoting the accountability and effectiveness of administrative government?").

214. Sargentich et al., *supra* note 166, at 4.

215. *Id.*

216. *Id.* Sargentich also makes the point that administrators also "become dependent on powerful voices in the private sector for political support and information." *Id.*

217. *Id.* at 27.

218. *Id.* at 28.

219. *Id.* at 4.

220. *Id.*

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chial perspectives.”²²¹ The same might be said of Congress whose perspective and interests are scattered among various committees and whose ability to act unilaterally depends on the strength of the congressional leadership in both houses.

“Greater accountability to the public, less domination by special interests, greater effectiveness and comprehensiveness in orientation, less parochialism—these are the institutional virtues claimed by the presidency’s strongest supporters as its comparative advantages over other governmental institutions,”²²² including Congress. However, those who worry about presidentialism fear erosion of the checks and balances that prevent one branch from dominating the others to the detriment of the national interest. These thoughts and others are developed in more detail below as the two sides of the debate are brought into closer focus, using President Trump’s issuance of the Keystone XL Pipeline permit as the triggering event for the discussion.

A. *In Support of a Dominant President*

There are several reasons why dominant presidents make sense, particularly in the current political environment. A dominant president can offer greater efficiency than either of the other two branches²²³ as well as a way to overcome congressional deadlock and institutional barriers facing presidential initiatives. The president, elected in national elections, represents the national interest more than Congress. The courts, Congress, and the public can check presidential abuses of power, and there are lots of positive examples of dominant presidents in our past.

With respect to efficiency, the president is singular, takes no recesses, and has access to confidential sources of information, making the president “the best equipped of the three branches to act with the necessary decisiveness, dispatch, and knowledge.”²²⁴ Because the president has supervisory authority over the entire executive branch “he can synchronize and apply general principles to agency action in a way that congressional committees, special interest groups, and bureaucratic experts cannot.”²²⁵ “Alone among the actors competing for control over the federal bureaucracy, the President

221. *Id.*

222. *Id.*; see also Johnsen, *supra* note 188, at 368 (stating “Reagan was among the handful of presidents most critical of judicial exclusivity in constitutional interpretation and most supportive of presidential interpretative independence (even as he sought to diminish Congress’s interpretive role)”).

223. Kagan, *supra* note 10, at 2331 (providing “[a]ll models of administration must address two core issues: how to make administration accountable to the public and how to make administration efficient or otherwise effective”).

224. *Presidential Emergency Power*, *supra* note 152, at 1103.

225. Kagan, *supra* note 10, at 2339.

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has the ability to effect comprehensive, coherent change in administrative policymaking.”²²⁶

Champions of a strong presidency, like Justice Kagan, praise the office’s efficiency, its administrative effectiveness and ability to achieve presidential goals “without undue cost, in an expeditious and coherent manner.”²²⁷ Because the president is “a unitary actor, he can act without the indecision and inefficiency that so often characterize the behavior of collective entities,”²²⁸ like Congress. Congress mostly “acts in decentralized and reactive ways unlikely to promote coordination, increase efficiency, or provide leadership.”²²⁹ Congress “cannot adequately prescribe in advance the measures to be taken in response to particular emergencies; the unforeseen dangers that are endemic to crises require the availability of great discretionary power.”²³⁰ Thus, Justice Kagan argues that increasing the president’s power in relation to Congress could lead to “less factionally driven and more coherent and active political oversight.”²³¹

But there are those who do not agree with Justice Kagan’s support for presidentialism. Thomas Sargentich believes Justice Kagan’s “presidential model has become a full-blown presidential mystique, in which the special character of chief executive oversight is underscored.”²³² He argues “the policy arguments for the presidential mystique exaggerate the presidency’s positive qualities, while unduly diminishing the attributes of Congress and agencies. Indeed, her accountability and effectiveness claims present a picture of the President as a white knight uniquely able to vindicate the public interest.”²³³ However, there needs to be accountability even for the actions of a white knight. “The essence of accountability lies in the transparency of government actions, the public’s capacity to insist on justifications for the exercise of power, and arrangements that subject officials to discipline when justifications for their actions fall short.”²³⁴

Another problem with arguments promoting enhancement of presidential power are that they are “one-sided and unbalanced,” tending to overemphasize the president’s broad accountability and understating the representativeness of Congress as well as overstating “the policymaking effec-

226. *Id.* at 2341.

227. *Id.* at 2339.

228. *Id.* at 2339.

229. *Id.* at 2348–49 (“When Congress acts in this sphere, it does so through committees and subcommittees highly unrepresentative of the larger institution (let alone the nation) and significantly associated with particularized interests”).

230. *Presidential Emergency Power*, *supra* note 152, at 1103.

231. Kagan, *supra* note 10, at 2349.

232. Sargentich et al., *supra* note 166, at 4.

233. *Id.* at 35–36.

234. Peter M. Shane, *Legislative Delegation, the Unitary Executive, and the Legitimacy of the Administrative State*, 33 HARV. J.L. & PUB. POL’Y 103, 108 (2010).

tiveness of the President.”²³⁵ Even a president who adheres to legal constraints on his actions “can energetically impose on the bureaucracy a wrong-headed policy.”²³⁶

Peter Shane opposes “the philosophy of presidentialism,” which he describes as the president having “a wide range of powers virtually exempt from congressional regulation or judicial review, including the power of command over all discretionary policymaking of other executive officers.”²³⁷ He argues this operationalization of the theory of the unitary executive “threatens to create an organizational culture of entitlement in the executive branch that is antagonistic to democracy and the rule of law,” which may lead to lawless decision-making.²³⁸ He argues that a “true unitary executive” makes the legitimacy of the state vulnerable, not because of any broad policymaking delegation by Congress, “but because of efforts by Presidents and misguided Justices to insulate the executive from the checks and balances that the Constitution intends and on which good governance rests.”²³⁹ Even Justice Kagan, a supporter of strong presidential power, acknowledges that the “comparatively unitary, responsive, and energetic institution of the Presidency” may be more likely “to deviate from accepted interpretations of delegation provisions.”²⁴⁰

On the positive side of a dominant president is that, unlike Congress, the president represents a national constituency. This gives the president an “an electoral incentive to represent the nation’s public as a whole.”²⁴¹ It also gives the president “a stronger relation to the public’s majoritarian preferences than anyone else, including members of Congress, agency heads, or leaders of interest groups.”²⁴² The national scope of the election means that presidential campaigns focus on broad policy issues.²⁴³ But, Justice Kagan warns that even a candidate gaining a popular majority, which

235. Sargentich et al., *supra* note 166, at 27; *see also Id.* at 27 (saying the arguments also “overstate the policymaking effectiveness of the President while diminishing that of agencies”).

236. *Id.* at 34.

237. Shane, *supra* note 234, at 109.

238. *Id.*; *see also* Kagan, *supra* note 10, at 2349 (“the President has no greater warrant than an agency official to exceed the limits of statutory authority. But the history of presidential administration may suggest that it poses a danger of such lawlessness—that Presidents, more than agency officials acting independently, tend to push the envelope when interpreting statutes”).

239. Shane, *supra* note 234, at 110.

240. Kagan, *supra* note 10, at 2350.

241. Sargentich et al., *supra* note 166, at 25; *see also* Kagan, *supra* note 10, at 2335 (arguing “[t]he advent of what has become known as the permanent presidential campaign, a development linked to fundamental changes in polling technology and mass media, at once demonstrates and reinforces the President’s attention to the national electorate’s views and interests”).

242. Sargentich et al., *supra* note 166, at 26.

243. Kagan, *supra* note 10, at 2334. Although Justice Kagan’s comment is limited to the breadth of the policy issues providing the public with some information about the future president’s view of regulation, the comment supports broader implications, as I have noted in the text.

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has eluded some recent presidents like George W. Bush and Donald J. Trump, “rarely provide[s] conclusive grounds to infer similar support for even that candidate’s most important positions”²⁴⁴ This gives “Presidential claims of prior public validation” for their action “a tinny timbre.”²⁴⁵

Given that a president can be elected without obtaining the majority of the popular vote, it is difficult for supporters of the concept of a dominant president to maintain that an election creates “a clear majoritarian mandate on a particular matter of policy.”²⁴⁶ Presidential campaigns are influenced by the electorate’s view of broad issues, such as the country’s national security needs or economic conditions, or more likely, a candidate’s personal appeal as opposed to particular policy issues, and often symbolic and emotional issues (like fear of migrants) can dominate a campaign.²⁴⁷ These factors also make it difficult to “suggest that such contests generate sharply-drawn majoritarian mandates as to particular policy issues.”²⁴⁸ Additionally, presidents generally rely on the financial support of individual interest groups and are attentive to that electoral base, whose interests are remembered after the election.²⁴⁹ This makes it “implausible to view the electorate as an undifferentiated body of nation-wide voters, each of whom carries equal weight with a President.”²⁵⁰ The idea of a “‘national’ presidential election is oversimplified. In reality, presidential elections consist of a series of state contests, the rewards of which are the state’s electoral college votes.”²⁵¹

In fact, it is Congress, with its “broad-based representation of constituencies across the nation,” that appears to speak for the interests of a broader range of public opinions than any single executive officer, including the President of the United States.²⁵² “If broad representation is the goal, congressional action is an important means of achieving it.”²⁵³ The accountability defense of a dominant president thus “embraces an oversimplified, one-sided slant in favor of presidential hegemony.”²⁵⁴ Moreover, Congress

244. *Id.*

245. *Id.*

246. Sargentich et al., *supra* note 166, at 28; *see also Id.* (stating “[f]or one thing, a President can be elected without obtaining a majority of the popular vote—as in the cases of President Clinton in 1992 and 1996 and President George W. Bush in 2000”).

247. *Id.*

248. *Id.*

249. *Id.* at 29.

250. *Id.*; *see also Id.* at 33 (stating that “[i]t is not unheard of for presidents themselves to be parochial in their commitments”).

251. *Id.* at 29.

252. *Id.*

253. *Id.* at 30.

254. *Id.*

offers a check on the actions of the president who just might use his power “to inappropriately cloud issues and avoid accountability.”²⁵⁵ Having Congress function as a check on the president comforts anyone who oppose their policies.²⁵⁶ And, the “vigorous debate fostered by a robust system of institutional interaction can help to prevent the dominance of particular special interests.”²⁵⁷

Privileging the president’s opinions over those voices of the other two branches insufficiently recognizes the importance of “dialogue involving the people and all of the institutions of government in pursuit of the public interest.”²⁵⁸ Justice Kagan’s vision of “presidentialism” exalts the president’s positions as “singularly rational, comprehensive, and valuable” and disregards “the possibility of presidential narrow-mindedness, fixation on particular goals to the detriment of broader objectives, or indebtedness to specific interests rather than a more idealized national perspective.”²⁵⁹

Supporters of a dominant president, like Justice Kagan, also argue that Congress, the courts, and public interest groups can check any potential abuses by the president. She opines that “[i]f Congress can create a zone of independent administration by preventing the President from removing officials at will, then it can advance the same end by barring the President from imposing his policy choices on them.”²⁶⁰ In theory, these checks on the president sound very good, but the ability of each to perform that function depends on their institutional strength and presidential transparency, neither of which is assured.²⁶¹ For example, in the case of the Keystone XL Pipeline permit, courts cannot review the merits of the President’s action, and

255. *Id.* at 30, n.127 (citing Robert R. M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 858 (2004) and concluding that “Elena Kagan acknowledges the possibility that a President might use his or her power to inappropriately cloud issues and avoid accountability, but she grossly underestimates the danger”).

256. *Id.* at 32.

257. *Id.*

258. *Id.*

259. *Id.* at 33.

260. Kagan, *supra* note 10, at 2323.

261. “For years, President Bush has repeated a simple point when challenged about the aggressiveness of his Administration’s policies: ‘I came to Washington to solve problems.’ Like the President, every member of Congress came to Washington to solve problems, and to make America stronger and safer. However, the power of Congress to satisfy its constitutional responsibilities and provide for the general welfare of the American people has diminished in recent years. The strength and influence of Congress is not a partisan issue, and its power should not ebb and flow depending on which party controls which levers of government. The American people deserve active and aggressive lawmakers—not *despite* the troubled times we live in, but *because* of the troubled times we live in.” Schumer, *supra* note 184, at 39.

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the speed with which President Trump issued the permit cloaked his action from public and congressional view.²⁶²

There is also “no certainty” that the Supreme Court will determine whether the President can ignore a law based on his opinion of its constitutionality, in this case Section 501 of the Temporary Payroll Tax Cut Continuation Act of 2011, should he do so.²⁶³ Between 1789 and 1981, the Court only reviewed two of twenty instances of constitutionally based presidential defiance of a congressional act.²⁶⁴ The Court addressed the issue of the President’s refusal to comply with the law in neither of those instances; rather, it went to the merits of the statute’s validity.²⁶⁵ The result is unless “Congress takes steps to check presidential refusals to honor ‘unconstitutional’ laws, we may find that through a subtle process of accretion, the Executive has acquired a suspending power that is both selective and absolute.”²⁶⁶ And it is naive to suppose that members of Congress have large or enduring commitments to the public interest, given their desire to retain their seats, and their constituents either want to “appropriate the benefits of governmental largesse or to avoid the burdens of governmental regulation.”²⁶⁷ Members are generally happy to satisfy their constituents by trading public policies for support for reelection.²⁶⁸

Thus, there is a risk that, “granting plenary executive power to act in emergencies may pose great dangers to the rule of law and to our system of limited, constitutional government.”²⁶⁹ After-the-fact congressional review of a presidential action, may not be able to reverse that action and is “constrained by constitutional doctrine prohibiting legislative interference in the execution of the laws.”²⁷⁰ “The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively

262. Parker, *supra* note 13, at 255. (stating that “[t]here is no dispute that when the President, not DOS, makes the decision to issue a permit, that decision is not reviewable. But, unless the President actually invokes that authority, DOS’s decision should be reviewable”).

263. The government’s defense of the Keystone XL Pipeline permit is broadly based on the President’s assessment of his constitutional powers. *See* Defendant’s Memorandum in Support of Motion to Dismiss Plaintiff’s Complaint, *Indigenous Envtl. Network v. Trump*, (D. Mont. June 27, 2019) (No. 4:19-cv-00028-BMM).

264. May, *supra* note 109, at 999.

265. *Id.*

266. *Id.* at 1011. May notes there are things Congress might do, such giving the president “improved means of obtaining judicial review as an alternative to defiance, discouraging lower level executive officials from carrying out directives to ignore the law, and increasing access to the courts for those who wish to challenge noncompliance when and if it occurs.” *Id.*

267. Sargentich, et al., *supra* note 166, at 25.

268. *Id.*

269. *Presidential Emergency Power*, *supra* note 152, at 1103. *See also* Kagan, *supra* note 10, at 2313 (noting “[o]r as a less restrained advisor [Paul Begala] remarked, in comparing executive directives to legislative initiatives: ‘Stroke of the pen, law of the land. Kind of cool’”).

270. *Presidential Emergency Power*, *supra* note 152, at 1103.

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to preserve congressional power—or, what is almost the same thing, to deny authority to the other branches of government.”²⁷¹

But the bureaucracy itself and the public can constrain a president. For example, “[i]nertia, bureaucratic pushback, and public backlash” may make it difficult for a president to reverse a course set by a prior president.²⁷² Thus, a strong president “may be frustrated by a federal bureaucracy that is steeped in routine and prone to inertia and following the dictates of habit,”²⁷³ making “bureaucratic pushback” a potential powerful constraint on presidential power.²⁷⁴ While some studies suggest that career civil servants recognize their “subordinate roles as unelected government officials” and generally comply with the dictates of a new administration, “there is at least some evidence that bureaucrats in the Trump Administration are departing from these norms.”²⁷⁵ For example, “[r]ogue Twitter accounts by government employees have lampooned and lambasted the Administration” on its climate policy.²⁷⁶ To preempt the possibility of political interference, government employees leaked contrary scientific documents on climate change, retiring government officials issued “scathing critiques of the Trump Administration as they retired,” and “close-knit cadres inside agencies as diverse as EPA, the Department of Labor, and the State Department have covertly organized in preparation for further resistance.”²⁷⁷

So, the path for a president seeking to reverse the policies of his predecessor, like President Obama’s position that issuance of the Keystone XL Pipeline permit was ill-advised, is not easy. However, resistance in this form is not always assured. It can be ignored and over-ridden by a president’s superior power and position as well as his access to the bully pulpit.

This Part has identified various arguments in support of a dominant president, such as a president’s prerogative powers, his duty to take care that the laws are faithfully executed, his inherent authority as Commander-in-Chief and his inherent authority over foreign affairs, and the assurance that the courts, Congress, and the public will check any excessive use of that power. The Part has also shown the weaknesses of those arguments, although none should be fully discounted.

271. Kagan, *supra* note 10, at 2314.

272. Hoshijima, *supra* note 210, at 239.

273. *Id.* at 240 (referring to the Trump Administration’s efforts to reverse the Obama Administration’s climate policies and saying, “climate-consciousness may be too ingrained to be easily stripped from the federal bureaucracy. To reinforce this difficulty, agencies may respond imperfectly to presidential mandates due to habit. Bureaucratic agencies are often defined by regularized and stable practices”).

274. *Id.* at 241.

275. *Id.*

276. *Id.*

277. *Id.* at 241–42.

B. Opposition to a Dominant President

On the one hand, a strong president may improve “democratic responsiveness by consolidating power in a nationally representative President”; on the other, it may “erode democratic responsiveness by weakening congressional control of federal departments and agencies.”²⁷⁸ Presidential administration, by providing room for agency personnel to make sound scientific and technical decisions, may promote competence; alternatively, it may erode agency expertise by offering opportunities for “covert” presidential interference in agency staff work.²⁷⁹ As with support for a dominant president, opposition to it is not clear cut.

A strong president can actually “crowd[] out agency expertise,”²⁸⁰ especially when a president’s interest in gaining re-election or some other “political victory” can conflict with expert views’ interests.²⁸¹ These interests can lead him “to defer to public or constituency opinion even when ill-informed or self-interested,” or “to seek near-term results even when doing so will sacrifice long-term benefits.”²⁸² While close scrutiny of presidential action, can promote transparency, it may, conversely, empower the president to influence agency policy formulation “behind closed doors” and then give him the freedom to disavow those decisions later, increasing “bureaucratic opacity.”²⁸³ Inertia, protection from judicial and congressional correction, and the president’s control of the bully pulpit diminish the possibility of any fundamental change in a presidentially directed policy initiative.²⁸⁴ Additionally, when “smart policies and regulations” work, they “become stickier,” and thus harder to reverse, even though there is no congressional imprimatur. Once a lot of “individual and collective steps” have been taken to implement a certain policy, those policies “lock in” and entrench us in moving in their direction.²⁸⁵

As this Part will show, neither Congress nor the courts are especially effective when it comes to preventing abuses of power by strong presidents in response to some organized special interest or from presidents violating constitutional norms, like the separation of powers doctrine. But, unchecked, expansive presidential power enables successor presidents to reverse the initiatives of prior presidents, which may allow the creation of an

278. Hoshijima, *supra* note 210, at 180–81.

279. *Id.* at 181.

280. *Id.* at 180.

281. Kagan, *supra* note 10, at 2356.

282. *Id.*

283. Hoshijima, *supra* note 210, at 181.

284. Kagan, *supra* note 10, at 2358.

285. Hoshijima, *supra* note 210, at 232–33 (quoting President Obama discussing his climate change initiatives).

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‘imperial’ Chief Executive “who acts arbitrarily and with few constraints.”²⁸⁶

1. Congress and the Courts have Limited Ability to Check Presidential Abuses of Power

When it comes to limiting the president’s actions, Congress is relatively “frail.”²⁸⁷ Congress has “neither the tools nor the incentives” to block “wrongful assertions of presidential authority.”²⁸⁸ It is hard for Congress to get the two-thirds vote in each house to overturn a presidential order.²⁸⁹ This makes Congress an insufficient check on an intemperate president. While one house of Congress could vote to disapprove of or strip the funding from some presidential action, as the Court held in *INS v. Chadha*,²⁹⁰ “the concurrence of the two Houses plus the President is the exclusive means by which laws are enacted,” means doing that “would have no legal or practical effect, other than as a protest.”²⁹¹ *Chadha* also creates a problem with inferring any affirmative meaning from legislative acquiescence in presidential action.²⁹² Even if both Houses joined in the action, unless the president cooperated, the Presentment Clause or a presidential veto override would make that action ineffective.²⁹³ A vote supporting the president’s interpretation of some claimed power would be ineffective because only courts “can issue binding interpretations of law.”²⁹⁴ Committee hearings, in which members noted that they did not acquiesce in the president’s action would only have the effect of disputing future claims of “acquiescence by silence.”²⁹⁵ It would also be futile for members to try and stop the president

286. *Id.* at 233.

287. Peter L. Strauss, *Eroding Checks on Presidential Authority-Norms, the Civil Service, and the Courts*, 94 CHIC.-KENT L. REV. 581, 586 (2019) (stating “[i]f not good law, there was worldly wisdom in the maxim attributed to Napoleon that ‘The tools belong to the man who can use them.’ We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson J., concurring)).

288. Kagan, *supra* note 10, at 2350.

289. *Id.*

290. 462 U.S. 919 (1982).

291. Morrison, *supra* note 168, at 1220, 1224.

292. *Id.* at 1220 (asking “[o]r, using Justice Burton’s terminology, by what law or other legally binding means had Congress ‘reserved for itself’ the power to decide when federal law could be used in these circumstances to achieve the goals that the President sought? Because there is no statute on point, it must be the sounds of silence that created these legal limitations. But that would be at least odd, if not worse, because it would suggest that Congress has *more* power when it does nothing than when one House acts as it did in *Chadha*”).

293. *Id.* at 1224.

294. *Id.*

295. *Id.* According to Morrison, “the sounds of silence begin to be heard when one branch takes certain actions that trigger what the Court sees as an obligation to respond by the other, lest silence be construed as acquiescence.” *Id.* at 1218; *see also Id.* at 1221 (stating “Justice Frankfurter agreed that

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by suing him, because courts have shown increasing reluctance to grant members of Congress standing in these cases.²⁹⁶

A president's broad supervisory powers, which enable him to insert policy considerations into administrative agency initiatives, like rulemakings, limit the practical effectiveness of any constraints on his direct action.²⁹⁷ In fact, there are "few forms of presidential pressure that are 'clearly out of bounds,'"²⁹⁸ which leaves room for potential presidential shenanigans.

"The difficulty Congress faces in resisting these presidential efforts factors into the calculus that makes active involvement in, and even dictation of, administrative outcomes so attractive to Presidents."²⁹⁹ But, allowing presidents to engage in such behavior "undermine[s] Congress's institutional interests."³⁰⁰ A statute that clearly delegates to the head of an agency that it is to be the decision-maker should be read that way because any contrary interpretation "would displace the agency head's discretion."³⁰¹ "After all, what is the point of delegating power to an agency head if it can be displaced?"³⁰²

Justice Kagan's argument in response is that one should not "assume Congress intends to protect its institutional prerogatives,"³⁰³ runs counter to institutional behavior, which is generally self-protective of the institution's prerogatives.³⁰⁴ In addition, Justice Kagan's argument that Congress frequently fails to protect its institutional interests does not mean that it never

consistent executive action, to which Congress did not object, could put a 'gloss' on the statute that permitted the executive to act as it had done before. In that particular case, however, the Justice found that there were an insufficient number of comparable actions to warrant inferring the gloss").

296. *Id.* at 1224 (citing *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997)).

297. Hoshijima, *supra* note 210, at 238.

298. *Id.*

299. Kagan, *supra* note 10, at 2309.

300. Sargentich, et al., *supra* note 166, at 22; *see also* Kagan, *supra* note 10, at 2352 (stating that "enhanced presidential control of administration becomes a political substitute for the nondelegation doctrine, pressuring Congress to take increased responsibility for initial policy choices, but without relying on judicial intervention"). *See Id.* at 2365 (stating that "[t]he doctrine as applied thus expresses, albeit tenuously, some special suspicion of the President as a policymaker"); *see also Id.* at 2369 (stating that "all else equal, administrative action taken pursuant to a delegation to an agency official, but clothed with the imprimatur and authority of the President, should receive maximum protection against a nondelegation challenge. The President's involvement, at least if publicly disclosed, vests the action with an increased dose of accountability, which although not (by definition) peculiarly legislative in nature, renders the action less troublesome than solely bureaucratic measures from the standpoint of democratic values").

301. Sargentich, et al., *supra* note 166, at 24.

302. *Id.*

303. *Id.* at 22 (citing Kagan, *supra* note 10, at 2230).

304. *But see Id.* at 22 (asking "why should we assume that congress intends to protect its institutional prerogatives?").

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does.³⁰⁵ Indeed, why would any member of Congress “want to undermine the relative power of their own committees vis-à-vis agencies, which would be the predictable effect of assigning directive power over executive branch rulemaking to the President who is, as Kagan recognizes, ‘Congress’s principal competitor for power in Washington?’”³⁰⁶ When Congress is controlled by the opposite party, a president assuming an administrative activity “sounds a very loud ‘fire alarm’ to a Congress controlled by the other party.”³⁰⁷ Congress may respond to such action with “hearings, harassment, and threats of sanction.”³⁰⁸ These may be “distributed unevenly” and may focus on those presidential activities that it can control more easily, like the budget.³⁰⁹

Congress can use its power to “veto” a serious instance of a presidential abuse of power, such as intemperately declaring a national emergency where there is none. But a congressional veto “is politically a weak device for controlling the President . . . a blunt instrument, too extreme to be used except in response to the most egregious presidential abuses.”³¹⁰ If there is any appearance of a dangerous situation, public opinion may prevent Congress from acting, making the prospect of a congressional veto a “useless” check on a president who uses “the existence of an emergency as a pretext for overreaching.”³¹¹ Even if the declaration of an emergency is a pretext, as arguably it is in the case of the Keystone XL Pipeline presidential permit, Congress may have a hard time “directly contradicting the President, whose office and access to the media give him vast powers to define issues and influence public opinion.”³¹²

Justice Kagan’s description of the ineffectiveness of Congress’ oversight of agency action and the reasons for it are equally, if not more applicable to its oversight of the president. So Justice Kagan’s explanation of why Congress’s oversight of agencies is ineffectual—that Congress “rarely is held accountable for agency decisions” and congressional oversight requires both collective action and presidential acquiescence—makes uncertain Congress’s interest in overseeing administrative action and “its capacity to control agency discretion restricted.”³¹³ In fact, congressional over-

305. *Id.*

306. *Id.* at 23.

307. Hoshijima, *supra* note 210, at 228.

308. *Id.*

309. *Id.* (stating that “[t]he most concerted congressional attacks on the fourth pillar centered on programs that Congress could easily shape through its budgetary powers: the DOD’s climate-consciousness efforts and federally funded climate change science”); Kagan, *supra* note 10, at 2347 (describing hearings, harassment, and threats of sanction as the key congressional tools).

310. *Presidential Emergency Power*, *supra* note 152, at 1118.

311. *Id.*

312. *Id.*

313. Kagan, *supra* note 10, at 2347.

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sight activity with respect to agency action diminishes to the extent that the president is actively involved in it.³¹⁴ “In these circumstances, presidential powers—particularly the veto—will loom large in any congressional oversight effort of the President; as Congress discovered during both Reagan’s and Clinton’s tenures, it cannot often marshal the resources necessary to overturn administrative action backed by a resolute (because responsible) President.”³¹⁵ In fact, once the president begins to engage in unilateral action over administrative agencies, Congress often will cede the field: “[R]ather than protesting, representatives are relieved that they can evade political responsibility for making hard decisions.”³¹⁶ But the empirically supported counter argument posits that when a president starts to direct administrative agencies Congress will be goaded “into increased oversight activity: ‘By raising the stakes for other actors in the system, such hegemonistic claims may trigger an oversight arms race.’”³¹⁷ So the effectiveness of congressional oversight over a president is not clear—Congress may (or may not) be able to curtail presidential excesses.

With respect to the judicial branch, a court is “seldom willing, even with an overwhelming body of constitutional precedent behind it, to stand against a united front of the legislative and executive branches.”³¹⁸ This reluctance carries forward to protect the president when he exercises emergency powers. While emergencies “do not create power,” they can create circumstances in which dormant powers may be used.³¹⁹ Courts are inclined to find sufficient latitude in the Constitution to allow “almost any conceivable congressional delegation of emergency powers to the executive . . . a residue of ‘domestic prerogative,’ a body of inherent presidential powers which may be utilized in domestic emergencies.”³²⁰ Hence a court reviewing President Trump’s use of a national emergency to justify his issu-

314. *Id.*

315. *Id.*

316. *Id.* at 2348.

317. *Id.* (stating that “the advent of presidential administration roughly coincided with an increase in visible congressional oversight”).

318. Roche, *supra* note 5, at 595; *see also Id.* at 597 (arguing that “[t]he Supreme Court then will rarely, if ever, attempt to frustrate the exercise of real political power; and, since in the United States real political power normally is shared between the President and Congress, the Court has shown great respect for emergency powers given to the President by Congress no matter what constitutional substance may be involved”).

319. *Id.*

320. *Id.*; *see also* Johnsen, *supra* note 188, at 374–75 (stating that “In his first State of the Union address, he [Roosevelt] said, ‘[M]eans must be found to adapt our legal forms and our judicial interpretation to the actual present national needs of the largest progressive democracy in the modern world.’ He reportedly said that when he took the presidential oath of office and swore to uphold the Constitution, ‘I felt like saying, ‘Yes, but it’s the Constitution as I understand it, flexible enough to meet any new problems of democracy—not the kind of Constitution your Court has raised up as a barrier to progress and democracy’”).

ance of the Keystone XL Pipeline permit may not be troubled at all by his actions—“as new problems create new constitutional needs, the Constitution is found by the philosopher-Justices to contain adequate instruments to deal with emergent requirements.”³²¹

Peter Strauss identifies another problem with relying on courts to check an untethered president—“the President’s insulation from normal forms of judicial control.”³²² Presidential actions pursuant to a direct congressional delegation, are largely unreviewable,³²³ unless they raise constitutional issues.³²⁴ In a case challenging the President’s action vis-à-vis the Keystone XL Pipeline permit, *Sisseton v. United States Department of State*,³²⁵ a United States District Court said with respect to redressability: “[e]ven if the most egregious violations of the NHPA and NEPA have occurred, which they have not, plaintiffs are asking the court to direct the Department [of State] to ‘suspend and/or revoke the Presidential permit.’ However, even if the court were to do so, the President would still be free to issue the permit again under his inherent Constitutional authority to conduct foreign policy on behalf of the nation.”³²⁶

Similarly, in *NRDC v. United States Department of State*,³²⁷ another challenge to the permit, the court said that “agency action pursuant to a delegation of the President’s inherent constitutional authority over foreign affairs is tantamount to an action by the President himself.”³²⁸ The State Department was acting solely on behalf of the President, exercising his purely Presidential prerogatives.³²⁹ Since the president is not an agency, presidential action is not subject to judicial review under the Administrative Procedure Act (“APA”).³³⁰ This served to insulate the State Department’s

321. Roche, *supra* note 5, at 597.

322. Kagan, *supra* note 10, at 2350.

323. See Parker, *supra* note 13, at 238 (stating that “[t]wo federal district courts have deemed the final decision, regardless if it is made by DOS or the President, unreviewable.”); see also *Id.* at 233 (arguing that “[i]f DOS’s decision to grant the Presidential permit is not reviewable by the courts because the President retains contingent authority, DOS’s decision is shielded from scrutiny. Then, the agency decision may be driven entirely by political motives, rather than by a transparent, careful, and informed decisionmaking process”).

324. Kagan, *supra* note 10, at 2368 (“Presidential action occurring under a direct delegation usually is insulated from legal challenge, except when the challenge is constitutional in nature.”). See also *Id.* at 2351 (stating that “the Supreme Court held in *Franklin v. Massachusetts*, 505 U.S. 788 (1992) that the President is not an ‘agency’ as defined in the APA and his actions therefore are not subject to the judicial review provisions of that statute,” noting the case arose from a challenge to an action that Congress had committed to the sole discretion of the President, separate from and subsequent to agency involvement”).

325. 659 F. Supp. 2d 1071 (D.S.D. 2009).

326. Parker, *supra* note 13, at 248 (citing *Sisseton*, 659 F. Supp. 2d at 1078).

327. 658 F. Supp. 2d 105 (D.D.C. 2009).

328. *Id.* at 109.

329. Parker, *supra* note 13, at 251 (citing *NRDC*, 658 F. Supp. 2d at 109).

330. *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992).

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actions because it was acting for the President, when it decided to suspend its review of the permit.³³¹ The *NRDC* Court reasoned that “because the President could always use his authority to direct the agency or even revoke the delegation of authority for it to issue permits, the decision must be ‘presidential.’ At a minimum, the President must ‘acquiesce’ to the agency decision, which makes the process Presidential enough to be unreviewable.”³³²

In a third case, *Sierra Club v. Clinton*,³³³ plaintiffs challenged the sufficiency of an EIS under NEPA and the APA, as well as the constitutionality of the presidential permitting process and withstood motions to dismiss both those claims but lost their claim that the permit was unconstitutional.³³⁴ But, none of the three courts questioned the President’s inherent authority to issue permits for cross-border pipelines in the absence of a congressional regulatory scheme governing the construction of oil pipelines.³³⁵

With regard to the reviewability of a presidential permit, “[e]ven though the President’s retention of final decision-making authority is contingent upon this specific event of performing a tiebreaker between the Secretary of State and another agency head, courts hearing cases with facts similar to those of the Keystone XL Pipeline have interpreted paragraph (i) as being the sort of retention of final decision-making authority that the Supreme Court discussed in *Franklin*—the kind that precludes any review.”³³⁶ “A subsequent case, *Dalton v. Specter*,³³⁷ confirmed the holding in *Franklin*,” that the President’s actions are not judicially reviewable under the APA, but also “explained that the President’s actions, at least those not taken pursuant to statutory authority, could be reviewed for constitutionality,” as the “Constitution grants, or at least does not deny, the President authority in various arenas. One of those arenas is to regulate foreign affairs.”³³⁸

Justice Kagan argues the reverse with respect to the reviewability of a president’s action under the APA. She contends that when a president di-

331. Parker, *supra* note 13, at 251; *see also* Campau, *supra* note 24, at 289 (stating that “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”).

332. Parker, *supra* note 13, at 251–52.

333. 689 F. Supp. 2d 1147 (D. Minn. 2010).

334. *Id.* at 1151–52, 1163.

335. Parker, *supra* note 13, at 253 (*citing* *Sisseton-Wahpeton Oyate v. U.S. Dep’t of State*, 659 F. Supp. 2d 1071, 1078 (D.S.D. 2009); *NDRC v. U.S. Dep’t of State*, 658 F. Supp. 2d 105, 106 (D.D.C. 2009); *Sierra Club*, 689 F. Supp. 2d at 1155).

336. *Id.* at 245.

337. 511 U.S. 462 (1994).

338. Parker, *supra* note 13, at 243.

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rects an action Congress has delegated to an agency, “the President effectively has stepped into the shoes of an agency head, and the review provisions usually applicable to that agency’s action should govern.”³³⁹ She also maintains that courts, to the extent that they are receptive to legal challenges to presidential action, are able to prevent a presidential directive from displacing “too greatly” the preferences of at least a prior Congress, compared to a current “overseeing” one, “with respect to agency action.”³⁴⁰

However, she concedes that the “Court has held that presidential action is not reviewable under the APA for claims of statutory violations; and although formally reserving the issue whether review is available outside the APA framework, the Court has suggested firmly that presidential actions claimed to follow from either constitutional or statutory authority ‘embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate.’”³⁴¹ Justice Kagan also argues for diminished review of presidential action when “demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question.”³⁴² Her only requirement is that the President “disclose publicly and in advance” his contribution to the ultimate action.³⁴³ Here, where there is no question about presidential involvement in the issuance of the Keystone XL Pipeline permit, if she is right on its reviewability, Justice Kagan’s diminished review approach would apply.

A final possible check on the president abusing his Article II powers is the people. Popular consensus can play an important role in limiting the actions of a president.³⁴⁴ Community consensus can play an important role in limiting the actions of a president.³⁴⁵ Roche interprets *Youngstown* as

339. Kagan, *supra* note 10, at 2351.

340. *Id.*

341. *Id.* at 2369.

342. *Id.* at 2380; *see also Id.* at 2377 (stating that “courts could apply Chevron [deference] when, but only when, presidential involvement rises to a certain level of substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes”).

343. *Id.* at 2382 (arguing that “[t]he critical matter is less the form than the fact of candid and public acknowledgment of the presidential role in shaping an administrative decision”).

344. Roche, *supra* note 5, at 618 (arguing that “[w]hile all students of government appreciate the complexities of presidential existence in the United States, and most will admit that the President requires a high degree of discretion and autonomy for the proper exercise of his function, it is also important that a line be drawn between responsible autonomy and irresponsible autonomy. While it is no easy task to draw this line, its general outline should follow the boundary between community consensus and elitist conviction”).

345. *Id.* (arguing that “[w]hile all students of government appreciate the complexities of presidential existence in the United States, and most will admit that the President requires a high degree of discretion and autonomy for the proper exercise of his function, it is also important that a line be drawn between responsible autonomy and irresponsible autonomy. While it is no easy task to draw this line, its general outline should follow the boundary between community consensus and elitist conviction”).

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reaffirming the importance of community control, saying “[w]hether [the Court’s] interpretation of the reality of the emergency is correct or not only time will reveal, but in the contemporary context the Court insisted that the view of the American community prevail over the views of government experts. In so doing, the Court insisted on the primacy of discussion, of pragmatic blunderings and successes, over expertise and autonomous insight.”³⁴⁶

Roche’s discussion of the role of community focuses on the debate among the Justices of whether there was an emergency that justified President Truman’s actions.³⁴⁷ He suggests that “this argument over premises [whether or not an emergency existed] is not one that can be solved by the process of legal ratiocination, but rather it must be determined through judicial insight into the attitudes and opinions of the American community—particularly as reflected in the views of congressmen.”³⁴⁸ Going further, Roche states that this determination “is essentially a problem in social psychology, not in law.”³⁴⁹ The process of consensus is important to the survival of democratic governments, which, in turn, validates the “viability of government by discussion,” and “the view that for better or for worse democratic executives must accept, or be compelled to accept, restraint of their insights and prerogatives.”³⁵⁰

Indeed, one reason that Justice Kagan is not worried about the potential for the president to engage in nefarious acts is because the president is accountable to the public; that accountability serves to keep presidential exuberance “in check by mooring it to current or at least potential public opinion.”³⁵¹ She reasons that the “potential for this sharpened democratic scrutiny should help, in the first instance, to keep the President’s exercise of authority within healthy parameters.”³⁵²

However, the effectiveness of this check on presidential excesses only works if the president is “transparent” in his methods, creating “the poten-

346. *Id.*

347. *Id.* at 617 (stating that “[t]he legal arguments between the two divisions of the Court were consequently of little significance; the vital disagreement was over premises. Granted the assumption that no emergency existed, the majority view fell into the tradition of limitation. Granted the assumption that an emergency existed, the minority opinion fell into an equally well-defined tradition of judicial restraint”).

348. *Id.*

349. *Id.* (arguing that “[a]n emergency is-like the middle class-more a state of mind than an objective socio-political phenomenon”).

350. Roche, *supra* note 5, at 618.

351. Kagan, *supra* note 10, at 2345–46.

352. *Id.* at 2349; *see also* Roche, *supra* note 5, at 616 (“Thus in Jackson’s opinion [Youngstown Sheet & Tube], the critical point was not that presidential autonomy violated the principle of the separation of powers, but that irresponsible presidential autonomy, prerogative exercise which did not have its foundation in the democratic process, did breach a basic principle of American constitutionalism: that the actions of the executive must be based on community consensus”).

tial for slack between his actions and the public’s revealed or shaped preferences.”³⁵³ And a president has many ways to hide what he does from the public and is beyond the reach of information disclosing statutes, like the Freedom of Information Act,³⁵⁴ even though his office is not.³⁵⁵ So transparency may be difficult to achieve when it applies to presidential acts, undermining any ability for the public to act as a check on the president.

2. *The Potential for Dominant Presidents to Violate Constitutional Norms*

President Trump’s assumption of the State Department’s role in issuing presidential permits for cross-border energy facilities is an example of a president either usurping a congressionally delegated function to an administrative agency or engaging in lawmaking to the extent that the President’s action, in effect, amended Section 501 of the Temporary Payroll Tax Cut Continuation Act of 2011 by adding language rescinding Executive Orders 11,423 and 13,337. “Basic separation of powers doctrine maintains that Congress must authorize presidential exercises of essentially lawmaking functions.”³⁵⁶ Here, Congress affirmed the delegation of discretionary authority to issue the Keystone XL Pipeline permit to the State Department by specifically incorporating that delegation in statutory text. By taking on sole responsibility for this authority, President Trump “exceed[ed] the appropriate bounds of his office.”³⁵⁷

“The system of checks and balances established in the Constitution is in no small measure based upon it: James Madison’s famed prescription of ‘ambition . . . counteracting ambition’ was designed to generate a kind of friction that would make governmental deliberation extensive and governmental action difficult to accomplish.”³⁵⁸ Accordingly, “institutional arrangements promoting dynamic government, such as the presidential control of bureaucracy, pose a risk of both tyranny and instability that should not be tolerated.”³⁵⁹ “[T]he muscular nature of the governmental action,” here the issuance of a permit by the President instead of by a line agency, “portends excessive departures from status quo ordering.”³⁶⁰ However, Justice Kagan points to a “counter-tradition,” one calling for “enhanced gov-

353. Kagan, *supra* note 10, at 2346 (stating that “the real question about presidential control is not whether it should exist to the exclusion of all other influences on administration, but whether within an inevitably pluralist system, the President should possess the strongest possible weapons”).

354. 5 U.S.C. § 552 (2018).

355. *Id.* § 552(f).

356. Kagan, *supra* note 10, at 2319.

357. *Id.* at 2320.

358. *Id.* at 2342.

359. *Id.*

360. *Id.*

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ernmental, and in particular executive, vigor. At the core of this tradition is Hamilton's vision of a strong and efficacious government, with leadership provided by a chief executive operating with 'decision' and 'dispatch.'"³⁶¹ To Justice Kagan, reflecting Hamilton's view, a system of checks and balances should not effect a moderating effect on the executive; rather it should create and then concentrate "certain powers in an executive capable of resolute action."³⁶²

Regardless of whether one views the system of checks and balances as having a moderating or energizing effect on presidents, the system had the potential for what Bruce Ackerman calls "crises in governability, produced by the inability of the executive and legislative branches to cooperate in exercising their shared powers."³⁶³ The modern phenomenon of divided government, recently driven by polarization between the political parties, has led to the decline in Congress's capacity to engage in collective action to meet national needs: "partisan differences" have been "superimposed on institutional differences," leading to "the phenomenon (and, indeed, by now the cliché) of gridlock."³⁶⁴ The result is that the ability of Congress to check the president is vanishing in the modern era. Any further unbalancing to the power distribution between Congress and the president by increasing the president's powers threatens to destroy the Constitution's institutional structure in the near, and even long, term.

Manning and Goldsmith make the argument that "Article II of the Constitution should be understood to provide the President with a 'completion power,' which enables him 'to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of congressional authorization to complete that scheme.'"³⁶⁵ They argue that that power is "defeasible" because Congress can limit its use by specifying in the statute how it is to be implemented.³⁶⁶ This so-called "completion power" contributes to an understanding of "the broad enforcement discre-

361. *Id.* at 2342–43.

362. *Id.* at 2343.

363. *Id.* at 2343–44.

364. *Id.* at 2344 (arguing that "[t]hese new circumstances create a need for institutional reforms that will strengthen the President's ability to provide energetic leadership in an inhospitable political environment"). Justice Kagan goes on to note that the administrative system became increasingly rigid at roughly the same time, reducing the capacity of agencies to innovate and increasing their "tendency to do what they always have done even in the face of dramatic changes in needs, circumstances, and priorities." Courts contributed to this "ossification" by increasing procedural requirements in response to the participation of interest groups in the administrative process. *Id.* (arguing that "[t]he combination has made torpor a defining feature of administrative agencies, resulting both in inadequate and in overzealous regulatory efforts").

365. Glen Staszewski, *Textualism and the Executive Branch*, 2009 MICH. ST. L. REV. 143, 171–72 (2009).

366. *Id.* at 172.

tion that is accorded to the executive branch and the judiciary's practice of deferring to reasonable interpretations of ambiguous statutory provisions by executive branch agencies."³⁶⁷ But, exercising "completion power" by filling a statutory gap with incidental powers is a far cry from claiming a power that Congress has not authorized, and, in fact, has allowed to have been specifically delegated to an administrative agency, as is the case here.

Furthermore, it would be a surprise if the president "had significant unspecified powers beyond those that the Constitution enumerates for Congress, especially because of the limitation in the Necessary & Proper Clause."³⁶⁸ It is Congress, not the president that the Clause authorizes to "make all Laws necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States."³⁶⁹ Given the power allocation structure of the Constitution, while the president has some inherent powers flowing from his "express powers," they are unlikely to be extensive.³⁷⁰

However, the Constitution does not answer the "ultimate presidential powers question," whether the president "can exercise any power that is granted to the federal government, unless he is told that he cannot, or whether he is limited in what he can do, which means he has mainly the powers granted him by Congress or expressly by the Constitution itself, with a penumbra extending only slightly beyond the powers specified."³⁷¹ So, unless Congress told him he could not issue the permit for the Keystone XL Pipeline, he could do it as he was merely exercising his completion power to fill a gap left by Congress that executive orders filled with a direction to a federal agency.

Here, Congress only directed President Obama to complete the permit review process within sixty days. It incorporated key provisions from those two executive orders that direct the President to act through the State Department when he issues trans-border permits for energy facilities and set out the requirements that apply to that process. If there is an argument that President Trump was only exercising this completion power when he issued the permit, arguably he has gone beyond the penumbra of that power in his failure to abide by the dictates of the executive orders. His actions either illegally suspended Section 501 of the Temporary Payroll Tax Cut Continuation Act of 2011, or engaged in a lawmaking activity by amending that law

367. *Id.*

368. Morrison, *supra* note 166, at 1232.

369. *Id.* (quoting U.S. CONST., art. I, § 8, cl. 18).

370. *Id.*

371. *Id.* at 1234. Morrison notes, but does not elaborate on the significance of the fact that Congress frequently authorizes the president to do something, but "almost never includes prohibitory language in a statute." *Id.* at 1213.

to rescind those executive orders in violation of the separation of powers doctrine.

The ambiguity of the answer to Morrison's question about the scope of the president's power will be a temptation to dominant presidents, like President Trump, to try and usurp legislative power. This will be especially true, as the ability of Congress, the courts, and the public to stop him is close to non-existent.

VI. CONCLUSION

When general concerns about dominant presidents are folded into the specific circumstances of the Keystone XL Pipeline permit, then the dangers from President Trump's issuance of the permit become even more apparent. These concerns arise not only because of the specific permit's potential to cause substantial adverse environmental harm, but also because of the possibility it may become a permanent way to avoid environmental accountability for what may turn out to be destructive future projects as well as serve as a rationale for future presidents to behave in a similar, intemperate way.

The arguments by advocates of a strong presidency exaggerate the abilities of the courts, Congress, and the public to protect national interests from over-zealous presidents, who can be as interested as members of Congress in protecting their reelection and place in history and hence beholden to special, not national, interests. A self-empowered president who fails to respect institutional and constitutional norms, as President Trump has done in issuing the Keystone XL Pipeline permit, threatens those norms and the balanced constitutional structure of our government. The gains of efficiency, a way to end congressional deadlock, and improved administrative accountability, touted by Justice Kagan as an advantage of a dominant president, seem less persuasive in the context of the chimeric nature of presidential transparency and subservience to the will of Congress.

Thus, President Trump's issuance of the Keystone XL Pipeline permit to facilitate the cross-border development of a project of dubious need, but with the potential for significant environmental harm, becomes a stalking horse for constitutional transgressions by future presidents. While the permit is troublesome in its own right, what it portends for the future balance of powers among the three branches of government is deeply troubling, especially in the current era, in which one party has been able to co-opt all three branches to bend to its will.

The desirability of a strong president depends on the "contents" of that leadership; "energy is beneficial when placed in the service of meritorious

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policies, threatening when associated with the opposite.”³⁷² Thus, there is a need to “preserve an appreciation of richly divergent perspectives in a world of checks and balances, in which no single hierarchical voice should be seen to overcome all others. Of course, nothing can guarantee a rich polyphony—but at least we can keep from being totally drowned out by the unifying voices of our age,”³⁷³ or, in current times, by a single voice.

372. Kagan, *supra* note 10, at 2341; *see also Id.* at 2341, n.365 (citing THE FEDERALIST NO. 70 (Alexander Hamilton)) (arguing that “[e]nergy in the executive is a leading character in the definition of good government”).

373. Sargentich, et al., *supra* note 166, at 36.

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