

Legal Sidebar

Obama Administration Rejects Keystone XL Pipeline Permit Request: Could Congress Nevertheless Approve It?

11/09/2015

On November 6, President Obama rejected TransCanada's application for a presidential permit to construct and operate the cross-border facilities necessary for the proposed Keystone XL pipeline to transport oil sands crude from Canada to Gulf Coast refineries. Under [Executive Order 11423](#), as amended by [Executive Order 13337](#), the President has delegated to the Secretary of State his authority to receive applications for presidential permits. Issuance of a permit requires a State Department determination that the project would serve the "national interest."

In a [Record of Decision and National Interest Determination](#), Secretary of State John Kerry wrote that granting a permit to the Canadian company would not serve the national interest for several reasons, including that it "would undermine U.S. climate leadership and thereby have an adverse impact on encouraging other states to combat climate change and work to achieve and implement a robust and meaningful global climate agreement." Even assuming that TransCanada (or another party) could demonstrate standing to challenge the Obama administration's rejection of the pipeline permit request in federal court, it may face difficulties in arguing that a court could review that action. However, Congress appears to have the constitutional authority to enact a law superseding the President's decision and approving the pipeline's border crossing.

If TransCanada were to challenge the President's rejection of its permit request, it is not clear that a court could review that action. Although one federal district court [found](#) that environmental groups could sue under the [Administrative Procedure Act \(APA\)](#) to challenge the State Department's final environmental impact analysis accompanying an approval of a different cross-border pipeline permit, the Keystone XL decision involves a different situation: the denial of the permit itself. Congress has not established a statutory framework for consideration of cross-border oil pipeline permits, and at least three federal district [courts have found](#) that issuing permits for such cross-border facilities is an activity that falls within the President's inherent power to conduct the nation's foreign relations [derived](#) from Article II of the Constitution. Lower courts [have indicated](#) that the president's denial of a permit under this authority, even if delegated to the State Department, is a presidential action rather than an "agency action" reviewable under the APA. In addition, it does not appear that any other federal statute provides a private right of action to review the president's decision, and the [executive order](#) governing issuance of permits expressly states that it does not create any right of action.

Nevertheless, Congress likely has the constitutional authority to enact a law permitting the pipeline's border crossing (as it [attempted to do](#) earlier this year). As noted above, courts have held that the permitting of cross-border pipeline facilities lies within the President's constitutional authority over foreign relations. However, these decisions rested on the fact that Congress has not enacted a regulatory framework for issuing permits for the construction and operation of such facilities.

Congress possesses broad constitutional authority over foreign commerce, including cross-border oil pipeline facilities. If Congress were to override successfully any presidential veto and enact a law approving the Keystone XL pipeline's border crossing, the President's rejection of the permit would be at odds with the expressed will of Congress. Under the

test set forth in Supreme Court Justice Jackson's concurring opinion in [Youngstown Sheet & Tube Co. v. Sawyer](#), *which courts and scholars often use to assess presidential authority*, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Thus, it appears that Congress could enact a law superseding the President's decision and approving the pipeline's border crossing over the President's objections, provided that it was able to override any presidential veto.

For more on the legal issues surrounding the proposed Keystone XL pipeline, see [this CRS Report](#). For background and a discussion of policy issues related to the pipeline, see [this CRS Report](#).

Posted at 11/09/2015 12:17 PM