



Congressional Action Related to Foreign Commerce

A history of legislation related to border crossing facilities further suggests that congressional action related to permitting of

pipeline border crossings is a legitimate exercise of Congress's authority to regulate foreign commerce. Examples of congressional legislation "regarding certain types of border crossing facilities," include the Submarine Cable Landing Licensing Act of 1921 and the International Bridge Act of 1972.⁷³ Additionally, Congress has passed several statutes relating specifically to petroleum or pipelines, and some of these require the President to make particular findings, such as that certain exports are in the national interest: the Export Administration Act of 1979,⁷⁴ the Mineral Leasing Act of 1920,⁷⁵ the Naval Petroleum Reserve Production Act of 1976,⁷⁶ the Outer Continental Shelf Lands Act Amendments of 1978,⁷⁷ the Energy Policy and Conservation Act,⁷⁸ and the Comprehensive Anti-Apartheid Act of 1986.⁷⁹

Judicial Interpretations of the Executive and Legislative Authorities to Regulate Foreign Commerce

The Supreme Court's pronouncements on the foreign commerce clause recognize the expansive scope of this enumerated congressional power.⁸⁰ The Court has said that this power is "exclusive and plenary."⁸¹ In the seminal 1824 Commerce Clause case *Gibbons v. Ogden*, the Supreme Court said the words of the Commerce Clause "comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend."⁸² As of 2006, the Supreme Court had "never struck down an act of Congress as exceeding its powers to regulate foreign commerce."⁸³

In addition, although there is no precedent that directly addresses Congress's power to legislate pipeline border crossings, language found in multiple judicial opinions further suggests that the executive authority to regulate such facilities may be amended by legislation. As noted above in *Sierra Club v. Clinton*,⁸⁴ the plaintiff challenged the Secretary of State's 2009 decision to issue a permit authorizing a pipeline from Canada to Wisconsin. The reviewing federal district court found that the authority to issue permits for these border-crossing facilities "does not derive from a delegation of congressional authority ... but rather from the President's constitutional authority over foreign affairs and his authority as Commander in Chief."⁸⁵ In reaching its conclusion, the court noted that "despite the fact that cross-border permits for pipelines have been issued by Presidents in the past, Congress has not attempted to exercise any exclusive authority over the permitting process. Congress's inaction suggests that Congress has accepted the authority of the President to issue cross-border permits."⁸⁶ This seems to suggest a recognition by the court that the cross-border permitting process is not the exclusive province of the executive branch and that Congress may legislate in this area if it is so inclined.

Similarly, in *Sisseton-Wahpeton Oyate v. U.S. Department of State*,⁸⁷ the reviewing federal district court engaged in a discussion of the nature of the authority being exercised by the President in granting cross-border permits. The court noted that

In this case, the proposed pipeline crosses international borders. *Under the federal Constitution, then, the authority to regulate such a project vests in either the legislative or executive branch of government.* Congress has failed to create a federal regulatory scheme for the construction of oil pipelines, and has delegated this authority to the states. Therefore, the President has the sole authority to allow oil pipeline border crossings under his inherent constitutional authority to conduct foreign affairs.⁸⁸

As with the Attorney General opinions discussed above, the court's language suggests that Congress possesses the constitutional authority to legislate border crossing facilities, which suggests that Congress also can legislate to amend the role of the executive branch with respect to such facilities.

Summary

As the discussion above demonstrates, all three branches of the federal government have historically taken an expansive view of the nature of Congress's authority to regulate foreign commerce, even in the absence of existing legislation in the area. Although the Temporary Payroll Tax Cut Continuation Act of 2011 appears to be the first legislation enacted on the subject of cross border pipeline permitting, the absence of previous legislation related to the permitting of cross border facilities does not mean that Congress lacks the constitutional authority to take action on these matters.

The executive branch also possesses some ability to act in the area of border crossing permitting, derived from the power to conduct foreign affairs under Article II of the Constitution. The executive's ability to act in this area, however, is informed by the previous lack of federal legislation in this area. The absence of legislation up to this point may have "enable[d], if not invite[d], measures on independent presidential responsibility" in which the President has acted in the "absence of either a congressional grant or denial of authority."⁸⁹ However, if Congress chose to assert its authority in the area of border crossing facilities, this would likely be considered within its constitutionally enumerated authority to regulate foreign commerce.⁹⁰ Congress may consider legislation to overturn the domestic effect of legal action denying a permit for a border crossing facility for the Keystone XL pipeline. It could also potentially establish criteria for the issuance of any cross border permits, and potentially require the issuance of permits to entities which fulfill such criteria.