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TRANSCANADA'S KEYSTONE XL PIPELINE: POLITICS, ENVIRONMENTAL HARM, & EMINENT DOMAIN ABUSE

Ryan Harrigan

I. INTRODUCTION

The Keystone XL Pipeline is a proposed addition to the already existing Keystone Oil pipeline system built by TransCanada. The Keystone XL Pipeline will extend from outside Hardisty, Alberta, through Saskatchewan, Montana, South Dakota, Nebraska, Kansas, Oklahoma, and Texas. As such, it will make Keystone XL the longest oil pipeline outside of Asia. The United States’ portion of the Keystone XL will consist of approximately 1,380 miles of 36-inch diameter pipe and have the capacity to transport approximately 830,000 barrels per day (bpd) of oil to the [US]. As of February 2011, the Keystone XL "along its original route was estimated to cost more than $7.0 billion, with the U.S. portion accounting for at least $5.4 billion of that total." While TransCanada's Keystone XL may seem like just another advancement for the oil industry, it has drawn immense controversy.

1. Courtney Cherry, The Keystone Pipeline: Environmentally Just?, 6 ENV'TL & ENERGY L. & POL'Y J. 125, 126 (2011). "[P]hase one pipeline was over 2,000 miles long, and [was] created to transport crude oil from Hardisty, Alberta to United States refineries in Wood River and Patoka, Illinois." Id. ‘Phase two, entitled ‘Keystone Cushing,’ is an extension of the Keystone Pipeline from Steele City, Nebraska to Cushing, Oklahoma. The 36-inch pipeline will connect to storage and distribution facilities in Cushing, a city that is a major hub for crude oil marketing, refining, and pipelines." Id. Phase three of the pipeline will be the ‘Keystone XL.’ Id.

2. Id.


6. CRS Keystone XL: Key Issues, supra note 4, at 15.
Since the Keystone XL was proposed in 2008, the opposition to the pipeline has taken many forms: from a march on the White House involving tens of thousands of people, to a formal letter written by His Holiness, the Dalai Lama, and Desmond Tutu addressed to President Obama. Yet even with such distinguished opposition, much of the general public does not understand the arguments articulated in the controversy.

Proponents of the Keystone XL declare the pipeline will have a positive effect on both our daily lives and our Nation’s economy. Pipeline proponents believe Keystone XL will reduce our dependence on foreign oil because the pipeline will be utilizing and transporting a new source of fossil fuel: Canadian tar sands. Advocates of TransCanada’s proposal believe the pipeline will decrease fuel prices for Americans, specifically the Mid-West, because of the increased production of oil from refineries in the Gulf of Mexico. Furthermore, proponents are emphasizing the fact that TransCanada’s proposed pipeline will produce much-needed jobs for Americans in light of the current state of the U.S. economy. While the pipeline proponents’ platform appears to be beneficial, the Keystone XL opposition has shown that these benefits are highly misconstrued, and the only effect
that the pipeline will have on the United States is wholly negative. From an environmental standpoint alone, National Aeronautics and Space Administration (NASA) scientist, and member of the opposition James Hansen, stated that if the Canadian tar sands were utilized to the extent proposed for in Keystone XL, it would essentially be "game over" for the climate and our future.

Luckily on January 18, 2012, President Barack Obama weighed in to the controversy by formally rejecting TransCanada’s proposal. However, it is surely not the last time we will hear from the Canadian oil company. Just days after President Obama’s decision, TransCanada executive Alex Pourbaix stated that not only would the company continue to seek approval from the U.S. government, but Keystone XL is all but inevitable.

The Keystone XL Pipeline should not be constructed now or in the future for several reasons. First, the current process in place, which grants oil companies the necessary permit to construct a pipeline that crosses an international border of the United States, is unsuitable. The permitting process does not have the ordinary safeguard of judicial review, and the authority to grant such permits should not rest solely in the hands of the President of the United States. Second,

17. *Id.* “If [Obama] chooses the dirty needle it is game over because it will confirm that Obama was just greenwashing, like the other well-oiled coal-fired politicians with no real intention of solving the addiction. Canada is going to sell its dope, if it can find a buyer. So if the United States is buying the dirtiest stuff, it also surely will be going after oil in the deepest ocean, the Arctic, and shale deposits; and harvesting coal via mountaintop removal and long-wall mining. Obama will have decided he is a hopeless addict.” *Id.*
20. *Id.*
21. *Id.*
23. See infra Section II(A).
24. See infra Section II(A).
25. See infra Section II(A).
TransCanada's proposed pipeline will render irreparable damage to the environment and our nation's natural resources.\textsuperscript{26} Keystone XL will increase both greenhouse gas (GHG) emissions and our U.S. dependence on fossil fuels while conferring little to no benefit to our nation.\textsuperscript{27} Third, TransCanada's authority to obtain and utilize the power of eminent domain in the construction of their oil pipeline is unjust.\textsuperscript{28} The Framers of the Constitution did not intend for the eminent domain power to be exercised as it has been in the construction of Keystone XL, and continued use as such is perverse.\textsuperscript{29}

II. ANALYSIS

A. The Permitting Process

Usually, the site development of an oil pipeline will fall under the authority of the state, or states, which the pipeline traverses.\textsuperscript{30} However, if a company wishes to establish an oil pipeline within the United States and the path of the pipeline crosses a border with a foreign country, the company must obtain a permit that will allow that pipeline to be constructed.\textsuperscript{31} Currently, this mandatory permit is issued by the executive branch and as such has come to be known as a "presidential permit."\textsuperscript{32} The issuance of a presidential permit to an oil company is contingent on a finding that the proposed oil pipeline will, in fact, "serve the national interest."\textsuperscript{33} As of today, the President's authority to receive applications for permits has been transferred to the Secretary of State through Executive Order (EO) 13337.\textsuperscript{34}

In determining whether the construction of an oil pipeline is in the "national interest," the State Department is required to prepare a comprehensive evaluation of the proposed pipeline and consider a multitude of potential impacts the pipeline could have on the United States.\textsuperscript{35} Most importantly, the State Department must consider the
potential effect on the environment.\textsuperscript{36} Pursuant to 22 C.F.R. Section 161.7(c), the State Department must generate an Environmental Impact Statement (EIS) that adheres to the guidelines laid out by the National Environmental Policy Act (NEPA).\textsuperscript{37} In preparing the EIS, the State Department is required to "request input from cooperating agencies which include any agency with jurisdiction by law or with special expertise regarding any environmental impact associated with the project."\textsuperscript{38}

In the case of Keystone XL, the initial Draft EIS was found inadequate in July 2010.\textsuperscript{39} Then, flaws were found again in the second Draft EIS issued in April of 2011.\textsuperscript{40} Nevertheless, a Final EIS was rendered in August of 2011,\textsuperscript{41} and in accordance with the permitting process; the mandatory ninety day public review period began.\textsuperscript{42} It was within

\textsuperscript{36} CRS Keystone XL: Key Issues, supra note 4, at 6.

\textsuperscript{37} CRS Keystone XL: Key Issues, supra note 4, at 6. "The National Environmental Policy Act, was one of the first laws ever written that establishes a broad national framework for protecting our environment. NEPA's basic policy is to assure that all branches of government give proper consideration to the environment prior to undertaking any major federal action that could significantly affect the environment. NEPA requirements go into effect when airports, buildings, military complexes, highways, parkland purchases, and other federal activities with the potential for impacts are proposed. Environmental assessments (EAs) and Environmental Impact Statements (EISs), which are assessments of the likelihood of impacts from alternative courses of action, are required from all federal agencies and are the most visible NEPA requirements." National Environmental Policy Act, E.P.A. (last visited Feb. 18, 2012), http://www.epa.gov/region1/nepa/.

\textsuperscript{38} CRS Keystone XL: Key Issues, supra note 4, at 8. "Cooperating agencies for the Keystone XL project are the U.S. Environmental Protection Agency (EPA); the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS); the Department of the Interior’s Bureau of Land Management, U.S. Fish and Wildlife Service, and National Park Service; the U.S. Army Corps of Engineers; the U.S. Department of Agriculture’s Farm Service Agency, Natural Resources Conservation Service, and Rural Utilities Service; the Department of Energy’s Western Area Power Administration; and state environmental agencies." CRS Keystone XL: Key Issues, supra note 4, at 8.

\textsuperscript{39} CRS Keystone XL: Key Issues, supra note 4, at 8.

\textsuperscript{40} CRS Keystone XL: Key Issues, supra note 4, at 9.

\textsuperscript{41} CRS Keystone XL: Key Issues, supra note 4, at 9.

\textsuperscript{42} CRS Keystone XL: Key Issues, supra note 4, at 8. "Once a final EIS is issued, the State Department [holds] six public hearings to gather additional comments on whether authorization of a Presidential Permit for Keystone XL would be in the national interest. CRS Keystone XL: Key Issues, supra note 4, at 8."
this period that environmental groups, property owners, and citizens were allowed to voice their concerns about TransCanada’s proposal and their attitude toward the imposition of Keystone XL. Due to the influx of opposition to Keystone XL, on November 10, 2011, the State Department decided to seek additional information before moving forward with the “national interest” determination. The State Department stated that an additional EIS was needed and it would be expected by early 2013. However, that was not soon enough for pipeline proponents and Republican Party members of Congress. In an effort to bring Keystone XL into the presidential election year, the Senate approved a provision that was tacked on to the December 2011 Payroll Tax Cut Bill regarding Keystone XL. More specifically, the provision called for President Obama to make a decision regarding the President Permit of the XL pipeline within sixty days. Ultimately, President Obama denied the permit, stating that he concurred with the State Department’s decision that additional information for the EIS was required before a determination could be made of whether Keystone XL was in the national interest. While the outcome of the permitting process has led to a desired result in regard to Keystone XL, the process has its flaws and those need to be addressed before another permit is issued.

i. Lack of Judicial Review

It is fair to say that the concept of judicial review is inherent in the United States’ judicial system. Judicial review gives either the state or federal courts the ability to review administrative acts. In order to sue the federal government, and initiate judicial review, the government “must waive sovereign immunity.” Usually this waiver is automatically provided because under the Administrative Procedure Act (APA), “Agency action[s] [are] made reviewable by statute and final agency action[s] for which there is no other adequate remedy in a

43. CRS Keystone XL: Key Issues, supra note 4, at 8.
44. CRS Keystone XL: Key Issues, supra note 4, at 10.
46. Id.
47. Id.
48. Times Topics, supra note 2.
49. Times Topics, supra note 2.
50. See infra Section II(A)-(B).
court are subject to judicial review.\(^54\) However, in the case of the permitting process, the issuance of a permit by the State Department is currently not considered a final agency action\(^55\) and thus not subject to judicial review.\(^56\) In laymen terms, this means that presidential permits can be issued without affording the public an opportunity to challenge their issuance.\(^57\)

The APA was created as a procedural safeguard against potential separation of powers abuses.\(^58\) The APA has been called by some “a bill of rights for individuals and groups dealing with administrative agencies.”\(^59\) If viewed on its face, the issuance of a permit by the State Department after it has received, researched, and rendered its the “national interest,” is a final agency action and thus should be subject to judicial review.\(^60\) Any derivation from this result would oppose the purpose of the APA.\(^61\) Further, the State Department’s actions meets the two requirements of a “final agency action” as dictated by the Supreme Court.\(^62\) First, the State Department’s decision is the “consummation of the agency’s decision making process” because the State Department followed all established procedures regarding the permitting process and rendered the verdict as to whether a particular oil pipeline is in the “national interest.”\(^63\) Second, the State Department’s action is “one by which rights or obligations have been deter-

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54. CRS Keystone XL: Key Issues, supra note 4 (citing 5 U.S.C.A § 500 et seq (West) (recodified by Pub. L. No. 89-554, (Sept. 6, 1966)).
56. Id.
57. See id. at 113.
58. See Tom C. Clark, Attorney General, 1947, Attorney General’s Manual on the Administrative Procedure Act, FSU COLL. OF LAW, http://www.law.fsu.edu/library/admin/1947i.html. “The Administrative Procedure Act may be said to have four basic purposes: (1) To require agencies to keep the public currently informed of their organization, procedures and rules (2) To provide for public participation in the rule making process (3) To prescribe uniform standards for the conduct of formal rule making and adjudicatory proceedings, i.e., proceedings which are required by statute to be made on the record after opportunity for an agency hearing (4) To restate the law of judicial review. . .” Id.
61. See generally Clark, supra note 58.
62. Bennett v. Spear, 520 U.S. 154, 177-78 (1997). “As a general matter, two conditions must be satisfied for agency action to be ‘final’: First, the action must mark the ‘consummation’ of the agency’s decision making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” Id. (citations omitted).
63. See id.
mined" because it determines whether an oil company has the right to construct a pipeline across an international border. While it is certainly true that the State Department is only conducting the permitting process pursuant to EO 13337, that does not mean that the State Department has not furnished a final agency action that warrants the procedural safeguard of the APA.

If the lack of judicial review over the issuance of presidential permits is not enough to question the current legitimacy of the permitting process, the recent holding from Natural Res. Def. Council, Inc. v. U.S. Dep't of State, that dictates that the EIS produced during the permitting process is not subject to review, certainly is enough. NEPA requires that an EIS be issued for every action by a federal agency that could potentially "affect the quality of the human environment." Further, "courts have consistently held that an EIS is a final agency action subject to review under the APA." Yet, the U.S. District Court for the District of Columbia determined that the EIS issued during the course of the permitting process was not subject to review simply because the State Department was acting on behalf of the President. Whether the EIS requirement of NEPA applies to the President should not make a difference in the determination of judicial review under the APA. The fact of the matter is that the State Department rendered a final agency action that should be subject to judicial review. This decision is incredibly worrisome because not only is there no judicial review over the already issued permits, but now there is no judicial review over the seemingly determinative factor of whether a permit will be issued, namely, the EIS. The court now has carved out an exception to the indispensible concept of judicial review for the entire permitting process.

This concern is emphasized by the foul play that occurred during the Keystone XL permitting process. Specifically, the State Department "allowed TransCanada to solicit and screen bids" from companies and determine which one would conduct the environmental impact study. Unsurprisingly, TransCanada recommended one of their own major clients, and the subsequent study found that the

64. See id.
66. Id. at 108.
67. Supra notes 42-54 and accompanying text.
70. CRS Keystone XL: Legal Issues, supra note 4, at 26.
72. See generally CRS Keystone XL: Key Issues, supra note 4, at 5.
73. See generally CRS Keystone XL: Key Issues, supra note 4, at 5.
74. Times Topics, supra note 2.
75. Times Topics, supra note 2.
“massive pipeline would have limited adverse environmental impact.” Luckily, word of this potential conflict of interest was brought to Harold W. Grisel, Inspector General of the State Department, and he was able to institute a formal investigation. Putting aside the fact that the permitting process lead to a desired result in the case of Keystone XL, the current complete lack of judicial review in granting presidential permits is improper and needs to be addressed before any other permits are issued.

ii. Authority to Grant Permits

The ultimate power to decide whether an oil company should receive the necessary permit to construct an oil pipeline should not be vested solely in the President’s power to conduct foreign affairs. The powers exercised by the President and the entire executive branch “are authorized by legislation or inherent presidential powers based in the Constitution.” As previously mentioned, the Secretary of State’s power to issue permits originates from EO 13337. Typically, an EO will name the source of authority, which designates that it has the power over what is being ordered. In the case of EO 13337, no authority is stated except that the Secretary of State is to “receive all applications for [permits], as referred to in Executive Order 11423.” However, when we look to EO 11423, no statute or constitutional provision is listed as a source of its authority. While EO 11423 does state that “the proper conduct of foreign relations of the United States requires that executive permission be obtained for the construction and maintenance,” that can be labeled as a conclusory and self-serving statement that points to no authority. Nevertheless, that

76. Times Topics, supra note 2.
77. Times Topics, supra note 2. “The inspector general’s report released in February 2012, found no conflict of interest or improper political influence in the agency’s review. However, the report said the department had not adequately weighed concerns about the route of the 1,700-mile pipeline and should strengthen its oversight of contractors performing environmental impact statements for major projects.” Times Topics, supra note 2.
78. Infra Section (II) (B) (ii); see also CRS Keystone XL: Legal Issues, supra note 4.
79. CRS Keystone XL: Legal Issues, supra note 4, at 5.
82. CRS Keystone XL: Legal Issues, supra note 4. Please note there is a source of authority mention in EO13337 but that source refers only to the “Constitution and the Laws of the United States of America, including Section 301 of title 3, United States Code.” However, 3 U.S.C. Section 301 simply provides that the President is empowered to delegate authority to the head of any department or agency of the executive branch. CRS Keystone XL: Legal Issues, supra note 4, at 5.
83. CRS Keystone XL: Legal Issues, supra note 4, at 5.
84. See generally CRS Keystone XL: Legal Issues, supra note 4.
statement has been held as the executive’s source of authority over the permitting process, solely because the President holds the power to conduct foreign affairs. 

While the President’s power to conduct foreign affairs is broad, the permitting process does not logically fall within the power. The issuance of a permit to construct an oil pipeline across an international border does not effectuate the purpose behind the President’s power to conduct foreign affairs. The President is “the constitutional representative of the United States with regard to foreign nations” and was given the power to conduct foreign affairs because he is “the primary organ of communication with foreign governments.” In the case of the permitting process, those who seek a permit are not foreign governments but private companies. There is no basis to conclude that the President was given the power to conduct foreign relations which would allow him to pick and choose which private oil company would be allowed to build an oil pipeline across the U.S.-Canadian border. Further, in the case of Keystone XL, TransCanada is an incorporated and registered limited liability company in the U.S., with its principal place of business in Houston, Texas. Thus, under the law of the U.S., TransCanada is not even a foreign entity.

The President was given the power to conduct foreign affairs so that


88. See United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936). “The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.” Id.

89. See id.


91. See Fox, supra note 19; CRS Keystone XL: Key Issues, supra note 4, at 5.

92. See Goldsmith, supra note 87, at 1686; CRS Keystone XL: Key Issues, supra note 4, at 6.


94. Id.
he could be the “primary agent of U.S. foreign relations,” not to oversee private and seemingly domestic business tactics.95

Only two federal trial courts have ever addressed the authority of the permitting process.96 First, in Sisseton v. United States Department of State, the Native American Sisseton Wahpeton Tribe of South Dakota sought injunctive relief against the issuance of the permit for a part of the Keystone Pipeline network.97 Second, in Sierra Club v. Clinton, environmental groups “challenged the Secretary of State’s decision to issue a permit authorizing the Alberta Clipper pipeline.”98 Both trial courts held that the President’s power to conduct foreign relations was a valid source of authority over the permitting process.99 However, in so holding, both courts emphasized the fact that “Congress had never attempted to exercise any exclusive authority over the permitting process.”100 While it is true that Congress never exercised power over the permitting process, that should not be the main justification for upholding EO 11423 and the President’s power over the permitting process.101 There is no reason to extend the President’s power to conduct foreign affairs by incorporating the permit process because Congress never challenged the President’s authority.102 It is not as if the powers of our government are not delegated on a first come, first served basis. Nevertheless, the legitimacy of the permitting process has only recently been decided at the trial level and the “Supreme Court has not definitively opined on the circumstances in which any such authority may be exercised.”103

Lastly, it is important to note that Congress could withdraw the President’s current authority over the permitting process by passing legislation.104 According to Article I, Section 8, Clause 3 of the Consti-

97. Sisseton, 659 F. Supp. 2d at 1071.
98. CRS Keystone XL: Key Issues, supra note 4, at 28 (citing Sierra Club, 689 F. Supp. 2d at 1147).
99. Sierra Club, 689 F. Supp. 2d at 1156; Sisseton, 659 F. Supp. 2d at 1081.
100. Sierra Club, 689 F. Supp. 2d at 1163; Sisseton, 659 F. Supp. 2d at 1081. “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." Sisseton, 659 F. Supp. 2d at 1081.
101. See Sierra Club, 689 F. Supp. 2d at 1163; Sisseton, 659 F. Supp. 2d at 1081.
102. See generally Sierra Club, 689 F. Supp. 2d at 1163; Sisseton, 659 F. Supp. 2d at 1081.
104. See U.S. Const. art. I, § 8, cl. 3; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).
tution, also known as the Commerce Clause,\(^{105}\) Congress retains the power to "regulate commerce with foreign nations."\(^{106}\) Further, it has been consistently held that "[i]mports from a foreign county are foreign commerce subject to regulation, so far as this county is concerned, by Congress alone."\(^{107}\) That being said, the Keystone XL pipeline, which would be pumping Canadian tar sands from Alberta to Texas,\(^{108}\) falls directly within Congress' delegated power.\(^{109}\) Thus, it appears that both Congress and the President have authority over the permitting process—Congress from Article I of the Constitution and the President from his power to conduct foreign affair, as held by the federal courts.\(^{110}\) Putting that aside, it is clear that the permitting process is flawed and the authority to grant permits should not be left solely in the hands of the President.

B. Negative Environmental Impact

TransCanada stated it would work with native Nebraskans and the State of Nebraska to ensure that the Keystone XL site would not adversely affect the environmentally fragile Sands Hills region.\(^{111}\) While that was a huge win for those that opposed the pipeline, there are other inherent environmental problems surrounding the Keystone XL that have the potential to adversely affect the entire nation.\(^{112}\) The Canadian "tar sands" that the Keystone XL seeks to transport to refineries in the United States are "strikingly different from conven-


\(^{106}\) U.S. Const. art. I, § 8, cl. 3.


\(^{108}\) Cherry, supra note 1, at 125-26.

\(^{109}\) Guy W. Capps, Inc., 204 F.2d at 660.

\(^{110}\) See U.S. Const. art. I, § 8, cl. 3. This seemingly "concurrent authority" was coined as the "zone of twilight" by Justice Jackson in his famous concurrence to Youngstown Sheet & Tube Co. v. Sawyer. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952). Justice Jackson articulated a three-part test to describe how much authority the President has in conducting specific actions. Id. Presidential acts can either be made with direct congressional approval, "maximum approval"; no congressional approval, "zone of twilight"; or in opposition to Congress, "lowest ebb." Id. at 635-37. If Congress were to pass legislation today, granting itself authority over the permitting process, it would render the E.O. 11423 as "lowest ebb" and Congress' newly create authority would reign supreme. Id.

\(^{111}\) CRS Keystone XL: Key Issues, supra note 4, at 1. "[T]he Sand Hills region of Nebraska, an extensive sand dune formation with highly porous soil and shallow groundwater." CRS Keystone XL: Key Issues, supra note 4, at 1. On November 14, 2011, TransCanada announced its decision to work with the Nebraska Department of Environmental Quality to identify an acceptable pipeline route around the Sand Hills." CRS Keystone XL: Key Issues, supra note 4, at 1.

\(^{112}\) CRS Keystone XL: Key Issues, supra note 4, 15-17.
TransCanada’s Keystone XL Pipeline

tional sources of oil.” The name “tars sands” stems from its initial thick and gooey appearance and the seemingly synonymous tar smell that it emits after it is mined. Pipeline proponents have stated that the tar sands region of Alberta, Canada, has an estimated 170 million barrels of oil, which would render it second only to Saudi Arabia in terms of the world’s crude oil reserves. While that is true, any potential benefit from using this new source of energy is outweighed by the numerous adverse environmental effects that are potentially life altering. Further, the construction of an oil pipeline that spans the width of our nation’s breadbasket is inherently troubling due to the catastrophic effects a seemingly inevitable accident could render.

i. Environmentally Unjust

TransCanada’s Keystone XL cannot be constructed because it will negatively affect our environment, advance the United States’ dependence on fossil fuels, and would put our nation’s future in jeopardy. Tar sands are simply a combination of “clay, sand, water, and heavy black viscous oil known as bitumen.” However, harnessing this energy source requires substantially more energy and resources than “conventional oil,” and, as a result, the surrounding environment suffers. The “bitumen in oil sands cannot be pumped from a conventional well; it must be mined, usually using strip mining.” Large amounts of water and natural gas must be used in this extracting process. Because of the already existing water shortage and increased controversy over new methods of extracting natural

114. Id. (citing Robert Kunzig, The Canadian Oil Boom, NAT’L GEOGRAPHIC, 46-48 (Mar. 2009)).
116. Id.
117. CRS Keystone XL: Key Issues, supra note 4, at 15-18.
118. CRS Keystone XL: Key Issues, supra note 4, at 16.
120. CRS Keystone XL: Key Issues, supra note 4, at 21.
The use of these resources puts the extraction of tar sands at the top of the list of environmental concerns. However, the worst part about utilizing tar sands is the amount of energy and emissions that are produced in the refining process.

After the tar sands are extracted from the earth, they are blended with other toxic chemicals into what the industry calls a "heavy crude," which is essentially the level of viscosity that allows it to be pumped through an oil pipeline and sent to refineries for conversion. In order to convert tar sands into crude oil, "the hydrocarbons that constitute bitumen are upgraded into synthetic crude oil." This process causes drastically more greenhouse gas (GHG) emissions than any other conventional or unconventional oil extracting method in use today. Experts in the field of GHG emission have ascertained that the production of tar sands can produce an additional "6 percent to 22 percent [per barrel] more CO2 than conventional oil, depending on the assumptions of the model." The opposition points out that "[g]iven the expected lifetime of the Keystone XL pipeline of fifty years, the EPA notes that the project could yield an extra 1.15 billion tons of GHG [emissions]." The effect of this increase in GHG emissions should be emphasized because if the Keystone XL pipeline is constructed, the oil refineries that would be tasked with converting tar sands and producing these

128. See Mergen, supra note 113, at 221.
129. CRS Keystone XL: Key Issues, supra note 4, at 19. Tar sands can be upgraded to a "syncrude, a light crude that is suitable for pipeline transport and is relatively easy to refine. Alternatively, bitumen can be blended with lighter hydrocarbons to form a heavy crude that can be transported by pipeline. The bulk of oil sands supply growth is expected to be in the form of the latter." CRS Keystone XL: Key Issues, supra note 4, at 19.
130. Mergen, supra note 113, at 221.
harmful GHG emissions are in the United States, not in Canada. In August of 2010, EPA officials “cast doubt on [Keystone XL] in the name of environmental justice” by detailing how Port Arthur, Texas, one of the cities in close proximity to the many potential Keystone XL refineries, could be irreparably harmed. The town of Port Arthur, Texas, is already located in “one of the dirtiest counties in our [nation]” and “ranks in the worst percentile for increased cancer and other non-cancer health risks, for the releases of recognized carcinogen, as well as developmental and reproductive toxicants.”

However, EPA officials have stated that of the numerous EISs issued by the State Department, none have taken into account the greater risks cities like Port Arthur could be subjected to due to increased exposure to emissions. While residents of Port Arthur could sue the oil companies individually, in an effort to obtain some sort of remedy, that will likely not happen due to “historically low income” minorities that live in the shadow of these oil refineries. Further, even if litigation of that sort were to happen, it would likely not institute a systematic change that would stop the oil industry from committing wide-spread pollution. Thus, Keystone XL would essentially expose U.S. citizens to irreparable damage without any way to stop it.

Some environmentalist groups have tried to address this seemingly “systematic discrimination” by bringing suit “with regard to environmental issues via the Equal Protection Clause of the 14th amendment.” However, none of the attempts under Section 601 and 602 of Title VI of the Civil Rights Act of 1964 have proven fruitful.

134. CRS Keystone XL: Key Issues, supra note 4, at 17.
136. See Cherry, supra note 1, at 131; Tresaugue, supra note 135.
138. See Cherry, supra note 1, at 130-33; Tresaugue, supra note 113.
139. Cherry, supra note 1, at 132.
140. See Cherry, supra note 1, at 133.
141. See generally Cherry, supra note 1, at 133.
142. Cherry, supra note 1, at 136.
143. Cherry, supra note 1, at 135-36. “Section 601 forbids discrimination based on race, color, or national origin by any government agency receiving federal assistance. Under section 601, the plaintiff must prove the agency intended to discriminate . . . Although, courts have held that individuals or entities can sue federal agencies under section 601, proving discriminatory intent is virtually impossible in cases of disparate environmental inequality.” Cherry, supra note 1, at 135-36. “Section 602 requires federal agencies to establish rules and regulations that uphold section 601, and is particu-
Some proponents of Keystone XL highlight the fact that on the current national trend of GHG emissions, the potential increase from utilizing tar sands is only minimal.\(^{144}\) This is true if one were to look at a graph of GHG emissions produced by the United States, but these proponents fail to see the bigger picture.\(^{145}\) The concern over increased GHG emissions stems from the United States’ continued dependence on fossil fuels.\(^{146}\) In a recent study, “a group of retired four-star generals and admirals concluded that climate change, if not addressed, will be the greatest threat to national security.”\(^{147}\) The construction of the Keystone XL pipeline is essentially the United States “bending over backwards” to quench its thirst for fossil fuels and that is why Keystone XL cannot be constructed.\(^{148}\) As stated by multiple Nobel Peace Prize recipients, the only way to reduce dependence on fossil fuels is to stop utilizing them and to start focusing on renewable energy sources.\(^{149}\) In summary, the drastic environmental effects that will result due to the construction and use of Keystone XL exhibit why the oil pipeline should not be built.

ii. The Risks Outweigh the Benefits

The inherent likelihood that the Keystone XL will cause a devastating environmental impact outweighs any possible benefit the pipeline could render.\(^{150}\) No matter how safe an oil pipeline is constructed or operated, there is always the potential for an accident.\(^{151}\) That being the case, oil companies usually estimate how many oil spills they will


\(^{145}\) See id.

\(^{146}\) See Keystone XL Pipeline: Dalai Lama, supra note 9.


\(^{148}\) Id.

\(^{149}\) Id.

\(^{150}\) Infra Section II(B)(ii).

have to deal with in a given year or over the course a pipeline’s life.\textsuperscript{152} In the case of Keystone I, TransCanada predicted that they would have “[one] accident over the course of [seven] years.”\textsuperscript{153} However, after only a single year of operation, Keystone I had yielded twelve accidents across the Midwest, the worst of which occurred in North Dakota resulting in a spill of over 21,000 gallons of oil.\textsuperscript{154} Who is to say that TransCanada, and the entire Midwest, will not suffer the same result with Keystone XL? While no one can state with absolute certainty that Keystone XL will follow in Keystone I’s accident-prone footsteps, TransCanada’s prior history is the best judge as to whether an oil spill will occur in the future.\textsuperscript{155}

The controversy surrounding the pipe used by TransCanada demonstrates a more specific example of how risky the Keystone XL extension will be. In late 2010, reports surfaced that TransCanada may have tampered with the pipe used to construct Keystone I.\textsuperscript{156} Subsequently the Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA) ordered TransCanada to dig up ten sections of the pipeline from Keystone I.\textsuperscript{157} After extensive testing, officials concluded that the pipe produced by the Indian manufacturer was made out of “defective steel” that was below the regulatory limits set by the U.S.\textsuperscript{158} At a Congressional hearing in December 2011, TransCanada told members of Congress that the pipe used for Keystone XL would meet all conventional oil pipeline standards and would be produced in North America, not India.\textsuperscript{159} However, reports dictate ten percent of the steel for Keystone XL will come from Welsup Corp,\textsuperscript{160} the same Indian manufacturer that produced the defective steel for Keystone I.\textsuperscript{161} Further, both the National Resources

\textsuperscript{152} See Contamination Clockwork, supra note 151.


\textsuperscript{154} See Philip O’Conner, Worries Over Defective Steel Force TransCanada to Check Oil Pipeline (Dec. 10, 2010), http://www.stltoday.com/news/local/metro/article_c0b2c3a6-ef66-532b-9266-2dd501b8df75.html; Comment to Department of State Regarding the Need for Supplemental Environmental Impact Statement for TransCanada Keystone XL Pipeline 11, NAT’L RES. DEF. COUNCIL & SIERRA CLUB (Dec. 16, 2010), http://switchboard.nrdc.org/blogs/eshope/Letter%20to%20Clinton%20on%20SEIS%204%204%2011.pdf [hereinafter Comment to Dep’t of State].

\textsuperscript{155} O’Conner, supra note 156.

\textsuperscript{156} Comment to Dep’t of State, supra note 156, at 11.


\textsuperscript{158} O’Conner, supra note 156.

\textsuperscript{159} O’Conner, supra note 156.

\textsuperscript{160} O’Conner, supra note 156.

\textsuperscript{161} See TransCanada: Unfit to Build, BOLDNEBRASKA (Mar. 21, 2012), http://boldnebraska.org/uploaded/pdf/unfit_to_build_report.pdf; Brad John-
Defense Council and the Sierra Club have stated that the pipe used in Keystone XL should not be held to the same standard as conventional oil pipes because it will be transferring tar sands, not crude oil. Numerous scientists have stated that there should be different pipe regulations because of the increased pressures needed to transfer tar sands and its highly corrosive tendency. However, further pipe regulation has yet to be proposed for Keystone XL.

If TransCanada’s infamous track record was not enough to dissuade the construction of the pipeline, then the elevated risk of having an oil pipeline span the distance of the single most important drinking water source for millions of Americans is enough. “Water - not oil - has always been the most valuable resource in the Midwest.” The Ogallala aquifer runs from North Dakota to Texas and regardless of whether TransCanada decides to uphold their promise to avoid the Sands Hills region of Nebraska, the route will still cross over thousands of bodies of water, all of which could contaminate the Ogallala. The Ogallala aquifer is not only utilized for drinking water but is also a major source of irrigation for farmland throughout the breadbasket of our nation. John Stansbury, a professor of environmental water resources at University of Nebraska, put together a report that details a “worst case scenario” of a Keystone XL spill. The report, which was submitted to the State Department for their EIS, states that a Keystone XL spill “would be sufficient to contaminate 4.9 billion gallons of water” and “[t]his water could form a plume...
TransCanada’s Keystone XL Pipeline

40 ft thick by 500 ft wide by 15 miles long.”\textsuperscript{172} Further, Stansbury stated that even if there was not a worst case scenario, “[t]here [could] be a leak at only 1% of flow rate and as long as it stays beneath the surface, [it] could not be detected,” and as a result, a seemingly small incident could turn into a catastrophe over time.\textsuperscript{173}

The risk of Keystone XL is not outweighed by the benefits proposed by proponents because those benefits are drastically misrepresented.\textsuperscript{174} First, proponents state that the Keystone XL pipeline will decrease gas prices because the supply of oil will increase.\textsuperscript{175} This statement is wrong.\textsuperscript{176} In fact, according to TransCanada’s own 2008 presidential permit application, the pipeline will do the exact opposite:

“Existing markets for Canadian heavy crude, principally PADD II [U.S. Midwest], are currently oversupplied, resulting in price discounting for Canadian heavy crude oil. Access to the USGC [U.S. Gulf Coast] via the Keystone XL Pipeline is expected to strengthen Canadian crude oil pricing in [the Midwest] by removing this oversupply. This is expected to increase the price of heavy crude to the equivalent cost of imported crude.”\textsuperscript{177}

Second, pipeline proponents believe that TransCanada’s Keystone XL will generate much-needed jobs for Americans.\textsuperscript{178} Specifically, supporters have stated that TransCanada’s proposal for Keystone XL would create as many as 20,000 jobs for Americans.\textsuperscript{179} However, TransCanada’s job prospects for Keystone XL are by no means reliable.\textsuperscript{180} In their presidential permit application, TransCanada stated that Keystone XL would create “a peak workforce of approximately

\textsuperscript{172} Stansbury, supra note 171, at 2.
\textsuperscript{173} Tullis, supra note 132, at 4.
\textsuperscript{174} See generally Tullis, supra note 132, at 4.
\textsuperscript{177} Id.
\textsuperscript{178} The Questionable Economics of the Keystone XL Pipeline, supra note 175.
\textsuperscript{179} The Questionable Economics of the Keystone XL Pipeline, supra note 175.
3,500 to 4,200 construction personnel."\textsuperscript{181} This number encompasses all the jobs created in both Canada and the U.S.\textsuperscript{182} Further, it should be noted that construction jobs are never permanent positions.\textsuperscript{183} Construction jobs are only temporary because once an oil pipeline is up and running, there is nothing that needs to be assembled.\textsuperscript{184} In fact, the State Department estimates that the pipeline could create only twenty permanent jobs for Americans.\textsuperscript{185} If this small yield of jobs is not enough, a report issued by Cornell University Global Labor Institute stated that the Keystone XL pipeline “may actually destroy more jobs than it generates.”\textsuperscript{186} The third and last benefit relied upon for instituting the Keystone XL pipeline is that pipeline will reduce the United States’ dependence on foreign oil.\textsuperscript{187} While proponents are correct when they state, “nearly 50 percent of oil consumed in the United States is imported from foreign countries,”\textsuperscript{188} these proponents fail to take into account the purpose that TransCanada has for the Keystone XL pipeline.\textsuperscript{189} In short, the “Keystone XL pipeline is an export pipeline.”\textsuperscript{190} The refineries in the Gulf of Mexico are expanding the exports to countries abroad, not the domestic market.\textsuperscript{191} Valero, the world’s largest independent oil refiner and known “top beneficiary of the Keystone XL pipeline”\textsuperscript{192} has already pitched to their investor the plan to send the refined tar sands to markets in Asia and Europe.\textsuperscript{193} Why would TransCanada choose to send their oil across the Pacific rather then sell it to the United States? The answer

\begin{itemize}
\item \textsuperscript{181} Sally Kohn, \textit{Six Reasons Keystone XL Was A Bad Deal All Along} (Jan. 18, 2012), http://www.foxnews.com/opinion/2012/01/18/six-reasons-keystone-xl-was-bad-deal-all-along/.
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Global Labor Institute, \textit{Cornell GLI Study Finds XL Pipeline Will Create Few Jobs}, available at http://www.ilr.cornell.edu/globallaborinstitute/research/Keystonexl.html (last visited May 16, 2012).
\item \textsuperscript{184} See generally id.
\item \textsuperscript{185} \textit{The Questionable Economics of the Keystone XL Pipeline}, supra note 175.
\item \textsuperscript{187} \textit{The Questionable Economics of the Keystone XL Pipeline}, supra note 175.
\item \textsuperscript{191} See id.; see also Undermining U.S. Energy, supra note 189.
\item \textsuperscript{192} Exporting Energy Security, supra note 190, at 1.
\item \textsuperscript{193} Exporting Energy Security, supra note 190, at 4.
\end{itemize}
TransCanada’s Keystone XL Pipeline

is simple: because “tar sands producers will be able to send Canadian crude to the Gulf Coast refineries in tax-free Foreign Trade Zones, where it can be refined and then sold to international buyers—at a higher profit to Big Oil.”\(^{194}\) It is clear that the proposed benefits of the Keystone XL pipeline are misleading and the established risks of the Keystone XL pipeline countervail.\(^{195}\)

C. Eminent Domain Abuse

According to TransCanada, they have “negotiated agreements with almost 93% of landowners who own almost 90% of the tracts of land along the entire pipeline route.”\(^{196}\) While those numbers cannot be confirmed, it brings up the question, what do they plan to do with the last seven percent of landowners who they have not negotiated deals with? TransCanada plans to condemn the land through the power of eminent domain.\(^{197}\) Eminent domain is the right of states, localities, and the federal government to take land from private hands, and condemnation is the process by which that private land is taken.\(^{198}\) This power of eminent domain stems from the Fifth Amendment of the Constitution.\(^{199}\) Some critics believe that eminent domain is settled law,\(^{200}\) and once land is set for condemnation there is no hope of fighting off the power of the government.\(^{201}\) However, controversy has surrounded TransCanada’s exercise of eminent domain because the Keystone XL proposal has been called by some the “largest and most aggressive eminent domain action since the construction of the interstate highways.”\(^{202}\) TransCanada has already obtained the eminent domain power in all six states Keystone XL is sited to cross.\(^{203}\) However, that does not mean that TransCanada should have been granted

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\(^{194}\) Undermining U.S. Energy, supra note 189.

\(^{195}\) Supra Section: B. The Risks Outweigh The Benefits.


\(^{198}\) Condemnation & Eminent Domain, STATE LA WYERS, http://www.statelawyers.com/Practice/Practice_Detail.cfm/PracticeTypeID:21 (last visited Jan. 28, 2012).

\(^{199}\) U.S. CONST amend. V.

\(^{200}\) See generally STEVEN GREENHUT, ABUSE OF POWER: HOW THE GOVERNMENT MISUSES EMINENT DOMAIN (2004) (discussing how society’s innate trust in the government’s claim of eminent domain allows the government to abuse their power and leaves the public with few options for recovery).

\(^{201}\) Id.


that power. In fact, TransCanada should not be allocated the power of eminent domain because the construction Keystone XL is not how the Framers intended the power to be utilized.\textsuperscript{204} Keystone XL does not fulfill a public use or a public purpose that would authorize the power of eminent domain under the Fifth Amendment.\textsuperscript{205} Further, the means by which TransCanada was delegated that power by the states is seemingly improper and simply feels wrong.\textsuperscript{206}

i. Not What the Framers Intended

Delegating the power of eminent domain to advance the oil exploits of a private company at the expense of Americans’ property rights is not in accordance with the Fifth Amendment.\textsuperscript{207} The Takings Clause of the Fifth Amendment states, “nor shall private property be taken for public use, without just compensation.”\textsuperscript{208} The plain meaning of the Clause dictates a limitation of the government’s power, “not a grant of power.”\textsuperscript{209} The Framers intended the Clause to embody the importance of property rights by not allowing the government to take private property unless it was taken for public use and just compensation was given to the property owner.\textsuperscript{210} In a highly criticized majority opinion, the Supreme Court stated that the Takings Clause extends to circumstances in which the reason behind the exercise of eminent domain power was for a “public purpose.”\textsuperscript{211} While there is something to be said about the Court’s reasoning to extend the Takings Clause beyond its plain meaning, in the case of Keystone XL there is neither a public use, nor a public purpose.\textsuperscript{212}

The Keystone XL pipeline is not a public use because it is neither being created for “use by the public,”\textsuperscript{213} nor will the public be able to physically possess it in any way.\textsuperscript{214} Keystone XL is a completely private oil pipeline, and the land is being taken for TransCanada’s own exploits.\textsuperscript{215} The Supreme Court has held that the construction of a highway, railroad, park, or even a stadium is considered a public pur-

\begin{itemize}
\item \textsuperscript{204} \textit{Infra} Section II(C)(i).
\item \textsuperscript{206} \textit{Infra} Section II(C)(ii).
\item \textsuperscript{207} See generally U.S. Const amend. V.
\item \textsuperscript{208} Id.
\item \textsuperscript{209} Kelo, 545 U.S. at 505-11 (Thomas, C., dissenting).
\item \textsuperscript{210} See \textit{id}; U.S. Const amend. V.
\item \textsuperscript{211} Kelo, 545 U.S. at 480.
\item \textsuperscript{212} See generally \textit{id}.
\item \textsuperscript{214} See Landowners Challenge, infra note 224.
\end{itemize}
pose and warrants the power of eminent domain.\textsuperscript{216} However, Keystone XL does not equate to any of those things.\textsuperscript{217} It is not as if anyone could walk up to the Keystone XL, tap into the pipeline, and take some oil out for themselves, nor is the public granted access to the oil refineries.\textsuperscript{218} Further, Keystone XL should not be equated to a common carrier because the oil being transported through the pipeline, and ultimately sold as fuel, is being shipped to countries abroad and is not to being used by U.S. citizens.\textsuperscript{219} The construction of the pipeline will not decrease fuel prices, will not create a significant amount of jobs, nor will the pipeline advance energy security for the United States.\textsuperscript{220} TransCanada is a private company seeking to build an oil pipeline from Canada to the Gulf Coast—nothing more, nothing less.\textsuperscript{221}

The Keystone XL pipeline does not fulfill the "public purpose" principle under the Takings Clause either.\textsuperscript{222} In \textit{Kelo v. City of New London}, the Supreme Court extended the Takings Clause by holding that the city’s exercise of eminent domain power in furtherance of [an] economic development plan satisfied the constitutional public use requirement, even though city was not planning to open condemned land to use by the general public, where the plan served public purpose.\textsuperscript{223} In Oklahoma alone, TransCanada has filed seventy suits seeking condemnation of private property along the proposed route for Keystone XL that rely on this phrase "public purpose."\textsuperscript{224} In each case, TransCanada filed documents that outline the substantial benefits of Keystone XL that warrant the exercise of the eminent domain power.\textsuperscript{225} However, each of those substantial benefits listed are either misleading or fail to fulfill a "public purpose" in accordance with the holding in \textit{Kelo}.\textsuperscript{226}

First, TransCanada emphasized how Keystone XL will benefit the State of Oklahoma and the Nation by decreasing fuel prices, creating

\textsuperscript{216} \textit{Kelo}, 545 U.S. at 498.
\textsuperscript{217} See generally id.
\textsuperscript{218} See \textit{Times Topics}, supra note 2.
\textsuperscript{219} \textit{The Questionable Economics of the Keystone XL Pipeline}, supra note 175.
\textsuperscript{220} \textit{The Questionable Economics of the Keystone XL Pipeline}, supra note 175; \textit{Exporting Energy Security}, supra note 190, at 1; \textit{Undermining U.S. Energy}, supra note 189 at 1.
\textsuperscript{221} \textit{CRS Keystone XL: Key Issues}, supra note 4, at 1.
\textsuperscript{222} See \textit{Kelo}, 545 U.S. at 477.
\textsuperscript{223} See \textit{Kelo}, 545 U.S. at 477-79.
\textsuperscript{225} Id. (citing to Plaintiff’s Response to Defendants’ Exceptions to the Commission Report, \textit{available at} http://big.assets.huffingtonpost.com/transcanada_response.pdf).
\textsuperscript{226} See Plaintiff’s Response, supra note 225; \textit{Kelo}, 545 U.S. at 477.
jobs, and decreasing U.S. dependence on foreign oil. However, as previously analyzed in Subsection B(ii), those three benefits are misleading, if not verging on the line of fraudulent, and as such, do not warrant a public purpose.

Second, TransCanada stated that the financial impact of $20.931 billion on the United States and $1.224 billion on Oklahoma render it a public purpose. While that surely would be a large amount of money spent, a private company spending a large amount of money by itself does not constitute a public purpose. The Supreme Court specifically stated that “the mere pretext of a public purpose, when actual purpose was to bestow a private benefit” does not warrant exercise of the eminent domain power. While the Supreme Court did extend the exercise of eminent domain in Kelo to include “economic development plan[s],” Keystone XL does not equate to an economic development plan. TransCanada is not an extension of the public in the form of a locality or community improvement society. TransCanada is a private oil company looking to extend its existing Keystone pipeline network in an effort to make more profits. Further, TransCanada argued that the tax revenue from spending should be considered a public purpose, and this is true, to an extent. However, tax revenue has not been held solely as grounds for eminent domain. If that were what the Framers intended, then they would have simply placed a price tag on individuals’ property rights. Also, in TransCanada’s case they have previously not delivered on their promised tax benefits. “In its first year of operation, Keystone I generated less than half of the $5.5 million [projected] in Nebraska, and only a third of the estimated $9 million in state property taxes for South Dakota.” Thus, even if tax revenue were a public purpose, it should not be given much weight in light of TransCanada’s history.

Third, TransCanada states that Keystone XL will “alleviate the systematic lack of pipeline” and render more oil to refineries in

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227. Plaintiffs Response, supra note 225, at 7-12.
228. See supra Section II(B)(ii).
230. See U.S. CONST amend. V.
231. Kelo, 545 U.S. at 477.
232. Id. at 490, 477-81.
234. Id.
237. See generally U.S. CONST amend. V.
239. Id.
240. See id.
Oklahoma and the United States.\textsuperscript{241} While this is inherently true, the construction of an oil pipeline will create more pipe and more oil; this does not demonstrate a public purpose.\textsuperscript{242} Allowing TransCanada and other oil companies the opportunity to access more fossil fuels at a more efficient rate is not fulfilling a public ambition or public function.\textsuperscript{243} Oil pipelines and the profits they render are solely that of the company.\textsuperscript{244} Even if the oil industry were in dire need of oil pipelines or oil for refineries, Keystone XL would not satisfy a public purpose.\textsuperscript{245} As Supreme Court Justice Clarence Thomas eloquently stated, "[t]he Framers embodied that principle [private property rights] in the Constitution, allowing the government to take property not for 'public necessity', but instead for 'public use.'"\textsuperscript{246} Further, if viewed from an environmental standpoint, the increased processing of oil would do the exact opposite of serving a public purpose by increasing an already existing public problem—GHG emissions and U.S. dependence on fossil fuels.\textsuperscript{247}

ii. It Just Feels Wrong

The current process by which TransCanada is granted the authority to exercise the power of eminent domain by the states is unsuitable and inequitable.\textsuperscript{248} Unlike natural gas pipelines, "oil pipelines lack the federal eminent domain authority and federal preemptive rights that accompany the FERC [Federal Energy Regulatory Commission] natural gas certificate process."\textsuperscript{249} When an oil pipeline is sited to cross over multiple states, as Keystone XL is, the eminent domain authority is made up from a "patch work" of differing state laws.\textsuperscript{250} As a result, "[s]ome states grant eminent domain authority to all pipelines, some to pipelines that are public utilities, some only to crude pipelines, and some provide no eminent domain authority at all."\textsuperscript{251} Most of the states that Keystone XL will pass through have sweeping statutes,\textsuperscript{252} which seemingly guarantee any potential oil company the

\textsuperscript{243} See generally U.S. CONST amend. V.; Kelo, 545 U.S. at 477-90.
\textsuperscript{244} See Times Topics, supra note 2.
\textsuperscript{245} See U.S. CONST amend. V.; Kelo, 545 U.S. at 477-90.
\textsuperscript{246} Kelo, 545 U.S. at 505 (Thomas, C. dissenting).
\textsuperscript{247} Exporting Energy Security, supra note 190, at 1; Cherry, supra note 1, at 133.
\textsuperscript{248} See infra Section II(C)(ii).
\textsuperscript{249} Christopher J. Barr, Growing Pains: FERC's Responses to Challenges to the Development of Oil Pipeline Infrastructure, 28 ENERGY L.J. 43, 49 (2007).
\textsuperscript{250} Id. at 50.
\textsuperscript{251} Id.
\textsuperscript{252} See id.
power of eminent domain.\textsuperscript{253} In Texas, all that TransCanada needed to do to obtain the authority to exercise the power of eminent domain was to “check the box” of the T-4 form that is filed with the Texas Railroad Commission.\textsuperscript{254} A property owner in Texas fought this process and the lack of public use in TransCanada’s proposal for Keystone XL.\textsuperscript{255} The trial judge from the Larmar County Court of Texas, stated that the Railroad Commission of Texas is the only independent authority judging whether TransCanada’s pipeline was public or private, and the Railroad Commission seemingly did nothing to investigate a claim of “public use” on the T-4 form.\textsuperscript{256} However, the case in Texas is the exception, not the rule for the rest of the Nation.\textsuperscript{257} Other states that Keystone XL is sited to go through only require TransCanada to fit within the definition of “oil pipeline” of the already existing laws, and then it would be entitled to eminent domain power.\textsuperscript{258}

This systematic application of the eminent domain power should not be exercised for two reasons. First, the speed and efficiency of a statute that outlines which oil companies are allotted eminent domain should not come at the cost of individuals’ property rights.\textsuperscript{259} Second, as is the case with Keystone XL, not all oil pipelines are created equal.\textsuperscript{260} As previously stated, Keystone XL is transporting tar sands, not conventional oil, and poses a substantial risk to the environment.\textsuperscript{261} Not only is the refining of tar sands worse for the environment than conventional oil, but experts have stated that the safety guidelines for traditional oil pipelines should not be attributed to tar

\begin{itemize}
\item \textsuperscript{253} See \textit{id.}.
\item “According to information in the \textit{Texas Supreme Court case Texas Rice Land Partners; Ltd. and Mike Latta V. Denbury Green Pipeline-Texas, LLC} the TRC hasn’t denied a single T-4 permit up to 2008.” \textit{Id.} See also \textit{Matt Sledge, Keystone XL Pipeline: Texas Farmer Wins Temporary Restraining Order Against TransCanada, HUFFINGTON POST}, http://www.huffingtonpost.com/2012/02/14/keystone-pipeline-restraining-order_n_1277615.html (last updated Feb. 15, 2012).
\item \textsuperscript{256} \textit{Id.}
\item \textsuperscript{257} \textit{Id.}
\item \textsuperscript{258} Zeller, \textit{supra note 224}; \textit{See OKLA. STAT. ANN. tit. 52, § 60} (West 2012).
\item \textsuperscript{260} \textit{See Contamination Clockwork, supra note 151, at 2; Comment to Dep’t. of State, supra note 156, at 9.}
\item \textsuperscript{261} \textit{See Contamination Clockwork, supra note 151, at 2; Comment to Dep’t. of State, supra note 156, at 9.}
\end{itemize}
sands pipelines.\textsuperscript{262} In summary, it is troubling how a private oil company such as TransCanada can obtain the power of eminent domain with such ease and lack of oversight.

Setting aside the problems with the permitting process and lack of public use associated with Keystone XL, the state should not be condemning land on the presumption that TransCanada's Keystone XL pipeline will receive the presidential permit.\textsuperscript{263} If Keystone XL does not receive the presidential permit, it will not operate and if it does not operate, TransCanada has absolutely no public use that could justify the need to exercise eminent domain.\textsuperscript{264} A private company should not be able to obtain the power of eminent domain on a conditional basis.\textsuperscript{265} This is not to say that eminent domain powers can only be given on the absolute certainty that a public use will be fulfilled, because almost nothing can be proven with absolute certainty. However, the power of eminent domain should not be exercised when there are repudiatory hurdles that must be overcome prior to receiving assurance of success.\textsuperscript{266}

In the case of Keystone XL, this does not mean that TransCanada must wait until the last possible stage of their project to start acquiring the land they need because that would be illogical and inefficient. It only means in the few instances in which TransCanada will have to utilize the power of eminent domain, it should wait until there is a reasonable certainty that the pipeline will actually be built.\textsuperscript{267} According to TransCanada, they already have rights to over eighty-five percent of the total land Keystone XL is sited to cross.\textsuperscript{268} While eminent domain proceedings may expose the company to time in the courtroom, that little time is nothing in comparison to upholding the fundamental rights of property ownership.\textsuperscript{269}

III. CONCLUSION

The importance of the Keystone XL controversy is not solely based on the arguments being voiced from either the proponents or opponents. The Keystone XL controversy is the culmination of how the
United States as a whole deals with the disagreement. Both sides of the controversy voice their opinions, both sides pick apart the opposing argument looking for weaknesses, both sides use those weaknesses to denounce the other, both sides make amends, and the process starts all over again until there is a clear winner. In the case of the Keystone XL controversy, it cannot be said whether a clear winner has been decided. As such, arguments in opposition to Keystone XL must continue to be rendered.

The Keystone XL pipeline would be the largest oil pipeline in North America, an incredible feat for both the U.S. and Canada. However it is not what the U.S. needs now or in the future. The Keystone XL pipeline will render irreparable damage to the environment, TransCanada's authority to obtain and utilize the power of eminent domain is unjust, and the mandatory permitting process currently in place is illegitimate. While it cannot be determined whether the Framers predicted controversy such as this, it is surely the case that they would not have wanted an oil pipeline with such adverse affect on our Nation and its citizens to be constructed.

270. Times Topics, supra note 2.
271. Times Topics, supra note 2.
272. Supra Section II(A).
273. Supra Section II(B).
274. Supra Section II(C).