

# Intelligence MEMOS



From: Kristen van de Biezenbos and James W. Coleman

To: Keystone XL Observers

Date: December 8, 2020

Re: **YES HE CAN: JOE BIDEN'S POWER TO STOP PIPELINES**

On January 20, 2021, the United States will inaugurate Joe Biden as its 46<sup>th</sup> President and energy investors and policymakers will be closely watching his first actions in office – particularly his approach to important pipeline projects such as the embattled Keystone XL (KXL).

President-Elect Biden has long-opposed the pipeline. In May, he [promised](#) to “stand proudly in the Roosevelt Room again as president, and stop it for good by rescinding the Keystone XL pipeline permit.”

Commentators have questioned presidential authority to rescind an existing permit for a cross-border pipeline – specifically the presidential permit for KXL. However, the president’s authority to revoke a cross-border pipeline permit is absolute and, though TC Energy might have recourse for damages, Mr. Biden will have full discretion to cancel the permit once he assumes office.

Although Donald Trump granted KXL a permit to operate a pipeline crossing the Canada-US border in 2019 and TC Energy has already completed this border crossing, the [permit](#) itself states that it “may be terminated, revoked, or amended at any time at the sole discretion of the president.” When the permit is revoked, the company must remove the installed pipeline “at its own expense ... within such time as the president may specify.” Since 1968, presidents have been asserting that they have the discretion to approve or deny pipeline border crossings based on their judgment of the “national interest” and Congress has never passed any law setting firmer standards for this decision.

The history of the KXL pipeline demonstrates that presidents’ unfettered authority over border can lead to fickle policy. The pipeline was reviewed by Barack Obama’s State Department for seven years. It ultimately concluded the pipeline would actually [decrease](#) greenhouse gas emissions because any oil that would travel by the pipeline would still be produced and would then be transported by rail, which emits more greenhouse gas than pipelines. Despite this analysis, Mr. Obama used his discretion to deny the pipeline because even if it would actually reduce global greenhouse gas emissions, he said it would be “perceived as enabling further” emissions.

The presidential power to issue executive orders and proclamations does not appear in the Constitution, nor is it the result of a particular piece of legislation. Rather, the validity of executive orders comes from the president’s position as head of the Executive Branch, and the underlying constitutional authority to do what is ordered by way of the executive order or proclamation. Because executive orders that do have the force of Article II powers or congressional imprimatur behind them are considered law, they are subject to judicial review. This means federal courts can hear constitutional challenges to the substance of an executive order, and may invalidate an order that exceeds the executive’s authority.

Since the executive order comes from the power of the president instead of a particular president, Mr. Biden will be able to use his own executive authority to withdraw the Trump order once he assumes office in January. There is no limit on his ability to do so, either from Congress or in the Constitution. It is possible that he may choose not to, most likely due to overtures from Prime Minister Trudeau and possible assurances from Canada on carbon emissions, but his right to do so is not in doubt.

Assuming that Mr. Biden delivers on his promise to stop the pipeline, TC Energy and its investors will be left with the prospect of suing to reverse this decision or receive compensation. When the Obama administration rejected the pipeline in late 2015, the company, then known as TransCanada, filed a lawsuit in federal district court and a notice of intent to submit a claim to arbitration under NAFTA. The lawsuit, which was voluntarily dismissed when the project received a permit, claimed that the executive does not have authority to reject a cross-border pipeline. But even if TC Energy filed and won a similar suit today, the pipeline might still require federal permits for water crossings along its route, which the Biden administration could deny. A NAFTA (or CUSMA) claim, by contrast, would only provide compensation – it would not allow TC Energy to complete the pipeline.

TC Energy’s previous claim requested \$15 billion in compensation and a new claim would likely ask for even more. NAFTA arbitrators have never approved an award against the United States, but the facts of the KXL saga certainly would make this a unique case for them.

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