

The journey of California's proposed delta tunnels project (also known as California WaterFix) has been anything but straightforward and already faces [a slew of ongoing legal challenges](#).<sup>[i]</sup> Last week, Congress added a different kind of twist when the proposed Department of Interior budget for FY 2019 [was introduced in the House Appropriations Committee](#). The relevant language is found in [Section 437](#), on the second-to-last page of the bill draft:

Notwithstanding any other provision of law, the Final Environmental Impact Report/Final Environmental Impact Statement for the Bay Delta Conservation Plan/California Water Fix ... and any resulting agency decision, record of decision, or similar determination shall hereafter not be subject to judicial review under any Federal or State law.

Let's break that paragraph down. The provision clearly takes direct aim at judicial review under both the National Environmental Policy Act (NEPA)<sup>[ii]</sup> and California Environmental Quality Act (CEQA).<sup>[iii]</sup> Section 437 adds that "*any* resulting agency decision, record of decision, or similar determination shall hereafter not be subject to judicial review under *any* Federal or State law."<sup>[iv]</sup> This sentence might be read in two ways – as only preventing review of NEPA and CEQA determinations, or as barring all WaterFix lawsuits, regardless of their basis. Either way, Section 437 presents an interesting question of just how far Congress's jurisdiction stripping powers go.

### **What is jurisdiction stripping?**

In its simplest form, jurisdiction "refers to a court's adjudicatory authority."<sup>[v]</sup> Essentially, jurisdiction "is the power to hear and determine the controversy presented, in a given set of circumstances."<sup>[vi]</sup> If a court determines that it lacks jurisdiction to hear a case, it must dismiss the case.<sup>[vii]</sup>

"Jurisdiction stripping" refers to the Congressional power to restrict the jurisdiction of the courts. The power is derived from Article III, Section 1 of the U.S. Constitution, which states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>[viii]</sup> Accordingly, lower federal courts are courts "of limited jurisdiction, possessing 'only that power authorized by Constitution and statute.'<sup>[ix]</sup> Since Congress possesses the power to create lower federal courts and establish their respective jurisdictional powers, by implication, it also holds the power to withdraw jurisdiction.<sup>[x]</sup> And, of course, if the lower

federal courts lack jurisdiction to hear a particular matter, the Supreme Court does as well (the caveat being issues which invoke the original jurisdiction of the Supreme Court).[xi]

Yet, while Congress may strip jurisdiction from the federal courts, its power to do so is not unlimited. As I discuss below, the limits of Congress's ability to strip jurisdiction from the courts remain complicated and are often determined on a case-by-case basis.

### **Does Section 437 effectively strip federal courts of the ability to hear cases challenging WaterFix under federal law?**

**Probably.** As mentioned above, pursuant to Article III, Congress may define the jurisdictional boundaries of the lower federal courts. However, "[t]he separation of powers ... prevents Congress from exercising the judicial power" itself.[xii] Therefore, the key question in jurisdiction stripping cases is whether Congress's activities cross the line "between permissible exercises of the legislative power and impermissible infringements of the judicial power." [xiii] To decide whether Congress has crossed this line, the Supreme Court has developed a test: "Congress violates Article III when it 'compel[s] ... findings or results under old law. But Congress does not violate Article III when it 'changes the law.'" [xiv]

The clearest example of Congress impermissibly compelling a particular finding or result would be a hypothetical law that states "[i]n [the case of] *Smith v. Jones*, Smith wins." [xv] However, the distinction between compelling a particular result and merely changing the law is often not so clear cut. For instance, in *Patchak v. Zinke*, an owner of land adjacent to a parcel recently taken into trust by the Secretary of the Interior challenged the Secretary's authority to do so under the Administrative Procedures Act (APA). Congress responded by passing the Gun Lake Act, including Section 2(b) which declared, in part, the following: "Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described ... shall not be filed or maintained in a Federal court and shall be promptly dismissed." [xvi] The Supreme Court upheld this provision, stating that it changed the law by stripping jurisdiction over all lawsuits related to the parcel in question. [xvii]

In this instance, Section 437 doesn't direct the federal courts to decide the merits in any particular way on a NEPA claim concerning WaterFix. Instead, like *Patchak*, it changes the law by redefining the jurisdiction of the federal courts themselves. Therefore, Section 437 would likely prevent federal courts from hearing NEPA and other federal law challenges to WaterFix.

### **Does Section 437 prevent federal law challenges from being brought in state court?**

**Maybe.** State courts may, of course, hear federal claims.[xviii] However, Congress may restrict state courts' ability to hear certain federal claims "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." [xix]

Here, Section 437 arguably does not explicitly withdraw jurisdiction from state courts. § 437 only states that agency determinations regarding WaterFix "shall hereafter not be subject to judicial review under any Federal or State law." The provision does not explicitly declare that state courts cannot hear NEPA and other challenges under federal law to WaterFix. Absent an explicit statement or supporting legislative history showing otherwise, the default would be to assume that Congress only intended to restrict federal courts from hearing challenges to WaterFix.

Notably, even if Congress *did* intend to strip jurisdiction from both state and federal courts to hear federal law challenges to WaterFix, such a provision would not prevent the courts from hearing a due process or Fifth Amendment takings claim. In *Battaglia v. General Motors Corporation*, the Second Circuit dealt with a provision of the Portal-to-Portal Act which barred *both* federal and state courts from hearing specific claims under the Act. The Second Circuit reasoned that "while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation." [xx] *Battaglia* suggests that if challengers to WaterFix assert a due process or Fifth Amendment takings claim, such a claim would not be barred by Section 437.

### **Does Section 437 prevent CEQA or other state law challenges from being brought in state court?**

**Probably not.** While Congress may prevent state courts from hearing federal claims, it cannot prevent state courts from hearing claims based in state law. Congress did not create the state courts; therefore it cannot restrict state jurisdiction over state law claims.[xxi] Here, Section 437 declares that agency decisions concerning WaterFix (including under CEQA) "shall hereafter not be subject to judicial review under any ... State law." While this provision might prevent federal courts from hearing WaterFix state law claims, it likely does not prevent California state courts from hearing state law claims challenging the proposal.

## What happens next?

Currently, the FY 2018 Interior appropriations bill is in front of the [House Appropriations Committee for markup](#). It was scheduled for a hearing on May 22, but was rescheduled. If the bill passes with Section 437 attached, it will be up to the courts to wrestle with defining the provision's actual effect on the WaterFix lawsuits.

Regardless of the contours of Section 437, there is no doubt that it will prevent courts from hearing at least some challenges to WaterFix. Whether such a tactic is fair, however, remains squarely in the court of public opinion.

[I] So far, 25 lawsuits have been filed against the project. Michael Doyle and Amanda Reilly, *Congress learning to padlock courthouse door*, E&E News, May 21, 2018. Available at <https://www.eenews.net/stories/1060082265>.

[ii] "Final Environmental Impact Statement" refers to NEPA. See 42 U.S.C. § 4332.

[iii] "Final Environmental Impact Report" refers to CEQA. See Cal. Pub. Res. Code § 21061.

[iv] (emphasis added).

[v] *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160 (2010) (citing *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)).

[vi] *In re N.L.R.B.*, 304 U.S. 486, 494 (1938).

[vii] *Id.*

[viii] U.S. Const. Art. III, § 1.

[ix] *Beshir v. Holder*, 10 F. Supp. 3d 165, 170 (D.D.C. 2014) (citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994)).

[x] *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1938).

[xi] U.S. Const., Art. III, § 2.

[xii] *Patchak v. Zinke*, 139 S. Ct. 897, 905 (2018).

[xiii] *Id.*

[xiv] *Id.* (internal citations omitted).

[xv] *Id.* at 905.

[xvi] *Id.* at 904.

[xvii] *Id.* at 908.

[xviii] “The Supreme Court has ‘consistently held that state courts have inherent authority, and are presumptively competent to adjudicate claims arising under the laws of the United States.” *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

[xix] *Id.* at 460 (citing *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)).

[xx] *Battaglia v. General Motors Co.*, 169 F.2d 254, 257 (2d Cir. 1948).

[xxi] State courts may, of course, refuse to hear a case based on the abstention doctrine.