

EXECUTIVE BRANCH FORUM SHOPPING

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INTRODUCTION

Courts agree that the federal government may not seize a person in the United States and immediately ship them off to a prison in another country without providing any opportunity for judicial review.¹ But this basic constitutional rule has proven difficult to enforce in court. The challenge comes not only from a defiant Executive Branch, secret orders, and midnight transfers, but also defense-side agency forum shopping.² As soon as the Supreme Court held that challenges to designation and removal under the Alien Enemies Act must be brought in the district of confinement,³ the federal government moved detainees away from districts issuing protective orders to districts that have declined to act,⁴ necessitating a dramatic late-night intervention from the Supreme Court.⁵

This story is an especially vivid example of defense-side Executive Branch forum shopping, a phenomenon that has gone largely unnoticed and unstudied.⁶ Defense-side Executive Branch forum shopping refers to

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1. *E.g.*, *Trump v. J.G.G.*, 145 S. Ct. 1003, 1006 (2025).

2. *See infra* notes 41–48 and accompanying text.

3. *Id.*

4. Jeremy Roebuck & Marianne LeVine, *ICE Moves Detainees to Texas Facility Where Judge Declined to Halt Deportations*, WASH. POST (May 9, 2025), <https://www.washingtonpost.com/politics/2025/05/09/texas-bluebonnet-deportations-venezuelan-transfers/> [<https://perma.cc/3RNM-AA5L>].

5. *A.A.R.P. v. Trump*, 145 S. Ct. 1364, 1366–67 (2025).

6. There is a more robust literature around *Congressional* forum selection choices, but little attention is paid to the role that agencies can play in prescribing the eventual forum. *E.g.*, Amy L. Stein, *Administrative Forum Shopping*, 93 FORDHAM L. REV. 1697 (2025); Adam S. Zimmerman, *The Class Appeal*, 89 U. CHI. L. REV. 1419 (2022); William Ortman, *Rulemaking's Missing Tier*, 68 ALA. L. REV. 225, 226 (2016); Joseph

an Executive Branch agency, such as the Department of Homeland Security, changing how it acts for the purpose of manipulating the specific forum in which a litigant can bring a challenge. Although largely ignored in the literature, the phenomenon has caught the attention of the Supreme Court, which recently curtailed the ability of the Environmental Protection Agency to control the venue in which Clean Air Act challenges would lie.⁷ This is a specific example of another, also largely unstudied phenomenon of defense-side forum shopping. Although we typically think of forum shopping as the province of the plaintiff, there are many instances in which defendants can control, to some extent, the forum in which challenges can be brought.

In this essay, I suggest that defense-side forum shopping in general, and Executive Branch forum shopping in particular, warrants greater attention.⁸ I first explain what forum shopping is and the rules of jurisdiction, venue, and procedure that allow it to exist. I then explain how Executive Branch forum shopping comes about, and how courts have responded to it. The Supreme Court in particular has been hostile to interpretations of federal law that allow agencies to manipulate which court will review their actions. Finally, I argue that defense-side Executive Branch forum shopping raises different and potentially more serious concerns than forum shopping by the plaintiff, and I suggest that Congress draft jurisdictional statutes with these concerns in mind.

I. BASICS OF FORUM SHOPPING

Forum shopping—a litigant choosing a court not for convenience, but for more favorable judges or precedent—is typically thought of as something that plaintiffs primarily do.⁹ The plaintiff is the author of their complaint, and has latitude to craft their complaint (and, to some extent, choose the parties to the lawsuit) to get it to the forum of their choice.¹⁰ For example, federal and state courts have overlapping subject matter jurisdiction, and a plaintiff with a viable federal claim can choose to bring their lawsuit in federal or state court. A plaintiff with only state law claims

Mead & Nicholas Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 7–9 (2015); David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 57 (1975).

7. *Env't Prot. Agency v. Calumet Shreveport Refin., L.L.C.*, 145 S. Ct. 1735, 1748 (2025).

8. This essay does not discuss federal government litigation choices, although federal litigators also have sway over forum by advancing aggressive interpretations of jurisdiction-limiting provisions, seeking transfer, or choosing to forfeit venue challenges.

9. Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 553–557 (1989).

10. *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002).

may be injured by multiple defendants, some of whom might defeat the complete diversity required for federal court subject matter jurisdiction, so if the stakes are high enough, the plaintiff can decide whether the suit will be litigated in federal or state court based on which defendants are named.¹¹ Indeed, one of the “twin aims of the *Erie* rule” that incorporates state law into federal litigation is “discouragement of forum-shopping” by minimizing the differences between federal and state courts in diversity lawsuits.¹²

Even within the federal courts, liberal rules of venue often provide plaintiffs with a range of choices where a lawsuit can be brought.¹³ Unless curtailed by statute in a particular instance (of which there are many),¹⁴ the default venue rules allow litigation against a federal officer or agency to be brought in any federal district court where any defendant resides *or* where any plaintiff resides.¹⁵ Thus, a lawsuit challenging an agency decision can, but need not, be brought in the district where the agency is located, and it can also be brought where any plaintiff lives. In many lawsuits challenging agency decisions, there are many plaintiffs from all over the nation who want to bring suit. A lawyer representing these clients thus has several courts available in which they can file the suit, and can choose the one that best furthers the clients’ goals.

The propriety of forum shopping is subject to some debate,¹⁶ but it is an inevitable part of our system to some extent.¹⁷ There are very real costs of forum shopping, but there are significant costs to restricting fora as well. Restricting forum choices could pose substantial barriers to plaintiffs’ access to the courts, potentially forcing them to litigate in a distant

11. Assuming, of course, that there is a good faith basis for the assertion. It would both violate the rules, *see* FED. R. CIV. P. 11(b)(2), and be unethical to include a claim or a defendant that a party lacks a good faith basis to assert, *see* MODEL RULES OF PROFESSIONAL CONDUCT r. 3.1 (AM. BAR ASS’N 2025). These are foundational rules to our profession, and anyone who forum shops in violation of these rules casts a pall on all of us.

12. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965); *see also* Scott Dodson, *The Culture of Forum Shopping in the United States*, 57 INT’L L. 307, 315 (2024).

13. 28 U.S.C. § 1391(b), (c).

14. *See infra* notes 29–31, 66.

15. § 1391(e).

16. Compare Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1530 (1995), and Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIA. L. REV. 267 (1996), with Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 80 (1999).

17. It is vital to distinguish between forum shopping (choosing a particular court) and judge shopping (manipulating the system to specify the *particular judge* in a lawsuit). The former may be tolerated, but the latter is nearly universally condemned. Joseph W. Mead, *Ending Judge-Shopping in Cases Challenging Federal Law*, YALE J. ON REGUL. (March 18, 2024), <https://www.yalejreg.com/nc/ending-judge-shopping-in-cases-challenging-federal-law-by-joseph-mead/> [https://perma.cc/E2G3-RWGM]; Norwood, *supra* note 16, at 268.

courthouse at considerable expense. Consider, for example, if every person challenging the action of the federal government had to hire a lawyer able to practice in the District of Columbia, and travel to DC for whatever court conferences are required.¹⁸ That would pose a severe burden on individuals seeking redress of grievances in other parts of the country.¹⁹ To be sure, these concerns of convenience have considerably less force when the plaintiff is a large institutional litigant, such as a national organization or a state.²⁰ But the benefits of providing broad access to the courts tolerates, at least to some extent, forum shopping.²¹

Often, debates around forum shopping focus on the plaintiff.²² Indeed, courts routinely give weight to the plaintiff's choice of forum as presumptively valid.²³ But that only tells part of the story. Less frequently acknowledged is that defendants also forum shop, although typically less so than plaintiffs. For example, a defendant facing a lawsuit in state court that includes a federal claim (or that otherwise could have been brought in federal court) can usually remove the case to federal court, choosing that forum over the plaintiff's choice.²⁴ A defendant can also contract with customers to include a forum selection clause that forces litigation into a particular court.²⁵ Even more drastically, a defendant can move its

18. See JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10856, WHERE A SUIT CAN PROCEED: COURT SELECTION AND FORUM SHOPPING 4-5 (2024), https://www.congress.gov/crs_external_products/LSB/PDF/LSB10856/LSB10856.3.pdf [<https://perma.cc/7JAS-K7S5>].

19. Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242, 250 (2017).

20. See *In re Chamber of Com. of U.S.*, 105 F.4th 297, 305-7 (5th Cir. 2024) (The U.S. Chamber of Commerce and various business associations brought a challenge in the Northern District of Texas against an agency regulation capping late fees for credit card users.). Although it often can be difficult to distinguish between forum shopping for strategic reasons, rather than forum selection for neutral reasons, this was an unusually clear case of the former, as it appeared that no credit card issuer was physically based in the district subject to the rule challenged. David Dayen, *Chamber Takes an L on Egregious Judge Shopping*, THE AM. PROSPECT (Mar. 29, 2024), <https://prospect.org/2024/03/29/2024-03-29-chamber-of-commerce-egregious-judge-shopping/> [<https://perma.cc/3Z6V-YTEA>]. There was no plausible convenience advantage to the Chamber to litigate in the Northern District of Texas.

21. *In re Chamber of Commerce of the U.S.*, 105 F.4th at 302-03.

22. E.g., Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1678 (1990).

23. *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 62 n.5 (2013).

24. 28 U.S.C. § 1441.

25. *Atl. Marine Const. Co.*, 571 U.S. at 62 ("When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause."). A defendant can also raise convenience challenges to venue that are function as defense-side forum-shopping. *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 75 (2d Cir. 2001) ("Courts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the

headquarters or place of incorporation to channel litigation to a particular forum.²⁶ For example, a newly invigorated personal jurisdiction doctrine may sometimes require a group of plaintiffs who wish to litigate together to litigate only where there is general personal jurisdiction over a defendant, and the defendant can prescribe the court where general personal jurisdiction exists by deciding where to incorporate.²⁷ These and other ways that defendants can influence forum choices should be part of the conversation whenever forum shopping is discussed.

II. EXECUTIVE BRANCH FORUM SHOPPING IN PRACTICE

Choosing the correct forum for suing the Executive Branch is a particularly fraught endeavor. Congress has considerable power to create, condition, and limit the jurisdiction of the lower federal courts, including the power to determine in which court challenges to agency decisions can be brought.²⁸ This gives Congress wide latitude to channel challenges to agency actions into the forum that it believes will best effectuate the relevant congressional purpose.²⁹ District courts have default federal question jurisdiction to review agency decisions,³⁰ but Congress has conditioned and divided jurisdiction to review agency decisions in a myriad of ways, stripping jurisdiction over some, and channeling other cases to a court of appeals, and sometimes directing cases to specific courts.³¹

Throughout the past several months, the significance of Congress's jurisdictional choices (or, at least as statutory language is understood by the federal courts) has been outcome determinative more than once. The pattern is that a seemingly (or even blatantly) unlawful Executive Branch action is challenged in court and held to be unlawful, but ultimately the

doctrine of *forum non conveniens* not because of genuine concern with convenience but because of similar forum-shopping reasons.”).

26. Benjamin Wermund, *Elon Musk Moved Tesla and SpaceX to Texas. They Could Test the State's New Business Courts*, HOUS. CHRON. (Sep. 17, 2024), <https://www.houstonchronicle.com/politics/texas/article/elon-musk-greg-abbott-texas-business-courts-19758096.php> [<https://perma.cc/FAF7-X3QJ>].

27. See, e.g., *Bristol-Myers Squibb Co. v. Super. Ct. of California, S.F. Cnty.*, 582 U.S. 255, 258, 262 (2017).

28. E.g., *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 185 (2023) (“A special statutory review scheme, this Court has recognized, may preclude district courts from exercising jurisdiction over challenges to federal agency action. . . . But Congress [] may do so implicitly, by specifying a different method to resolve claims about agency action.”).

29. Jonathan R. Siegel, SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES 51–58 (2021), <https://www.acus.gov/sites/default/files/documents/ACUS-Sourcebook-of-Federal-Judicial-Review-Statutes.pdf> [<https://perma.cc/5354-U998>].

30. 28 U.S.C. § 1331.

31. Siegel, *supra* note 29.

challengers are unable to obtain enduring relief because a higher court determines that the challenge can only be brought elsewhere.³² Saying that a case must be brought in a particular court can sometimes have dramatic effects on the outcome: it can change the applicable precedent, which procedural rules apply, the scope of remedies, and more.

There are very real costs to jurisdictional ambiguity. A party can litigate for years only to discover that they were in the wrong court and thus everything is wiped out. Or parties (and judges) can spend enormous energy trying to resolve which court the lawsuit should be brought in. Jurisdictional rules should be clear, and anything that changes the scope of where a case can be brought should be defined as neutrally and simply as possible: bright lines are best.³³ But those are not always the lines drawn by Congress.

Consider, for example, a constitutional challenge to an agency rule that was initially filed in a district court.³⁴ Unfortunately for the plaintiffs, there was a direct review provision that channeled challenges to agency “orders” to the court of appeals, and required that such challenges be brought within 60 days of the order.³⁵ The plaintiffs complained that a challenge to a “regulation” was not the same as an order,³⁶ but circuit precedent had attached a different meaning to those words.³⁷ As a result, the challengers had lost their ability to bring their constitutional challenge to the agency rule.³⁸

Because Congress has established such a complex jurisdictional morass to govern judicial review of agency action, agencies often can act strategically to implicate (or avoid) particular jurisdictional rules. This is most dramatic in the habeas context, as previewed in this essay’s opening paragraph.³⁹ After the Supreme Court held that challenges to many recent immigration seizures must be brought in a habeas suit *filed in the district of confinement*,⁴⁰ the Department of Homeland Security concentrated detainees in locations far away from their home.

32. See e.g., *Dep’t of Educ. v. Cal.*, 145 S. Ct. 966, 968 (2025).

33. *Env’t Prot. Agency v. Calumet Shreveport Ref., L.L.C.*, 145 S. Ct. 1735, 1762 (2025) (Gorsuch, J., dissenting) (“At the end of the day, venue rules are like traffic laws. They simply tell litigants where to go, and they should be easy to follow.”).

34. *N.Y. Republican State Comm. v. Sec. & Exch. Comm’n*, 799 F.3d 1126, 1128 (D.C. Cir. 2015).

35. *Id.* at 1129–1130.

36. The Administrative Procedure Act, for example, defines “order” to mean agency action “other than rulemaking.” 5 U.S.C. § 551(6).

37. *N.Y. Republican State Comm.*, 799 F.3d at 1130.

38. *Id.* at 1135.

39. See *supra* notes 1–5 and accompanying text.

40. *Trump v. J.G.G.*, 145 S. Ct. 1003, 1005–06 (2025) (quoting *Rumsfeld v. Padilla*, 542 U.S. 426, 443 (2004)).

For example, consider the Government's recent efforts to deny lawful permanent resident, Mahmoud Khalil, his ability to seek habeas relief near his home. Mr. Khalil was seized without warning from the streets of his home state of New York at 8:35 pm one evening, transferred to New Jersey at 2:00 am, and then sent to Louisiana a few hours later.⁴¹ According to the Government, this meant that the only habeas challenge could be brought in Louisiana.⁴² Remarkably, his attorneys somehow managed to file a habeas petition in the middle of the night within a matter of hours of his seizure, but, according to the Government, he had already been moved across state lines, making the petition improper in that venue.⁴³

The federal government's attempt to invoke the Alien Enemies Act and remove noncitizens without any opportunity for judicial review is an even more dramatic example of forum-shopping. The Supreme Court had clarified that individuals subject to removal from the United States under the Alien Enemies Act had a right to judicial review.⁴⁴ In response, individuals fearful of removal filed a class habeas petition in various districts, including the Southern District of Texas, which granted a class-wide temporary restraining order to everyone detained in the Southern District of Texas.⁴⁵ The Department of Homeland Security then moved individuals it planned to remove to the Northern District of Texas, which declined to issue a temporary restraining order.⁴⁶ In response, an ACLU attorney alleged that the federal government "was finding Venezuelan men, rounding them up and shipping them to the Northern District of Texas."⁴⁷ It would not matter how many other districts entered district-wide preliminary injunctive relief; the Department of Homeland Security's plan appears to be that it can avoid judicial review by housing detainees in the Northern District of Texas. Only an extraordinary late-night emergency injunction from the Supreme Court ensured that individuals would not be removed without appropriate notice.⁴⁸

These steps were extraordinary, but the Executive Branch's latitude to prescribe where challenges can be brought often takes a less dramatic form. Congress frequently prescribes particular jurisdictional rules for

41. Declaration of William Joyce ¶¶ 7–12, *Khalil v. Joyce*, 777 F. Supp. 3d 369 (D.N.J. 2025) (No. 2:25-cv-01963).

42. Respondents' Memorandum of Law in Support of Their Motion to Dismiss or to Transfer the Case at 3–9, *Khalil v. Joyce*, 777 F. Supp. 3d 369 (D.N.J. 2025) (No. 2:25-cv-01963).

43. *Id.*

44. *J.G.G.*, 145 S. Ct. at 1006.

45. *J.A.V. v. Trump*, 781 F. Supp. 3d 535 (S.D. Tex. 2025).

46. *A.A.R.P. v. Trump*, 778 F. Supp. 3d 882 (N.D. Tex. 2025), *appeal dismissed*, No. 25-10534, 2025 WL 1148141 (5th Cir. 2025), *cert. granted, judgment vacated*, 145 S. Ct. 1364 (2025).

47. Roebuck & LeVine, *supra* note 4.

48. *A.A.R.P. v. Trump*, 145 S. Ct. 1364 (2025).

particular types of agency decisions, which can allow agencies the opportunity to act in a particular way to implicate or avoid a particular court. However, the Supreme Court has been hostile towards the possibility of Executive Branch forum shopping, narrowly interpreting jurisdictional statutes in an effort to limit the ability of agencies to manipulate the forum where litigation will be brought.

Consider just a few examples. The Clean Air Act provides that challenges to “nationally applicable” EPA decisions must be brought in the D.C. Circuit, while regional decisions may be brought in the “appropriate” circuit.⁴⁹ The Clean Air Act further provides that the D.C. Circuit is the sole court to hear challenges to any “action [that] is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.”⁵⁰ Resolving a circuit split, the Supreme Court was troubled by the idea that the agency could have “unfettered control over venue,” speculating about the fear of agency “gamesmanship.”⁵¹ In response, the Court announced a new test for determining jurisdiction to review EPA decisions, which limited the power of the agency, and increased the power of courts, to decide where challenges could be brought.⁵²

Other judicial review provisions change forum based on whether an agency decision was based on particular statutory grants of authority, and agencies may have multiple authorities that might sustain an action.⁵³ Can an agency choose its court by citing (or not citing) a statutory provision that implicates a narrow review provision? The D.C. Circuit thought the answer was yes: “the statutory authority claimed by an agency will determine which courts have jurisdiction to review its actions.”⁵⁴ Although “[a]rguably, the FDA could have promulgated the regulation” under a statutory provision that would trigger direct review, there was no jurisdiction because the agency did not cite that statute.⁵⁵ In contrast, the Second Circuit thought that “although [the agency] failed to cite to the [specific statute] as the basis for its rulemaking authority, we believe the power to do so derives, if at all, from Congress’s general grant of authority” to the agency under that statute, thus triggering a direct review

49. 42 U.S.C. § 7607(b)(1).

50. *Id.*

51. *Env’t Prot. Agency v. Calumet Shreveport Ref., L.L.C.*, 145 S. Ct. 1735, 1748 (2025).

52. *Id.* at 1750.

53. *Soul Quest Church of Mother Earth, Inc. v. Att’y Gen.*, 92 F.4th 953 (11th Cir. 2023); *Avon Nursing & Rehab. v. Becerra*, 995 F.3d 305, 313 (2d Cir. 2021); *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004).

54. *Wellife Prod. v. Shalala*, 52 F.3d 357, 359 (D.C. Cir. 1995).

55. *Id.*

provision.⁵⁶ The Supreme Court eventually rejected the argument that an agency’s “passing invocation” of a statute “control[led] our interpretive inquiry” into the applicability of a direct review statute, at least when the statute did not purport to give the agency the power to act as it did.⁵⁷ Thus, the Court seemed to recognize the potential perils of agency forum shopping and declined to give weight to let the agency control jurisdiction in that particular case.

Despite the Supreme Court’s efforts to limit the Executive Branch’s latitude to select a forum, it is likely impossible to eliminate it completely, at least as long as Congress insists on providing specific jurisdictional rules for particular types of agency action. For example, Congress sometimes provides that challenges to regulations go directly to a court of appeals, but adjudications can be challenged in the district court, or vice versa.⁵⁸ The Administrative Conference of the United States recently encouraged Congress to channel challenges to agency rules directly to a court of appeals only when they are “promulgated using notice-and-comment procedures.”⁵⁹ Yet agencies often have wide discretion in whether they proceed by rulemaking, adjudication, or something else,⁶⁰ and are not necessarily required to proceed through notice-and-comment rulemaking.⁶¹ Thus, when jurisdictional rules depend on the nature of the agency action, the agency has the discretion of choosing its judicial forum by choosing the way in which it acts. Unless Congress prescribes one universal jurisdictional rule that applies to everything the Executive Branch does, there will be some potential for agencies to pick their reviewing court.

III. COMPARING OFFENSIVE AND DEFENSIVE FORUM SHOPPING

The stakes of judicial review of the Executive Branch can be enormous. As demonstrated by the federal government’s use of midnight transfers to try to avoid judicial enforcement of constitutional rights, the Executive Branch’s manipulation of forum options can have tremendous consequences for the rights of those in the United States. Most other circumstances are of a more benign valence, but the consequences to litigants and the judiciary can be substantial.

56. *Nat. Res. Def. Council*, 355 F.3d at 194.

57. *Nat’l Ass’n of Mfrs. v. U.S. Dep’t of Def.*, 583 U.S. 109, 124 n.8 (2018).

58. *Mead & Fromherz*, *supra* note 6, at 4.

59. Admin. Conf. of the U.S., Recommendation 2024-1, Choice of Forum for Judicial Review of Agency Rules, 89 Fed. Reg. 56276 (June 27, 2024) https://www.acus.gov/sites/default/files/documents/Choice-of-Forum-Adopted-Recommendation-2024.06.13_0.pdf [<https://perma.cc/FSY3-YKT4>].

60. *E.g., Sec. & Exch. Comm’n v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

61. *See* 5 U.S.C. § 553(a).

There are several reasons to be more skeptical of defense-side forum shopping, at least when conducted by the federal government. Plaintiff-side forum shopping in the federal courts typically involves exploiting rules of venue, and courts have discretion to transfer cases to a different venue if convenience, consolidation, or other interests favor it.⁶² Defense-side forum shopping, in contrast, often forces the plaintiff to litigate in a particular court by using *jurisdictional* rules to limit the range of courts in which a challenge could be brought.

Jurisdictional constraints often come with greater consequences than venue. For one, jurisdictional constraints remove judicial discretion to transfer the case to a more convenient forum. While venue constraints can be forfeited,⁶³ jurisdiction can be raised late into the litigation—even on appeal. A litigant who is unsure of which court to bring a suit in, or who guesses wrongly, could very well find themselves foreclosed by statutes of limitations.⁶⁴ Given these consequences, courts typically prefer clear jurisdictional lines.⁶⁵ Allowing an agency to influence the court’s jurisdiction muddies what should be clear rules.

Jurisdictional rules often have tremendous implications beyond which forum a case must be litigated in. Many statutes restricting or channeling challenges to specified agency decisions come with tight time limits—perhaps 30 or 60 days⁶⁶—while unchanneled agency challenges can take advantage of the relatively leisurely 6-year statute of limitations default rule.⁶⁷ Choosing the court can also mean choosing the statute of limitations that governs, which may foreclose late litigation altogether. Moreover, jurisdictional constraints can limit the scope of relief available to a litigant. Forcing a litigant to litigate in the Court of Claims, for instance, limits the type of relief available.⁶⁸ If an agency can manipulate where a case can be brought, it also can sometimes dictate substantive features of the litigation.

There are structural consequences for the judiciary as well. By limiting the range of courts that can weigh in on an issue—including, potentially, to just one court—the stakes of the first litigation become much more pronounced. If a litigant has a choice of several courts to challenge an agency policy, chooses poorly, and loses, that would

62. *E.g.*, 28 U.S.C. §§ 1404(a), 1407.

63. *See* FED. R. CIV. P. 12(h).

64. *See supra* notes 34–38 and accompanying text.

65. *See generally* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1 (2011).

66. *E.g.*, 28 U.S.C. § 2344.

67. 28 U.S.C. § 2401(a); *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 808 (2024).

68. *U.S. v. Tohono O’Odham Nation*, 563 U.S. 307, 313 (2011) (“[The Court of Federal Claims] has no general power to provide equitable relief against the Government or its officers.”).

generally not foreclose another similarly situated litigant from challenging the same policy in another court. The Supreme Court has praised the possibility of conflicting decisions as a virtue, allowing percolation of legal issues and generating circuit splits to highlight what issues warrant the Court's attention.⁶⁹ Allowing the agency to channel litigation into fewer courts poses a threat to both litigants' rights and to the decision-making structure of the judiciary.

CONCLUSION

Debates over the propriety of forum shopping—on either side of the “v”—will continue, but there is little doubt that forum shopping can have outcome-determinative consequences. No debate over forum shopping is complete if it only focuses on the plaintiff. Defense-side forum shopping by the Executive Branch can distort judicial review even more than similar selection tactics engaged in by challengers, and even foreclose effective judicial review altogether. The Supreme Court is appropriately skeptical of the Executive Branch having too much sway over which court will review agency decisions, and the late-night transfers by the Department of Homeland Security provide a vivid reminder of why such skepticism may be warranted. It is unlikely that Congress intends for the Executive Branch to be able to choose its reviewing court, and should keep the possibility of defense-side forum shopping in mind when drafting jurisdictional statutes.

69. *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984).