

State Supreme Courts are more likely to defer to executive branch agencies in states with institutionally powerful Governors

*State executive branch agencies can find their rules and regulations challenged in court, often leading to a state's Supreme Court having to rule on whether or not to uphold them. But can the decisions of a state's Supreme Court be influenced by a powerful Governor, who may try and resist either directly through reappointments, or indirectly through regulation? Using survey data from more than 2,200 state Supreme Court cases, **Gbemende Johnson** finds that Supreme Courts are more likely to rule in favor of executive branch agencies in states where the governor has increased institutional control over the entire executive branch structure. However, she also finds that Governors are unlikely to retaliate directly by changing judicial appointments, as they are likely to want to avoid very public institutional conflicts.*



Executive authority and judicial power have an interdependent relationship. Courts have the power to define the legality of executive policy; however, executives, such as governors and the president, are responsible for enforcing judicial rulings. Does executive power influence judicial decision-making? I attempt to answer this question by examining judicial decision-making in cases involving executive branch litigants. From a legal perspective, judges wish to make legally sound decisions that accurately reflect precedent and case facts.

However, from a strategic perspective, judges also want to make decisions that they know political officials, particularly executives, will enforce. My research finds evidence that state supreme courts are more likely to defer to executive branch agencies in states with institutionally powerful governors.

Similar to the president, state governors have a number of tools that allow them to control the state executive branch. To varying degrees, governors currently have the power to hire and fire personnel, reorganize executive branch structures, and issue executive orders. Arguably, the most important role of the governor is as the head of the state executive branch. State executive branch agencies issue a multitude of rules and regulations every year, and these agencies often find these policies and decisions challenged in court. State Supreme Courts must then decide whether to uphold the action of the state executive branch agency.

Court cases involving executive branch agencies are important to governors for many reasons. First, complying with judicial decisions targeted at the executive branch can be somewhat costly in terms of time, money, and effort officials must expend. In addition to tangible costs, aggressive judicial monitoring of executive branch activity potentially expands the reach of judicial power at the expense of the autonomy of the executive branch. Given the importance of executive branch litigation, I argue that state supreme courts will rule in favor of executive branch agencies in environments with powerful governors for two key reasons: to prevent gubernatorial enforcement resistance and to reduce the likelihood of gubernatorial retaliation.

Enforcement Resistance from Governors

Because others enforce their decisions, judges will sometimes behave strategically and consider how their decisions will be received by those in **power**. In response to unfavorable rulings, governors can direct bureaucrats to delay implementation of court rulings, or agencies can put forward rules or procedures that circumvent a court's holding. And this threat of enforcement resistance is heightened in environments with institutionally powerful governors. Specifically, scholars find that formal gubernatorial powers (i.e. appointment power, rule review authority) affect gubernatorial influence within the **executivebranch**. Governors who have increased formal control over the executive branch have institutional tools that not only aid them in retaining control over policy output, but also aid in resisting attempts by the judiciary to alter executive branch policy. Given the heightened threat of executive enforcement resistance in these environments, I expect state supreme court to show increased

deference in states where governors have more institutional control over the state executive branch.



New York County Supreme Court Credit: DennisinAmsterdam (Creative Commons BY SA)

Executive retaliation against judges

In addition to enforcement resistance, the threat of retaliation can also influence judicial behavior. In states where there is heightened gubernatorial influence over administrative policy, governors may perceive aggressive judicial intervention as not only a challenge to administrative policy, but also a challenge to the power of the executive. A direct way to retaliate against judges, available in the states, is to deny judicial reappointment. Specifically, in a small number of states, governors decide whether to retain appointed state Supreme Court justices. In these states, justices should show more deference to executive branch agencies in courts to prevent retention retaliation. Additional ways to retaliate against the judiciary include jurisdiction stripping, altering the size of the court, and reducing court staff and resources. For example, in some states governors have increased authority over the budget and can reduce the state budget without legislative [approval](#). Given the increased capacity of retaliation, I expect that state justices to show more deference to executive branch agencies in environments with institutionally powerful state executives.

To test my arguments, I used a sample of approximately 2,220 state Supreme Court cases involving executive branch agencies adjudicated between 1995 and 1998, taken from the [Brace and Hall Database](#). For the enforcement resistance argument, I measured gubernatorial appointment power across 15 types of executive branch agencies, and determined whether the governor could review rules agency rules. Using logistic regression, I find evidence that state Supreme Courts are more likely to rule in favor of executive branch agencies in states where the governor has increased institutional control over the entire executive branch structure, thus lending support to the enforcement resistance argument.

For the gubernatorial retaliation argument, I measured whether the governor has the power to retain state supreme courts, and whether the governor has enhanced unilateral control over the state budget. Although, there was evidence to support the enforcement resistance argument, I found less evidence to support the retaliation argument. Specifically, justices retained by governors, and justices in states where the governor has increased budget control were not necessarily more likely to defer to state executive branch agencies.

The cost to governors of responding to the court could potentially explain the divergent findings. Retaliating against the judiciary, either by reducing budgetary support or refusing to reappoint justices can lead to a very public institutional conflict that could backfire on a governor who lacks the necessary political capital to win a conflict with the court. However, the act of enforcement is typically completely within the purview of the executive,

and far less visible to the public. Given the potential public costs to governor of retaliating, it is likely that judges calculate the risk of retaliation to be much lower.

In the twentieth century, governors have seen dramatic increases in their powers of bureaucratic control and oversight. As governors gain more institutional powers, will they become increasingly resistant towards the interference of outside litigants and judicial intervention? The ability to “correct” legal missteps gives courts a tremendous amount of influence in the policy-making process. However, the reality of executive branch enforcement potentially places judges in a politically sensitive position if they have to make legal decisions that seemingly encroach upon executive authority.

*This article is based on the paper ‘[Judicial Deference and Executive Control Over Administrative Agencies](#)’ in *State Politics and Policy Quarterly**

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About the author

Gbemende Johnson - *Hamilton College*

Gbemende Johnson received her Ph.D. from Vanderbilt University and is currently an Assistant Professor of Government at Hamilton College. Her research interests include American Institutions, Judicial Politics, and Executive Branch Politics. Most of her current research focuses on the intersection of executive branch power and judicial decision-making. Her research has appeared in the *American Journal of Political Science* and *State Politics and Policy Quarterly*.



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