

# Executive Power and Judicial Deference: Judicial Decision Making on Executive Power Challenges in the American States

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## Abstract

Judicial intervention is often required to define the boundaries of executive power. Although many separation of powers analyses examine the interaction of courts and legislatures, few examine how the design of executive and judicial institutions affect judicial decision making in cases involving challenges to executive power in the U.S. context. I argue that the degree of judicial institutional vulnerability to executive retaliation will have a significant impact on judicial making. Using an original dataset of cases involving executive power challenges in the American states between 1980 and 2010, I find that courts are more likely to uphold executive power in environments where the threat of institutional retaliation from the executive is high. The results of this analysis indicate that the strength of judicial checks against executive power depends on broader relations of institutional authority, not just on constitutional doctrine or culture.

## Keywords

separation of powers, executive power, judicial decision making, U.S. state politics

When do judges rein in executive power? Executives at the state and federal level are equipped with many privileges that allow them to manage executive branch structures. Executive institutional capabilities include the use of executive orders, appointment/removal power, and the veto power. Despite the potency of these management tools, it is not uncommon for an executive to find his or her use of institutional authority challenged in court. Litigants who challenge executive power can argue that the executive has incorrectly used his or her institutional privileges, or that the executive undertook unilateral actions not recognized by the constitution. Alternatively, an executive can petition the court and assert that legislators have encroached upon his or her institutional authority. Ruling on executive power can place judges in a politically sensitive position, given that the executive is responsible for enforcing a ruling that potentially restricts the scope of his or her own institutional capabilities.

Do differences in the institutional design of courts and executive branch structures influence how judges decide cases involving challenges to executive authority? Although scholars have extensively examined judicial decision making within a separation of powers (SOP) context, the focus of most of these analyses is usually the relationship between the court and the legislature. Examining how variation in executive institutions influences judicial decision making presents the executive as

a more “active” player in interbranch conflict by considering the role of *executive institutional retaliation*, in addition to enforcement resistance. For example, an aggressive court may be necessary to monitor and observe executive authority, particularly in environments with institutionally privileged executives. However, the executive’s institutional and political capacity for unilateral retaliation against the court may result in courts that are more deferential to the executive.

As Chief Justice Marshall stated, “it is emphatically the province of the judicial department to say what the law is.”<sup>1</sup> However, given that the executive controls the apparatus that implements the law and can provide clarification to subordinate executive branch actors when legislative statutes conflict (Moe and Howell 1999), the executive can technically *say what the law is* as well. This apparent overlap in judicial and executive authority thus lays the groundwork for institutional conflict and tension when differences in interpretation arise over uses of executive power.

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In this paper, I examine judicial decision making in cases challenging executive power. The variation in the institutional environment of the U.S. states is ideal for examining the interaction of judicial and executive power. State executives possess many powers similar to that of the president; however, across states, there is considerable variation in executive use of institutional mechanisms of control (Bowman, Woods, and Stark 2010). For example, some state executives have the ability to appoint the majority of agency heads in the executive cabinet, whereas in other states, executives oversee a fragmented executive cabinet that includes elected agency heads. Similarly, the institutional structure of state courts across the United States varies substantially.

I argue that court institutional vulnerability to executive retaliation can constrain judicial decision making and affect whether courts uphold executive action. This paper proceeds as follows: First, I begin by discussing existing SOP literature in the United States and comparative contexts. I then explain how concerns of institutional retaliation and maintaining institutional legitimacy motivate judicial decision making. Using an original dataset of approximately 1,500 individual judge-level observations involving challenges to state executive power adjudicated between 1980 and 2010, I empirically analyze the conditions under which judges will vote in favor of executive power. I find that state supreme court justices are more likely to rule in favor of executive power in states where the executive's capacity for institutional retaliation is high. After presenting the results of my analysis, I conclude by discussing the ongoing tensions involving the exercise of executive power and judicial decision making.

## SOP and Judicial Decision Making

Scholars have examined judicial decision making in a SOP context with a particular focus on the relationship between the court and the legislature (Barnes 2004, 2006; Clark 2009; Epstein, Knight, and Martin 2001; Ferejohn and Weingast 1992; Gely and Spiller 1990; Lindquist and Solberg 2007; Marks 1988; Sala and Spriggs 2004; Segal 1997; Segal, Westerland, and Lindquist 2011; Spiller and Gely 1992; Whittington 2003, 2005). The basic premise of the SOP framework is that justices are political actors with clear policy preferences they desire to see enacted. However, rational justices also prefer maintaining the institutional legitimacy of their institution (Epstein and Knight 1998). These preferences will sometimes induce justices to behave strategically when making decisions involving statutory and constitutional challenges (Epstein, Knight, and Martin 2001; Segal, Westerland, and Lindquist 2011). In the federal context, if the preferences of U.S. Supreme Court justices and Congress are

proximate, justices are able to vote in a manner that reflects judicial policy preferences. However, if the preferences of the justices are distant from Congress, justices will vote strategically to prevent retaliation from political officials (Clark 2009).<sup>2</sup> If federal courts do rule on congressional legislation in a manner contrary to congressional preferences, Congress can (and does) respond with legislative overrides (Barnes 2004).<sup>3</sup>

Although, results have been somewhat mixed (Bergara, Richman, and Spiller 2003; Segal 1997), scholars do find evidence that justices behave strategically and validate congressional action when ruling on cases that involve statutory and constitutional challenges to federal legislation (Epstein, Knight, and Martin 2001; Gely and Spiller 1990; Spiller and Gely 1992). Further support for the SOP model comes from Clark (2009), who finds substantial evidence that the U.S. Supreme Court will be less likely to invalidate legislation when Congress introduces an increasing number of laws to "curb" the Court's jurisdiction (Clark 2009).

The focus of the SOP literature on the *court and the legislature* is clearly understandable. First, these analyses typically involve examination of judicial decision making on challenges to federal legislation, which brings the U.S. Supreme Court into direct conflict with Congress. In addition, at the federal level, the vast majority of retaliatory tools that can be used against the court originate with Congress (Rosenberg 1992). These tools include judicial budget reductions, jurisdiction stripping, altering the size of the court, removing federal judges, and legislation to overturn court rulings. The president's set of tools for responding to federal courts (namely, enforcement resistance and rhetoric) is, comparatively, somewhat limited. Therefore, the institutional tools of the federal executive limit the models of judicial behavior constructed by scholars.

Existing executive-court judicial decision-making literature in the U.S. context typically focuses on the role of public opinion in conjunction with the likelihood of executive enforcement resistance (Carrubba and Zorn 2010; Ducat and Dudley 1989; Howell 2003; Yates and Whitford 1998). Working within Neustadt's (1980) presidential prestige theory, Ducat and Dudley (1989) find that federal district judges are more likely to rule in favor of presidential power as presidential approval ratings increase. Also, a supportive political environment (i.e., unified government), in addition to increasing public approval ratings, increases the likelihood that federal courts defer to presidential use of executive orders (Howell 2003). Finally, Carrubba and Zorn (2010) consider how the threat of public sanction in response to executive noncompliance influences judicial decision making. Specifically, the public can provide an "indirect enforcement" mechanism (Carrubba and Zorn 2010,

823) whereby the president will comply with a court's ruling if he or she fears reprisal from the public.

### *Executive–Judicial Interaction in the Comparative Context*

Examination of judicial decision making in the comparative context aids in incorporating the executive as a more prominent player in the U.S. SOP framework (Carrubba, Gabel, and Hankla 2008; Helmke 2002, 2005; Staton 2004, 2006; Vanberg 2000, 2005). Comparative scholars have analyzed the threat of executive noncompliance and implementation resistance faced by international high courts. Diffuse support for the judiciary, public awareness, and importance of the policy under question to political officials can all substantially influence whether a court encounters compliance resistance from an executive (Staton 2004, 2006; Vanberg 2000). Understandably, judicial rulings that directly affect executive power are likely to be highly salient to executives.

In addition, the threat of executive retaliation can be particularly high in environments “where the separation of powers system seems to be under stress” (Sanchez Urribarri 2011, 855). Specifically, in institutional environments where the balance of power accrues to the executive, and the threat of executive reprisal grows, the apparent willingness of the court to issue antiexecutive rulings wanes (Helmke 2002; Sanchez Urribarri 2011). Tools of executive retaliation in these environments include impeachment, tenure alteration, and even court nullification (Helmke 2002, 2005). Interestingly, although judicial power appears most vulnerable in environments of high executive power consolidation, waning executive authority can give rise to greater expression of judicial authority and independence (Helmke 2002). Specifically, Helmke (2002) finds that previously institutionally insecure judges will “strategically defect” and rule against the government as the power of the government weakens.

Viewing executive–judicial relations broadly, the balance of executive power substantially affects judicial decision making. Specifically, as executive power declines, either in terms of institutional authority (Helmke 2002) or in terms of political popularity (Howell 2003), judges are more willing to support challenges to executive authority and government power. Comparatively, the SOP systems in the United States confer a great deal of independence to U.S. judicial institutions (Helmke and Rosenbluth 2009). However, differences in institutional and political environments *across* the United States provide for varying degrees of judicial independence from executive authority.

Examining judicial decision-making on executive power in the states is beneficial because it allows for the investigation of court outcomes across a wide variety of

judicial and executive branch institutional arrangements. Using the “natural laboratory” of the state environment (Hall 2001), this analysis attempts to expand the SOP framework by examining how differences in the balance of institutional power and structural design affect judicial decision making on issues of executive power.

The power of state executives has increased substantially throughout the twentieth century because of institutional reforms to improve the efficacy and coordination of executive branch structures (Bowman, Woods, and Stark 2010; Conant 1988). However, across states, there is substantial variation in executive institutional privileges, as well as the structure of state courts. Specifically, some states, particularly southern states, have a highly fragmented executive branch structure where a number of high-ranking executive branch officials face elections (Rossi 2001). The institutional culture of these states suggests, perhaps, a preference for a restrained executive. However, other states allow the executive substantial control over the executive branch structure (Rossi 2001) and in deciding who serves on the state supreme court (Sheldon and Maule 1997). The institutional culture and design of states with institutionally privileged executives suggest a preference for greater executive autonomy and expansive authority. In states where the threat of executive resistance and retaliation is greatest, U.S. judges should exhibit increased deference to the executive when ruling on challenges to executive authority.

### *Executive and Judicial Institutional Design and Retaliation*

Cases involving challenges to executive action can place judges in an undesirable situation. In fact, Howell (2003, 139) argues that when ruling on cases involving executive authority, judicial power is at its most “vulnerable.” In these cases, courts can check the power of the executive, but the executive must then enforce the court ruling. One way government officials can negatively affect courts is through punitive budgetary action (Douglas and Hartley 2001, 2003). Although the federal government (and some state governments) places restrictions on the ability to reduce the salaries of judges, officials can direct punitive or retaliatory budget actions toward court staff and facility resources (Douglas and Hartley 2001; Ferejohn and Kramer 2002; Rosenberg 1992).

In addition to retaliation against court resources, enhanced budgetary control can also facilitate enforcement resistance. Specifically, if court decisions require funding and resources, executives can resist providing the funding necessary for the proper implementation of court decisions (Douglas and Hartley 2001). This allows executive branch officials to essentially circumvent court rulings and reduce the efficacy of the court. Essentially,

increased unilateral control over budgets provides executives with an institutional tool to respond to unfavorable court rulings. When executives have expansive unilateral budgetary control, I expect judges to be sensitive to retaliatory resource threats and exhibit increased deference to executive authority in court.

**Hypothesis 1:** As executive resource retaliation capacity increases, the probability of a judge voting in favor of executive power increases.

Prior research shows that both selection and retention methods of judges influence their decision making (Brace and Hall 1995; Langer 2002). Political officials can select judges who have a jurisprudence that reflects a record of voting in favor of executive and government power. However, the method of judicial *retention* makes justices vulnerable to tenure retaliation (Brace, Hall, and Langer 1999; Langer 2002). When courts are in an environment where other government actors have divergent preferences and play a role in judicial retention, there exist strong incentives to alter decision-making behavior at the decision on the merits stage (Brace, Hall, and Langer 1999; Langer 2002). Specifically, judges retained by government officials have greater incentive to rule in a manner that favors policy makers, as compared with courts not subject to political retention. Therefore, judges who face retention decisions from the executive should be most likely to rule in favor of executive power.

**Hypothesis 2:** As executive control over judicial retention increases, the probability of a judge voting in favor of executive power increases.

### *Public Opinion, Executive Prestige, and Judicial Decision Making*

Because courts are responsive to public opinion (Brace and Boyea 2008; Flemming and Wood 1997; Howell 2003), the public's orientation toward the state executive should affect judicial decision making. High public support for the executive can create an environment of increased or enhanced judicial deference. First, judicial deference to the executive in an environment with high executive support allows judges to remain in line with public preferences. Specifically, to engender implementation of judicial rulings, courts depend heavily on the widespread view from the public that its decisions, and the institution itself, are legitimate (Clark 2009; Gibson and Caldeira 1992). If public approval of the executive reflects the mood of the public (Edwards 1976), it follows that judges may be hesitant to rule in a manner that runs counter to public preferences. In addition, a politically

popular executive can use his or her public support as leverage to either ignore the court or resist enforcement of judicial decisions (Howell 2003).

However, as public support for the executive wanes, this creates a less supportive political environment for executives that can reduce the willingness of the executive to retaliate against the court or resist enforcement responsibilities, given the threat of public reproach (Howell 2003). Therefore, as prestige of an executive wanes, judges can be more aggressive in taking action to restrict executive power (Ducat and Dudley 1989, 101).

**Hypothesis 3:** As state executive prestige increases, the probability of a judge voting in favor of executive power increases.

### **Research Design, Data, and Method**

To test my hypotheses regarding judicial deference and executive power, I used LexisNexis to collect an original dataset of cases involving challenges to executive power between 1980 and 2010 in the areas of appointment/removal power, executive orders/proclamations, executive privilege, and the executive veto power. These executive powers represent multiple arenas of power for the governor. Executive authority involving executive orders and executive privilege is a power typically directed within the executive branch. Alternatively, the veto power can cause power disputes with the state legislature. In addition, these powers are similar to the presidential powers examined in federal-level analyses (Ducat and Dudley 1989). My search was restricted to cases where a litigant claimed that an exertion of executive power was invalid or cases where the governor (or executive branch subordinate) argued that executive power in one of the aforementioned areas was violated or encroached upon. I focus on cases where the court reaches a decision on the merits of the executive power claim.<sup>4</sup>

The dataset of executive power challenges includes 235 cases across forty-nine states. Of the 235 cases in my dataset, state supreme courts ruled in favor of executive power in approximately 62 percent of cases (145/235). After the initial collection of state supreme court cases, I transformed the cases into individual judge-level observations by data by identifying the name of the individual judges in the case, the way in which each individual judge voted, and the partisan identification of each judge.<sup>5</sup> Performing this transformation produces 1,492 individual judge votes with approximately 59 percent of votes in favor of executive power (874/1,492).<sup>6</sup> The dependent variable in the analysis is whether the individual judges vote in favor (1) or against (0) executive power.<sup>7</sup>

Because the dependent variable is dichotomous, I estimate a series of logit models with standard errors clustered by individual judge and tests are one-tailed.

### Independent Variables

The key independent variables in my analysis are executive resource retaliation capacity, executive control of judicial retention, and executive prestige. To operationalize state executive resource retaliation capacity, I code for the degree of unilateral control the state executive has in terms of reducing the state budget. Specifically, states where the executive can reduce the budget without legislative approval are coded as (1), and states where executives do not have this authority are coded as (0).<sup>8</sup> Sixty-eight percent of observations fall in the resource retaliatory category. As unilateral control over the budget increases, I expect judicial support for the executive to increase in court. Interestingly, in their survey of court administrators, legislative budget officials, and executive budget officials, Douglas and Hartley (2003, 448) find that chief court administrators rated "rulings which have a direct impact upon the governor personally" as one of the actions by the court most likely to incur executive action against the judiciary's budget.

I operationalize judicial retention by creating six indicator variables for each method of judicial retention: Gubernatorial Retention, Legislative Retention, Partisan Election, Nonpartisan Election, Retention Election, and Lifetime Tenure. Courts with lifetime tenure serve as the base category. Four percent of judges in the dataset are retained by governors, 5 percent are retained by legislatures, 19 percent are retained by partisan election, 24 percent are retained by nonpartisan elections, 40 percent are retained by retention elections, and 9 percent have life tenure. Courts subject to gubernatorial retention should be the most supportive of state executive power. Courts subject to legislative retention should also be highly supportive of state executive power in court under certain circumstances. In cases where there is a direct dispute between the executive and legislature, courts that face legislative retention may understandably be more inclined to rule against the executive. Conversely, when courts retained by the legislature share similar policy preferences with the governor, the likelihood of success for state executives should also increase. Finally, in most cases involving executive power, the dispute can be framed in terms of a *nongovernment* opponent versus a *government* opponent. When framed in this manner, courts retained by the legislature should be more favorably inclined to rule in favor of government power (when the interests of the executive and the legislature are not in opposition).

Comparatively, courts with life tenure should be least likely to rule in favor of executive power (because of

their independence from retention retaliation). Elected courts are clearly not subject to direct retention retaliation from the executive and, therefore, have a measure of independence from the executive. However, elected judges and state executives are typically chosen by the same electorate (Boyea 2007) and could, therefore, exhibit high levels of support for executive power in court. Given these countervailing factors, the level of support from elected judge should fall somewhere in between that of politically retained judges and judges with life tenure.

To capture the "prestige" (or public approval) of the state executive, I collected the current governor's vote share in the previous election. Larger vote share indicates a greater public mandate, and as gubernatorial vote share increases, state supreme courts should be more likely to uphold executive power in court. The mean gubernatorial vote share in the dataset is 55.13 percent of votes.<sup>9</sup>

### Control Variables

The key independent variables (governor's power to retain judges, ability to reduce budget, and political popularity) are all capabilities and powers specific to the governor either as an individual (her political popularity) or the office of the governorship (retention and reduction capabilities). However, I also control for additional factors that I suspect are correlated with my independent variables and the decision of courts to rule in favor of executive power. Although concerns over retaliation and institutional legitimacy may induce judicial deference, courts may also rule in favor of the state executive because of court-executive partisan congruence. In this instance, courts are ruling in favor of executive power because of opinion sharing between the court and the executive. To control for policy agreement between the court and governor, I create an indicator variable coded as one (1) when the individual judge and the state executive are of the same political party, and coded as zero (0) when then individual judge and the state executive are of different parties.<sup>10</sup> Forty-six percent of judges share the party identification of the sitting governor.

Partisan congruence between the court and the legislature can increase the propensity of the court to rule against the state executive because partisan alignment with the state legislature reduces the vulnerability of the court to executive retaliation. Specifically, the executive could encounter his or her own political and institutional backlash if he or she attempts to retaliate against a court with a legislative ally. To control for partisan congruence between the court and legislature, I create an indicator variable coded one (1) when the majority of the judges on the court are of the same party as the majority party in the legislature (61% of observations), and zero (0) otherwise.

Characteristics of the litigants will also affect whether courts rule in favor of executive power. Because of advantages in experience, and selectively in litigant behavior, scholars find that the government is more successful in cases where they are acting as the petitioner (Sheehan, Mishler, and Songer 1992). However, similar to Yates's (2002) analysis of presidential legal success, I expect that executive action should have a higher rate of success when the state executive, or executive branch subordinate, is the respondent in a legal action. Selectivity in the decision to appeal to the state supreme court should result in a high success rate when an executive branch party is the petitioner in favor of executive power. However, given the assumption of validity that executive power usually enjoys (Schubert 1957), petitioners *challenging* executive power should face enhanced scrutiny from the court. Also, ruling in favor of executive power when the executive branch is the respondent is advantageous for judges because the court can rule in favor of the executive *and* simultaneously uphold a lower court ruling, if present, by ruling against the petitioner (Yates 2002). Cases where the executive branch is the appellant are coded as one (1), and all other cases are coded as zero (0). The state executive, or executive branch party, appears as the appellant in 36 percent of observations.

In cases involving disputes between the governor and legislative actors, courts must rule either against the legislative branch or the executive branch, and either branch could respond negatively against the court for an adverse ruling. I expect state executives to be less successful when the party opposing the executive is composed of state legislators. Judges may face greater retaliation risks when ruling against the legislature as compared with other individuals and organizations involved in executive branch litigation. Cases that involve a legislative opponent are coded as one (1), and cases that do not involve a legislative opponent are coded as zero (0). Twenty-nine percent of observations involve a legislative party opponent.

State executive success should vary according to the particular challenged executive action. Cases involving state executive appointment should have the highest probability of success, whereas the state executive's veto power should have the lowest probability of success. Although gubernatorial appointment power in the states is subject to greater restriction as compared with the president, many state executives are granted extensive appointment powers to governmental offices. However, challenges to the governor's veto power involve legislative power disputes where courts may grant the governor less autonomy. The governor's rate of success for challenges to executive privilege, executive order/proclamation should fall in between that of gubernatorial appointment and veto power. I create individual indicator

variables for each executive power category in my analysis, and veto challenges serve as the base category.

I also control for state supreme court docket discretion in civil appeals cases and in original proceeding cases. State supreme courts discretionary civil appeals docket have greater autonomy in deciding to hear cases challenging executive power. Similarly, in original proceedings cases, cases that are heard initially in state supreme court, state supreme courts can either have a discretionary or mandatory docket. In fact, approximately 28 percent of the cases (64/235) in my analysis reach the court through original proceeding jurisdiction.<sup>11</sup> To take into account the docket structure, I include separate indicator variables for civil and original proceeding docket discretion. I expect executive power success to be greater in environments where courts have mandatory dockets (in civil appeals or original proceeding dockets). Specifically, because these courts have less control over their docket, they have to potentially entertain frivolous cases, or challenges to executive power that have been overturned by lower courts. Cases where the court has a mandatory civil docket (15% of observations) are coded as one (1), and all other cases are coded as zero (0). Cases where the court has a mandatory original proceeding docket (24% of observations) are coded as one (1), and all other cases are coded as zero (0).

## Results

The results from my empirical analyses strongly suggest that state supreme court judges are responsive to threat of executive branch retaliation when ruling on cases involving executive power. In Table 1, Model 1 estimates the influence of gubernatorial retention on state supreme court judge decision making. Model 2 incorporates additional indicator variables for state supreme court retention methods. According to the results in Models 1 and 2, state supreme court justices are more likely to vote in favor of executive power when the executive has the increased capacity to retaliate against the court (statistically significant at the  $p < .05$  level). In Model 2, the probability of a vote in favor of executive power when the executive has institutional retaliatory capacity increases by 10 percent (Table 2). Although previous findings on the impact of executive retaliatory capacity were inconclusive (Johnson 2014), these results lend support to the findings of Douglas and Hartley (2003) that court officials are aware that state executives will sometimes use their budgetary power in response to adverse rulings.<sup>12</sup> Although the estimates are in the expected direction, the estimates for judicial retention method, including gubernatorial retention, lack precision in Models 1 and 2.<sup>13</sup> Similarly, the estimates for executive vote share in the previous election

**Table 1.** Executive Power Challenges in Court.

Variable	Coefficient (SE)	p value	Coefficient (SE)	p value
Court retention method				
Gubernatorial retention	0.039 (0.336)	.45	-0.110 (0.406)	.39
Legislative retention	—		0.177 (0.313)	.29
Partisan election	—		-0.173 (0.254)	.25
Nonpartisan election	—		-0.134 (0.257)	.30
Retention election	—		-0.291 (0.240)	.11
Lifetime tenure	—		—	
Executive power				
State executive budgetary reduction power	0.356 (0.124)	.00**	0.260 (0.147)	.04**
Executive prestige				
State executive vote share	0.010 (0.011)	.18	0.011 (0.011)	.17
Political environment				
Court-executive partisan congruence	0.182 (0.112)	.05**	0.171 (0.112)	.06*
Court-legislature partisan congruence	-0.229 (0.125)	.03**	-0.218 (0.132)	.05**
Court structure				
Civil appeal docket	0.330 (0.190)	.04**	0.322 (0.191)	.05**
Original proceeding docket	-0.245 (0.152)	.05**	-0.257 (0.174)	.07*
Case facts				
Legislative opponent	-0.596 (0.152)	.00**	-0.564 (0.153)	.00**
Executive power appellant	-0.968 (0.130)	.00**	-0.946 (0.137)	.00**
Executive order	0.463 (0.192)	.01**	0.432 (0.197)	.01**
Executive proclamation	1.271 (0.309)	.00**	1.255 (0.310)	.00**
Executive privilege	0.674 (0.268)	.01**	0.618 (0.277)	.01**
Appointment power challenge	0.736 (0.156)	.00**	0.721 (0.159)	.00**
Decade				
1990	-0.176 (0.144)	.11	-0.196 (0.145)	.09*
2000	-0.106 (0.156)	.25	-0.101 (0.158)	.26
Constant	-0.209 (0.625)		0.014 (0.673)	
Wald $\chi^2$	(15) 161.37		(19) 168.95	
N	1,492		1,492	

Dependent variable is whether the court rules in favor (1) or against (0) executive power. Tests are one-tailed. Standard errors are clustered by individual judge. \*\* $p \leq 0.05$ , \* $p \leq 0.10$

are in the expected direction, but the estimates do not achieve the traditional level of statistical significance.

### Control Variables

Many of the control variables have a statistically significant influence on whether state supreme courts rule in favor of executive power. The results from Table 1 show that partisan congruence between the judge and the governor increases the likelihood of a judicial vote in favor of executive power by as much as 7 percent (Table 2). Conversely, when the court and the legislature are politically aligned, the likelihood of a court ruling in favor of executive power drops by as much as 8 percent (Table 2).

The identity of the litigants and the specific executive power challenged also have an important influence on rulings in favor of executive power. As hypothesized, when legislators challenge executive power, the probability of a

court ruling in favor of state executive power drops substantially by 21 percent (Model 2, Table 2). Courts are well aware of the political sensitivities involved when navigating disputes between the executive and legislative branches. These findings suggest that judges are willing to rule against the executive to potentially avoid conflicts with their state legislature.

In addition, when the state executive (or executive party) petitions the court in favor of executive power, state justices are much less likely to rule in favor of executive power ( $p < .00$  level). In fact, the probability of a ruling in favor of executive power decreases by 35 percent (Model 2, Table 2). The results are consistent with Yates's (2002) finding that judges are less likely to vote in favor of the president (or the president's party) when the president is the appellant. Results from the model also show that executive success in court varies according to the executive power challenged. When compared with

**Table 2.** Executive Power Challenges in Court: Predicted Probabilities.

Variable	Model 1			Model 2		
	$\Delta$	% change	p value	$\Delta$	% change	p value
Executive power						
State executive budgetary reduction power	+0.09	16	.00	+0.06	10	.04
Political environment						
Court-executive partisan congruence	+0.04	7	.05	+0.04	6	.07
Court-legislature partisan congruence	-0.05	8	.04	-0.05	7	.05
Court structure						
Civil appeal docket	+0.08	12	.04	+0.07	10	.04
Original proceeding docket	-0.06	10	.06	-0.06	9	.07
Case facts						
Legislative opponent	-0.15	24	.00	-0.14	21	.00
Executive power appellant	-0.24	39	.00	-0.23	35	.00
Executive order	+0.10	17	.01	+0.09	14	.00
Executive proclamation	+0.24	38	.00	+0.21	33	.00
Executive privilege	+0.14	23	.00	+0.12	19	.01
Appointment power challenge	+0.15	25	.00	+0.14	22	.00
Decade						
1990	—			-0.05	8	.08

Changes in predicted probabilities calculated for statistically significant variables. For continuous variables, changes in predicted probability calculated as change from one standard deviation below the mean to one standard deviation above the mean. For indicator variables, change in predicted probability calculated as change from 0 to 1. Continuous variables held at their mean and indicator variables at their mode for calculation of predicted probabilities.

the base category (veto power challenge), state executives are more likely to win cases that involve executive proclamations and executive appointment power. In Model 2, Table 2 the likelihood of a ruling in favor of executive power increases by 22 percent in cases that involve executive appointment power (when compared with the cases that involve veto power challenges). Although courts are highly supportive of executive power, judicial support for executive power declines as executive authority reaches into other branches of government.

The type of docket discretion also affects whether judges vote in favor of executive power. Specifically, judges are more likely to vote in favor of executive power in states where the court has a mandatory civil appeals docket ( $p < .05$  level). Somewhat surprisingly, state supreme judges are less likely to vote in favor of executive power in states where there is a mandatory original proceeding docket. This finding could be a function of the composition of cases that funnel through the original proceeding docket. Of the cases that involve the civil appeals docket, approximately 60 percent of the petitioners are arguing against executive power. However, 85 percent of the cases involving an original proceeding involve an appellant arguing against executive power.<sup>14</sup> The reduced probability of success potentially results because a disproportionate number of original proceeding cases involve appellant challenges to executive power.

Only the 1990 decade indicator variable in Model 2 (Table 1) achieves statistical significance. Overall, the results suggest that, compared with the base category (1980 decade indicator), state supreme court justices show less deference to the executive in court over time.

### State Executive Prestige Re-examined

In Table 1, the estimates for state executive vote share lack precision; however, state executive vote share serves as a somewhat rough proxy for executive prestige. In Table 3, I re-examine state executive prestige using available public approval data from the U.S. Official's Job Approval Ratings (JAR) database. Although gubernatorial public approval ratings are not available for all state-years in the dataset, the JAR database contains the vast majority of public approval ratings pertinent to executive power analysis.<sup>15</sup> Using the available state executive approval data, I re-estimate the models in Table 1 with 1,185 judge-level observations.<sup>16</sup> The average public approval rating for state executives in the dataset is 51.94 percent. Similar to the full dataset, judges cast 57 percent of votes in favor of executive power. The results in Table 3 support the state executive prestige hypothesis. Specifically, as state executive public approval increases, state supreme court justices are more likely to vote in favor of executive power ( $p < .05$  level). A two standard deviation increase in state executive public approval



**Table 3.** Executive Power Challenges in Court: Gubernatorial Public Approval Ratings.

Variable	Model 1		Model 2	
	Coefficient (SE)	p value	Coefficient (SE)	p value
Court retention method				
Gubernatorial retention	0.610 (0.429)	<b>.08*</b>	0.596 (0.517)	.12
Legislative retention	—		0.298 (0.375)	.21
Partisan election	—		−0.116 (0.328)	.36
Nonpartisan election	—		0.046 (0.320)	.44
Retention election	—		−0.213 (0.307)	.24
Lifetime tenure	—		—	
Executive power				
State executive budgetary reduction power	0.347 (0.139)	<b>.01**</b>	0.239 (0.166)	<b>.08*</b>
Executive prestige				
State executive public approval	0.010 (0.005)	<b>.03**</b>	0.011 (0.006)	<b>.03**</b>
Political environment				
Court-executive partisan congruence	0.398 (0.128)	<b>.00**</b>	0.401 (0.131)	<b>.00**</b>
Court-legislature partisan congruence	−0.329 (0.147)	<b>.01**</b>	−0.290 (0.157)	<b>.03**</b>
Court structure				
Civil appeal docket	0.731 (0.248)	<b>.00**</b>	0.660 (0.247)	<b>.00**</b>
Original proceeding docket	−0.092 (0.187)	.31	−0.046 (0.221)	.41
Case facts				
Legislative opponent	−0.619 (0.158)	<b>.00**</b>	−0.601 (0.157)	<b>.00**</b>
Executive power appellant	−0.933 (0.140)	<b>.00**</b>	−0.901 (0.147)	<b>.00**</b>
Executive order	0.474 (0.217)	<b>.01**</b>	0.417 (0.225)	<b>.03**</b>
Executive proclamation	1.011 (0.349)	<b>.00**</b>	1.027 (0.352)	<b>.00**</b>
Executive privilege	0.831 (0.297)	<b>.00**</b>	0.765 (0.305)	<b>.01**</b>
Appointment power challenge	1.029 (0.173)	<b>.00**</b>	1.020 (0.183)	<b>.00**</b>
Decade				
1990	−0.435 (0.191)	<b>.01**</b>	−0.480 (0.192)	<b>.01**</b>
2000	−0.627 (0.198)	<b>.00**</b>	−0.652 (0.198)	<b>.00**</b>
Constant	−0.163 (0.400)		−0.023 (0.509)	
Wald $\chi^2$	(15) 166.22		(19) 178.91	
N	1,185		1,185	

Dependent variable is whether the court rules in favor (1) or against (0) executive power. Tests are one-tailed. Standard errors are clustered by individual judge. \*\* $p \leq 0.05$ , \* $p \leq 0.10$

(approximately 25 percentage points) increases the probability of a judicial vote in favor of executive power by 11 percent (+0.06 change,  $p < .05$ ). Similar to the findings from federal-level analysis (Ducat and Dudley 1989), state justices are less willing to restrict executive power in environments with politically popular executives.

The results from the previous analyses indicate that increasing executive popularity and retaliatory capacity increases judicial deference to executive power. It follows that judges in environments with high levels of executive approval and budget retaliatory capacity should exhibit the most deference in cases involving challenges to executive authority because the executive has public support *and* the capacity to retaliate against the court. In Table 4, I estimate models that include an interaction term comprised of executive budgetary reduction retaliatory capacity and state executive public

approval. Consistent with previous findings, both Model 1 and Model 2 show that judicial deference to executive power increases in environments with politically popular governments with the capacity to retaliate against the court (statistically significant at  $p < .00$  level). Specifically, as the governor's public approval rating increases (by two standard deviations) in environments where the governor has the capacity to retaliate, the probability of a ruling in favor of the executive increases by 23 percent (+0.13 change,  $p$  value  $< .00$ ). For example, if a governor has a 65 percent approval rating and the capacity to retaliate, the probability of a court ruling in favor of executive power is 0.73. However, if a governor with a 65 percent approval rating *lacks* the capacity to retaliate, the probability of a court ruling in favor of executive power is somewhat lower at 0.58 (statistically significant difference,  $p$  value  $< .00$ ). Figure 1 shows the

**Table 4.** Executive Power Challenges in Court: Public Approval Ratings Interaction.

Variable	Model 1		Model 2	
	Coefficient (SE)	p value	Coefficient (SE)	p value
Court retention method				
Gubernatorial retention	0.621 (0.436)	.11	0.483 (0.526)	.18
Legislative retention	—		0.203 (0.381)	.30
Partisan election	—		−0.255 (0.336)	.22
Nonpartisan election	—		−0.070 (0.322)	.41
Retention election	—		−0.428 (0.313)	<b>.09*</b>
Lifetime tenure	—		—	
Executive power				
State executive budgetary reduction power	−1.315 (0.552)	<b>.01**</b>	−1.754 (0.584)	<b>.00**</b>
Executive prestige				
State executive public approval	−0.011 (0.009)	<b>.08*</b>	−0.014 (0.009)	<b>.06*</b>
Interaction				
Public approval × Budgetary reduction power	0.032 (0.011)	<b>.00**</b>	0.037 (0.011)	<b>.00**</b>
Political environment				
Court-executive partisan congruence	0.427 (0.128)	<b>.00**</b>	0.442 (0.132)	<b>.00**</b>
Court-legislature partisan congruence	−0.344 (0.145)	<b>.01**</b>	−0.309 (0.155)	<b>.02**</b>
Court structure				
Civil appeal docket	0.710 (0.246)	<b>.00**</b>	0.619 (0.245)	<b>.01**</b>
Original proceeding docket	−0.071 (0.191)	.39	−0.023 (0.223)	.45
Case facts				
Legislative opponent	−0.613 (0.157)	<b>.00**</b>	−0.587 (0.157)	<b>.00**</b>
Executive power appellant	−0.940 (0.139)	<b>.00**</b>	−0.900 (0.147)	<b>.00**</b>
Executive order	0.465 (0.218)	<b>.03**</b>	0.377 (0.227)	<b>.05**</b>
Executive proclamation	0.941 (0.346)	<b>.00**</b>	0.954 (0.348)	<b>.00**</b>
Executive privilege	0.808 (0.292)	<b>.01**</b>	0.727 (0.301)	<b>.01**</b>
Appointment power challenge	1.070 (0.175)	<b>.00**</b>	1.050 (0.184)	<b>.00**</b>
Decade				
1990	−0.519 (0.196)	<b>.00**</b>	−0.594 (0.199)	<b>.00**</b>
2000	−0.697 (0.204)	<b>.00**</b>	−0.739 (0.205)	<b>.00**</b>
Constant	1.010 (0.535)		1.519 (0.658)	
Wald $\chi^2$	(16) 180.65		(20) 196.97	
N	1,185		1,185	

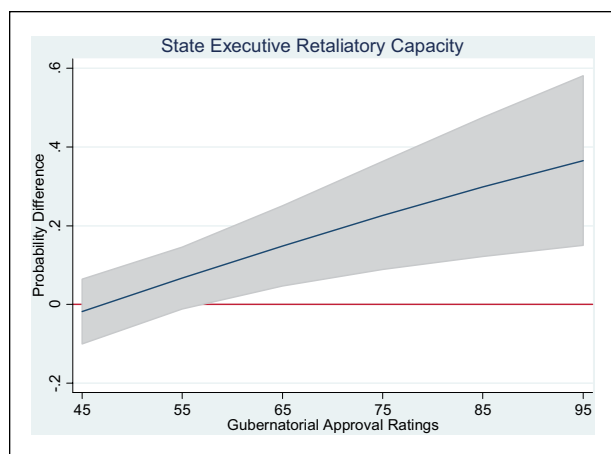
Dependent variable is whether the court rules in favor (1) or against (0) executive power. Tests are one-tailed. Standard errors are clustered by individual judge. \*\* $p \leq 0.05$ , \* $p \leq 0.10$

difference in predicted probabilities between governors with budget retaliation capacity and governors without budget retaliation capacity. Specifically, the graph shows that as public approval ratings increase, the difference in the probability of success between the two groups of state executives (governors with and without retaliatory capacity) becomes significantly larger.

## Discussion and Conclusion

This project has examined judicial decision making on cases involving challenges to executive power. Many SOP analyses focus on the interaction and tension between courts and legislatures; however, this analysis uses the SOP framework in the states to explore

institutional conflict between the court and executive branch. This analysis is also one of the few studies to empirically conceptualize the *executive's* capacity for retaliation. Using an original dataset of state supreme court cases involving executive power challenges, I find that courts will engage in more deferential behavior in environments where courts are particularly vulnerable to threats of executive institutional retaliation and threats to judicial legitimacy. This finding reflects results from federal-level and comparative research on the impact of executive institutional and political power on judicial behavior (Helmke 2002; Howell 2003; Sanchez Urribarri 2011; Yates 2002). Federal-level institutional design creates theoretical and empirical limits on analyses of judicial-executive interaction in the U.S. context. Scholars



**Figure 1.** Differences in Probabilities of Judicial Vote in Favor of Executive Power: State Executives with and without Retaliatory Capacity.

should increasingly take advantage of state-level variation to further explore interbranch conflict between judicial and executive institutions.

Historically, scholars and theorists considered the power of the judiciary to be a legitimate extension of executive power, specifically monarchical power (Scigliano 1971). The current expectation is that the executive and judicial branches maintain a delicate, but recognizable, boundary of separation in certain respects. Clearly, maintaining this separation can be somewhat difficult. In the U.S. context, executive power continues to expand substantially. Vagueness in the U.S. Constitution, as well as collective action problems with Congress, has allowed the president to act as a “first-mover” and implement policy unilaterally (Moe and Howell 1999).

In addition, the trend in the states has been toward a clear consolidation of executive power and authority over the executive branch structure (Bowman, Woods, and Stark 2010; Conant 1988, Beyle and Muchmore 1983). It is important to note that increased consolidation of authority in the executive branch is not necessarily universally problematic. In fact, state reformers viewed increasing the state executive’s managerial control over the executive branch as a way to improve the efficiency and effectiveness of state government (Conant 1988; Garnett 1980). However, as state executives gain more institutional privileges, an ever-present concern is executive abuse of authority, either through a reduction in executive transparency or reduction of internal checks on executive authority. According to Barnes (2004, 41),

Unchecked policy-making by any branch of government undermines a central bulwark against arbitrary state action in the American system of separate institutions sharing powers, namely, mutual supervision and redundant policy-making by diversely representative forums.

Legislatures can serve as a check on executive power; however, as mentioned previously, collective action difficulties can reduce the legislature’s effectiveness in restraining the executive. In addition, partisan agreement between the executive and the legislature can produce a legislative body all too willing to expand the authority of the executive to further electoral and policy goals.<sup>17</sup> However, based on the results from this analysis, it seems that judges are much more likely to restrain the power of the executive when equipped with a legislative ally. Specifically, judges are far less likely to rule in favor of executive power when the legislators are in dispute with the governor and when the court and the legislature share partisan preferences.

The legal responsibility of high courts to define and delineate proper boundaries of institutional authority positions the judiciary as a key actor to restrain executive authority. However, excessive judicial deference to executive authority, arising from noncompliance or retaliation concerns, not only raises concerns over judicial independence but also, in extreme cases, potentially signals a SOP system out of balance.

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Replication data for this article can be viewed at [www.gbemendejohnson.com/research.html](http://www.gbemendejohnson.com/research.html).

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## Notes

1. *Marbury v. Madison* (1803) 5 U.S. 137.
2. Although many separation of powers (SOP) analyses present legislatures as opposed or resistant to judicial interference, Whittington (2005, 2007) illustrates that

- in some cases, Congress and the president prefer U.S. Supreme Court intervention is constitutional and legislative disputes.
3. Barnes (2004) finds that a potentially beneficial effect of legislative overrides of court rulings is increased judicial consensus after congressional revision and clarification of challenged statutes.
  4. Although "decisions on the merits" has widely been the focus of judicial research, there are clearly underlying factors that affect litigant behavior and the agenda-setting behavior of courts, which subsequently affect case outcomes (Zorn 2002, 162). For example, some courts may strategically dismiss cases on procedural grounds to avoid a direct confrontation with the executive. To the extent that these potential biases are uncontrolled for, I suspect that my models provide conservative estimates on judicial deference to executive power.
  5. See Online Appendix C (at <http://prq.sagepub.com/supplemental/>) for case selection process and judge-level transformation process.
  6. Ninety-six cases in the dataset involve executive appointment/removal powers (40% of judge-level observations), seventy-two cases involve executive vetoes (31% of judge-level observations), thirty-eight cases involve executive orders (14% of judge-level observations), nineteen cases involve executive privilege (8% of judge-level observations), and ten cases involve executive proclamations (3% of judge-level observations).
  7. For example, in *State of Alabama and Harry Lyon v. Hubert Taylor* (1983) 437 So. 2d 482, a citizen challenged a judicial appointment by the governor of Alabama because the appointment seemingly violated the state's Anti-Nepotism Act (the appointee was the governor's brother-in-law). The court ruled that because the Anti-Nepotism Act did not apply to judicial appointments, the appointment was valid. This is coded as a ruling in favor of executive power, and all judges who voted with the majority would be coded as voting in favor of executive power.
  8. In two states in the dataset, state executives require the permission of elected officials in the executive branch to reduce the budget. Given the reduction in gubernatorial unilateral control in this instance, these states also receive a coding of zero (0). Information for state executive control over the budget taken from Budget Processes in the States 1987, 1989, 1992, 1995, 1997, 1999, 2002, and 2008, The National Association of State Budget Officers (<http://www.nasbo.org/publications-data/budget-processes-in-the-states>). This budget reduction capability includes the ability to reduce appropriations, reduce expenditures, and/or withhold allotments.
  9. See Online Appendix B (at <http://prq.sagepub.com/supplemental/>) for descriptive statistics.
  10. Langer, Laura. National Science Foundation CAREER Grant, SES #0092187 "Multiple Actors and Competing Risks: State Supreme Court Justices and the Policymaking (Unmaking) Game of Judicial Review." Washington, DC (May 2001–May 2006).
  11. Information for civil and original proceeding docket discretion retrieved from Court Statistics Project, State Court Caseload Statistics, 1980–2008, National Center for State Courts. <http://www.ncsc.org/>.
  12. In Online Appendix A (at <http://prq.sagepub.com/supplemental/>), I explore an alternative hypothesis that judges are not necessarily responding to institutional vulnerability from executive resource control but rather a culture of judicial deference created by general differences in executive power (see Online Appendix Table A1). The results of the analysis presented in Online Appendix A are consistent with the findings presented in Table 1.
  13. See online appendix (at <http://prq.sagepub.com/supplemental/>) for discussion of impact of selection method.
  14. The difference in the composition of civil appeal cases and original proceeding cases is statically significant at the  $p < .01$  level.
  15. The U.S. Officials' Job Approval Ratings (JAR) (Beyle, Niemi, and Sigelman 2002). The JAR database contains information regarding the public approval ratings of state executives taken from various state polls. The poll question used for my analysis concerns "standard job performance" ratings of governors from respondents. The values in the public approval measure reflect the percentage of respondents who gave a "positive" response regarding gubernatorial job performance. Specifically, responses such as of "very good," "good," "approve," and "excellent" across polls are grouped into positive responses.
  16. Fifty-seven percent (676/1,185) of the judicial votes are in favor of executive power. See Online Appendix B (at <http://prq.sagepub.com/supplemental/>) for descriptive statistics for variables in Table 3.
  17. After the Florida State Supreme Court ruled that Governor Rick Scott had overstepped his authority in requiring a freeze of all agency rulemaking (until his office could review pending rules), the Republican-led legislature responded by enhancing Scott's managerial and personnel control over the executive branch (Sanders 2012).

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