

SC & Presidential reference

Whether the Supreme Court can set a timeline for the President and state Governors to give their assent to legislative Bills has become a contested federalism issue. What have the states and the Centre argued?

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New Delhi | Updated: September 15, 2025 07:09 AM IST

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President Droupadi Murmu being received by Tamil Nadu Governor R N Ravi and Chief Minister M K Stalin at the Chennai Airport in August 2023. (Image source: TN Raj Bhavan)

The Supreme Court last week finished hearing arguments and reserved its opinion in the crucial reference made by President Draupadi Murmu on the powers of the President and Governors in giving assent to Bills.

The reference, invoking the apex court's advisory jurisdiction, was made following its ruling in April, which held that Tamil Nadu Governor R N Ravi's delay in granting assent to 10 Bills was unconstitutional. The court exercised its inherent powers under Article 142 to grant assent to the pending Bills and set timelines for Governors and the President to act after Bills reach their office.

Article 143(1) of the Constitution empowers the President to seek the SC's opinion on questions of law or fact which are of public importance. The court's opinion will be "independent advice" for the President to act on the issue. However, in essentially questioning whether the court could have set the timelines for the President and Governors, the reference has turned into a flashpoint between the executive and the judiciary.

The SC's opinion and any subsequent action by the President will test the limits of how judicial review that checks executive action will be accepted by the executive. It will also bring to focus the nature and challenges of a polyvocal court, as it will determine whether the five-judge Constitution Bench headed by Chief Justice of India B R Gavai will stand by a verdict by a two-judge Bench. Lastly, the reference is a keenly contested federalism issue, with the opposition-ruled states supporting judicial intervention and the Centre opposing it.

Here is an overview of the arguments and counterarguments that played out before the SC for more than 11 days.

Nature of reference

In its advisory jurisdiction, the SC can choose to decline giving its opinion. In the past, the court has returned at least two references without answering. Therefore, the first hurdle for the Centre is to satisfy the SC that the reference made is valid and ought to be answered.

The states argued that the reference must be rejected since it seeks to relitigate the issue, and is in the nature of an appeal against the SC ruling in April. A ruling by the SC, no matter the Bench strength, is the law of the land. There is no appeal against the ruling, and although the Constitution allows a review, it is done by the same judges who delivered the verdict.

The states argue that the Centre is seeking a review by a different Bench under the garb of a Presidential reference. Senior advocate Abhishek Manu Singhvi, appearing for Tamil Nadu,

argued that the reference was to “subvert the integrity of the Court and the principle of stare decisis.”

Solicitor General Tushar Mehta, however, stressed that the court’s advisory jurisdiction under Article 143 was distinct, and could be used to clarify constitutional doubts, even if past rulings existed.

Governor’s powers

The states said that the Governor is bound by the aid and advice of the state’s Council of Ministers under Article 163 of the Constitution, emphasising that governance must reflect the popular will, which cannot be usurped by the Governor. This argument is in line with several constitutional rulings of the SC over the decades that have reigned in the powers of the Governor, giving primacy to the elected government.

The Centre, on the other hand, argued that the Governor’s office has a distinct place in the constitutional framework, and was not intended to be a “postman” or a “showpiece.” Mehta said that amendments in the Constituent Assembly seeking to remove all discretionary powers were explicitly rejected.

The Centre’s arguments showed an enhanced role for the Governor as a check against the state legislature: Mehta said that while the Governor is “ordinarily bound” by the aid and advice of the Council of Ministers, but is not “always bound.”

The Centre cited the example of a 2004 Punjab law that unilaterally terminated a tripartite river-water sharing treaty to highlight the importance of a Governor having discretionary powers. The SC in 2016 declared the law unconstitutional.

The Centre also presented data from 1970 to the present, claiming that only 20 out of 17,000 bills were withheld by Governors, with 90% granted assent within the first month. This was offered to demonstrate that the withholding power was not exercised “at the drop of a hat”.

Governor’s veto

Central to the issue of the Governor’s powers in the legislative process is what happens when he sits on a Bill indefinitely. The SC, in its April ruling, envisioned this scenario and concluded that a

Governor cannot exercise a “pocket veto” over the elected government.

However, the Centre, in arguing the Presidential reference, told the SC that a “Bill, if withheld, will fall through”. The government made references to the colonial Government of India Act, 1935, where the Governor’s “initial withholding was an absolute veto.” Mehta told the court that similar language was later adopted in the Constitution.

The states, in their submissions, said “our Governors are not Viceroys” and pointed out how certain colonial discretions to Governors were intentionally omitted from the Constitution.

Judicial enforcement of timelines

The Centre had strong reservations on the SC’s April ruling in setting timelines for Governors and the President. It said that imposing “straightjacket” timelines for Governors to grant assent would amount to a judicial amendment of the Constitution and encroach on constitutional functions.

Attorney General R Venkatesh pointed out that the Constituent Assembly had consciously dropped proposed timelines for assent, replacing a six-week limit with the phrase “as soon as possible”. The Centre argued that such impasses should be resolved politically through dialogue between the state and the Governor, rather than the court acting as a “judicial headmaster”.

On the other hand, senior advocate Gopal Subramaniam, who appeared for Karnataka, argued that the phrase “as soon as possible” in Article 200 attaches a “sense of immediacy” to the Governor’s duty, and that the timelines in the April ruling indicated when judicial review would become available, not when automatic assent would occur.

States’ fundamental rights

The Centre was also strongly opposed to the SC’s April ruling allowing states to file writ petitions under Article 32 of the Constitution. Mehta submitted that Article 32 remedies were meant to enforce fundamental rights, and states could not “claim them for themselves”. He also argued that the Governors do not represent the central government.

Singhvi countered the submission and argued that even the framers of the Constitution envisaged Governors as a vital link between the union and the state. Interestingly, even Andhra

Pradesh, where the ruling party is a coalition partner in the Centre's National Democratic Alliance, defended the right of the states to move the SC in a writ petition.



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