

The judicial branch of federal and state government -- unlike the executive and legislative branches, which are necessarily political in nature -- was designed to be insulated from politics to preserve its fairness and impartiality while ruling on decisions made by legislatures and executives. Yet in recent years, a national trend toward politicizing the judicial process has emerged in states from coast to coast, including here in Tennessee.

To inform advocates focused on preventing further such attempts, this brief highlights recent national and local efforts to diminish the independence of state judicial branches.

I. National Trend to Weaken State Courts Seen in 2021

At both the federal and state levels, the three branches of government -- executive, legislative and judicial -- operate independently, with their own powers and responsibilities. In the American system of checks and balances, the judicial branch has the power to review the constitutionality of laws and regulations passed by the other two branches.(i)

Yet, state legislatures and governors across the country are increasingly seeking to diminish the role and independence of the judiciary by using legislation to target state courts -- **where 95 percent of all cases are filed.**(ii)

A recent review of 2021 state legislative sessions found **over 153 such bills were introduced in at least 35 states**, significantly more than in previous years. Of those, 19 laws appear to have been enacted across 14 states.(iii)

Legislative Examples From Other States

Last year's efforts to weaken courts' power -- often in retaliation for court rulings with which state legislators disagreed -- included:

- **Limiting the issues courts have the power to review;**
- **Changing the way judges are selected;**
- **Creating new courts in a partisan effort to gain more favorable outcomes to legal challenges;** and
- **Introducing legislatively drawn judicial districts for appellate courts.**(iv)

Limiting the issues courts have the power to review.

Following the 2020 election, some states passed laws limiting courts' authority to review certain election laws.



For example, a 2021 Georgia omnibus election bill included **limitations on courts' ability to expand polling place hours**, widely believed to negatively impact Georgian voters of color, who are more likely to face long lines at polling places.(v)

Changing the way judges are selected.

Montana passed two laws giving the governor more power over selecting judges.



One grants the governor power to **bypass the state's judicial nominating commission** to fill interim vacancies.(vi) The other, which would only go into effect if the first is struck down, would give the governor **more power to appoint members** to the judicial nominating commission by doubling its size.(vii)

Creating a new court to gain more favorable outcomes to legal challenges.

A proposed Texas bill sought to **replace the Democratic majority in the state's Third Court of Appeals with a six-judge, statewide intermediate appellate court** to hear high-profile lawsuits involving the state.(viii)



Judges to the new court would have run in statewide elections, which no Democrat has won in over two decades.(ix)

Introducing legislatively drawn judicial districts for appellate courts.

A Pennsylvania joint resolution sought to **allow the legislature to draw judicial districts for judges** who currently run in statewide elections.(x)



Shifting to geographically defined districts from at-large elections is widely considered an attempt to limit the number of judges from cities. As a constitutional amendment, it would be placed on the ballot for voters to ratify if approved in the 2022 session.(xi)

II. Recent Efforts to Alter the Judiciary in Tennessee May Point to Future Threats

Tennessee lawmakers also introduced multiple bills and resolutions during the 2021 legislative session that would diminish the role and independence of the state's judicial branch.



Tennessee's Judicial Branch

Courts

Tennessee's state court system includes **trial courts, courts of appeal** and the **state Supreme Court**.

Judges in **trial courts are popularly elected** in their districts for eight-year terms. Appeals court and Supreme Court jurists are **appointed by the governor and confirmed by the legislature** before then **running on a "retain-replace" ballot** every eight years.

Attorney General

While all other states place the attorney general (AG) in the executive branch, Tennessee's is **an officer of the judicial branch**.

Tennessee is the **only state where the AG is appointed by the state Supreme Court**. In the vast majority of states (43), voters popularly elect their AGs.

Tennessee Legislative Examples

Tennessee legislative efforts in 2021 included:

- **Attempting to change the attorney general selection process;**
- **Targeting judges and judicial powers;** and
- **Attempting to gain more favorable outcomes in rulings on constitutional challenges.**

Attempting to change the attorney general selection process.

Currently, the Supreme Court appoints the Attorney General. In 2021, however, the Senate passed Senate Joint Resolution 1, which **would have the General Assembly first confirm the court's candidates.**(xii)

Attempts to change the AG appointment process are not new. Lawmakers have previously discussed allowing voters to popularly elect the position, and in 2014, the Senate passed a resolution that would have allowed the General Assembly to elect an AG, but it failed in the House.(xiii)



Targeting judges and judicial powers.

A failed House resolution co-sponsored by all but nine of the 73 House Republicans **would have created a joint House and Senate committee to recommend removing a Davidson County Chancellor from the bench.**(xiv)

The resolution cited as rationale the judge's rulings to temporarily expand absentee voting access during the Covid-19 pandemic and alleged that she had "committed serious ethical violations and abused her authority by pursuing a personal and partisan agenda."(xv)



Legislators also sought to limit judicial powers with a bill to (1) **allow the state to file an interlocutory appeal in any case challenging a state law's constitutionality** and (2) **stay any court-issued injunction pending the final outcome of the appeal.** (xvi)

The final version of the bill signed into law was amended to instead grant the state the right to appeal a lower court's injunction order.(xvii)

Attempting to gain more favorable outcomes in rulings on constitutional challenges.

Three separate bills proposed changes to the state court system, with elements of each eventually merging into one that passed as the last bill of the 2021 session.(xviii)



Initially, legislators proposed creating a new statewide court (appellate in the House and trial court in the Senate) to address constitutional challenges, at a cost of nearly \$2 million.(xix) Both the House and Senate plans featured statewide judicial elections, which would have been the first of their kind in the state. In one version, judges would have run in partisan elections; in the other, they would have been appointed by the governor and then elected in retention elections.(xx)

The final bill **modifies state judicial processes** rather than creating a new court system. Key changes include:

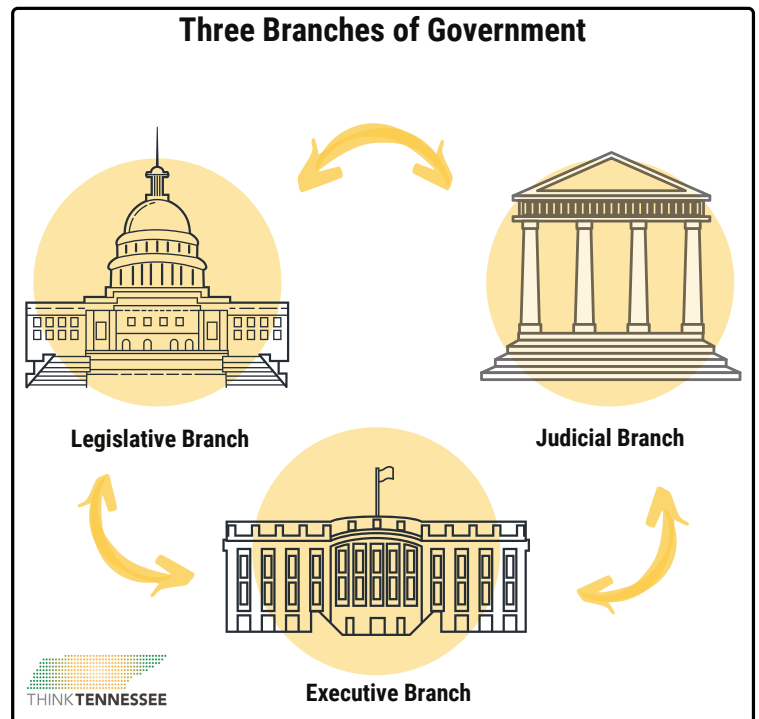
- Challenges to state law, including final redistricting maps, will now be heard in the **plaintiff’s county of residence** as opposed to Davidson County.
- A **panel of three judges**, the presiding judge and one from each additional Grand Division appointed by the Supreme Court, will hear the case instead of a single Davidson County chancellor.
- Lawsuits filed by non-Tennessee residents will now be filed in **Sumner County** rather than Davidson County.(xxi)

Legislators did not hide the partisan motivations behind these efforts, with the lead Senate sponsor arguing that judges from Davidson County, the most liberal constituency in the state, should not be deciding cases that affect the state as a whole. (xxii)

III. Legal Advocates Should Remain Vigilant to Ensure Continued Separation of Powers

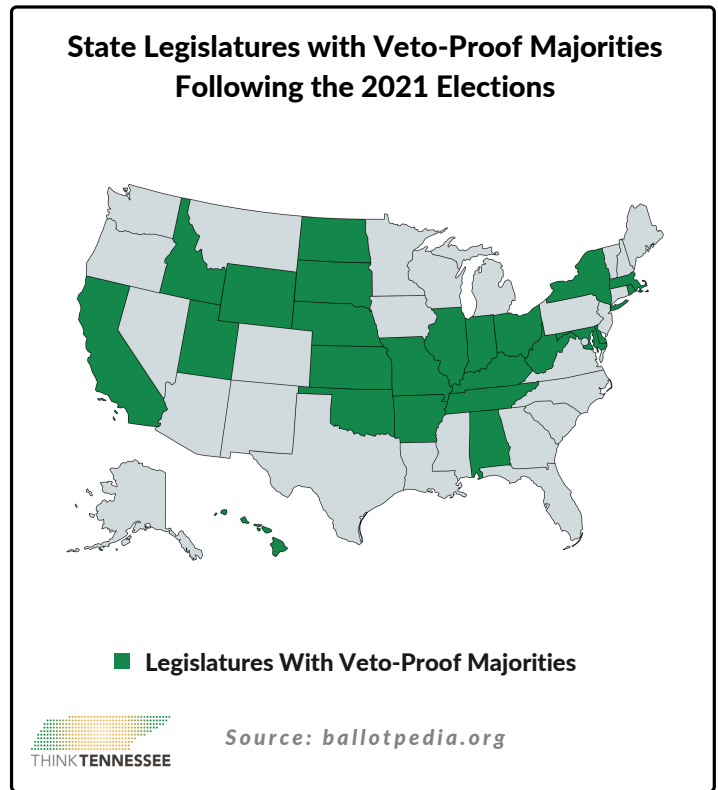
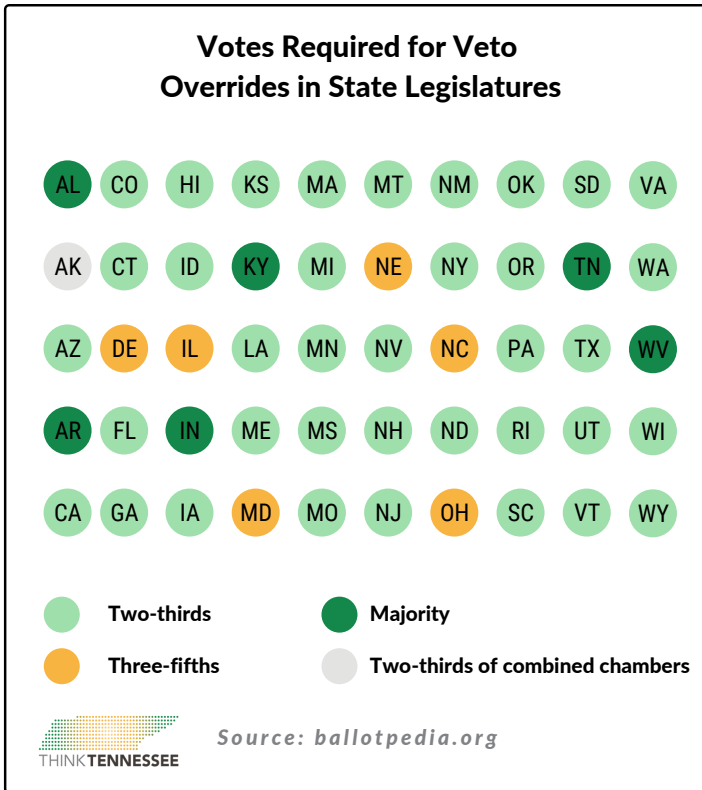
The framers of our federal and state constitutions separated the judicial branch from the executive and legislative branches to ensure that the judicial functions of government could **operate independently, prevent the concentration of unchecked power and preserve our constitutionally protected freedoms.**

That is not to say the branches never interact with each other. Tennessee’s legislature plays an important role in helping protect the integrity of our state’s judiciary. The speakers of both the Senate and the House each appoint four members to the state’s 16-member **Board of Judicial Conduct**, which regulates judicial conduct and addresses issues that may adversely affect the administration of justice in our state.(xxiii)



Preventing the concentration of unchecked power is especially important given that Tennessee’s state legislature is already one of the most powerful in the country. Tennessee is one of only four states where the General Assembly appoints our constitutional officers: the secretary of state, the state treasurer and the comptroller of the treasury. In most other states, these offices are popularly elected or gubernatorially appointed.

Tennessee is also one of six states where a **simple majority legislative vote can override a gubernatorial veto**, and one of 24 states with a **veto-proof majority** (meaning the majority party has enough votes to override a governor’s veto without any votes from the minority party).(xxiv)



If recent national and local efforts are indicators of what is to come, legal advocates will have a role to play in ensuring our courts maintain their impartiality and independence.

- (i) Tennessee Secretary of State. Judicial Branch. See <https://sos.tn.gov/civics/guides/judicial-branch>.
- (ii) Berry, Patrick, Alicia Bannon, and Douglas Keith. (December 14, 2021). Legislative Assaults on State Courts -- December 2021 Update. See <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-december-2021-update#ch2>.
- (iii) Ibid.
- (iv) Ibid.
- (v) Georgia General Assembly. (2021). SB 202. See <https://www.legis.ga.gov/legislation/59827>.
- (vi) Montana Legislature. (2021). SB 140. See http://laws.leg.mt.gov/legprd/LAW0210W%24BSIV.ActionQuery?P_BILL_NO1=140&P_BLTP_BILL_TYP_CD=SB&Z_ACTION=Find&P_SESS=20211. The bill grants the governor power to directly fill interim vacancies on the State Supreme Court and district courts. Berry, Patrick, Alicia Bannon, and Douglas Keith. (December 14, 2021). Legislative Assaults on State Courts -- December 2021 Update. See <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-december-2021-update#ch2>.
- (vii) Montana Legislature. (2021). SB 402. See http://laws.leg.mt.gov/legprd/LAW0210w%24BSIV.ActionQuery?P_BILL_DFT_NO5=LC0874&Z_ACTION=Find&P_SESS=20211. This bill was intended as a backup in case SB 140 is overturned. Berry, Patrick, Alicia Bannon, and Douglas Keith. (December 14, 2021). Legislative Assaults on State Courts -- December 2021 Update. See <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-december-2021-update#ch2>.
- (viii) Texas Legislature Online. (2021). SB 1529. See <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB1529>.
- (ix) Berry, Patrick, Alicia Bannon, and Douglas Keith. (December 14, 2021). Legislative Assaults on State Courts -- December 2021 Update. See <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-december-2021-update#ch2>.
- (x) Pennsylvania General Assembly. (2021). HB 38. See https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syearch=2021&sind=0&body=H&type=B&bn=38.
- (xi) HB 38 passed in the previous session of the Pennsylvania General Assembly, and it passed in committee in 2021. Berry, Patrick, Alicia Bannon, and Douglas Keith. (December 14, 2021). Legislative Assaults on State Courts -- December 2021 Update. See <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-december-2021-update#ch2>.
- (xii) Tennessee General Assembly. (2021). SJR 0001. See <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SJR0001>.
- (xiii) Daniels, Frank III. (April 15, 2015). Senate Says We Should Have a Say on Attorney General. Tennessean. See <https://www.tennessean.com/story/opinion/columnists/frank-daniels/2015/04/16/senate-says-say-attorney-general/25857095/>.
- (xiv) Tennessee General Assembly. (2020). HR 0023. See <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HR0023>.
- (xv) Ibid.
- (xvi) Tennessee General Assembly. (2020). HB 1072. See <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1072&GA=112>.
- (xvii) Schwarz, Berkley. (May 7, 2021). House Passes Interlocutory Appeal Legislation Before Adjourning, Sends Bill to Governor. TBA Law Blog. Tennessee Bar Association. See <https://www.tba.org/?pg=LawBlog&blAction=showEntry&blogEntry=61959>.
- (xviii) HB 1196/SB 0454 proposed changing the venue for actions challenging the constitutionality of state laws from Davidson County to the county of the plaintiff's residence. Tennessee General Assembly. (2021). HB 1196. See <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1196>. HB 1436/SB 1363 proposed establishing a three-judge panel to hear any challenge to the legislature's redistricting of state legislative or congressional districts. Tennessee General Assembly. (2021). HB 1436. See <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1436>. These elements were merged into HB 1130/SB 0868. See <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1130>.
- (xix) Tennessee General Assembly. (2021). HB 1130 Amendment 2. See <https://www.capitol.tn.gov/Bills/112/Amend/HA0455.pdf>. SB 0868 Amendment 2. See <https://www.capitol.tn.gov/Bills/112/Amend/SA0451.pdf>. Tennessee General Assembly Fiscal Review Committee. (April 20, 2021). Fiscal Memorandum SB 0868 - HB 1130. See <https://www.capitol.tn.gov/Bills/112/Fiscal/FM1223.pdf>.
- (xx) The initial House bill proposed judges should be appointed by the governor and then elected in a statewide retention election. The Senate proposed that judges would initially be appointed by the governor and then candidates would run in a partisan, statewide primary and general elections. Tennessee General Assembly. (2021). HB 1130 Amendment 2. See <https://www.capitol.tn.gov/Bills/112/Amend/HA0455.pdf>. Tennessee General Assembly. (2021). SB 0868 Amendment 2. See <https://www.capitol.tn.gov/Bills/112/Amend/SA0451.pdf>.
- (xxi) Sher, Andy. (May 6, 2021). Tennessee Republican Lawmakers OK New Three-Judge Panels to Consider Legal Challenges Against State. Chattanooga Times Free Press. See <https://www.timesfreepress.com/news/local/story/2021/may/06/tn-republican-lawmakers-ok-new-three-judge-panels/546454/?bcsbid=6b45349c-b1c0-4d0f-a6b2-6c3c1824e2db&pbdialog=reg-wall-login-created-tfp#/questions>.
- (xxii) Jackson, Daniel. (April 20, 2021). Tennessee Lawmakers Mull Creation of Statewide Chancery Court. Courthouse News Service. See <https://www.courthousenews.com/tennessee-lawmakers-mull-creation-of-statewide-chancery-court/>.
- (xxiii) Tennessee Code Annotated. §§ 17-5-201(a)(7) and (a)(8).
- (xxiv) Ballotpedia. Veto Overrides in State Legislatures. See https://ballotpedia.org/Veto_overrides_in_state_legislatures.