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Tennessee lawmakers want to take over AG's power to file federal suits. Here's how it would work.

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Some Tennessee lawmakers want control over when the state should challenge the federal government in court.

They have proposed an initiative to create a legislature-approved position and grant it the exclusive authority to represent the state in federal court — power that currently rests with the attorney general and reporter's office.

SB350/HB506, sponsored by Sen. Paul Bailey, R-Sparta, and Rep. Ryan Williams, R-Cookeville, would make the state's solicitor general — a position currently housed in the attorney general's office — answer directly to the Tennessee legislature. The official would be elected by lawmakers and hold a four-year term.

The legislation would strip the Attorney General's office of its authority to defend the state in federal courts, as well as in legal proceedings where state law is challenged. Under the bill, the solicitor general would have that authority and the power to decide if the state should join others in lawsuits challenging a federal law or executive order.

"This gives the legislature an opportunity to have a direct solicitor general that would advocate on behalf of the citizens of Tennessee," Bailey said Wednesday. "This will preserve our ability to pursue our standing in court these matters without seeking outside counsel."

But the proposal has drawn concerns from Democrats, the attorney general's office and legal experts, who argue the measure could be unconstitutional and lead to inefficiency.

"It strips all jurisdictions from the attorney general's office to litigate in federal court," said Jonathan Skrmetti, the state's chief deputy attorney general. "You'd have split teams and it would create tremendous inefficiency to the detriment of the state's legal interest."

The initiative advanced out of the Senate State and Local Government Committee after Bailey promised to further amend the bill to address Skrmetti's concerns. Sen. Richard Briggs, a Knoxville Republican chairing the committee, said Wednesday the bill must go through two more committees before hitting the Senate floor.

Bailey: bill would give legislature more control

Tennessee is the only state where the attorney general is appointed by the state Supreme Court. The position is not deferential to the legislature.

Bailey said he would like to see that change.

"There's been times in the past that the legislative branch wanted the attorney general to maybe enter into a pack with other states as far as filing lawsuits against the federal government," he said. "The attorney general said no, and the legislature basically didn't have any say in (it)."

Attorney General Herbert Slatery has refused multiple times to fight legal battles at the will of the legislature, Bailey said. A legislature-selected solicitor general, however, would be "beholden" to elected lawmakers, he said.

"If we felt like that it was in the best interest of Tennessee, then that solicitor general would be working on our behalf," he said.

Longstanding efforts to revamp authority, selection method of AG

Bailey and Williams' bill reflects longstanding legislative attempts to strip attorney general and reporter's office of its power and shift it elsewhere.

In 2006, then-Rep. Frank Niceley, R-Strawberry Plains, unsuccessfully pushed for the shift of power from the attorney general and reporter's office to a voter-elected solicitor general.

Following the proposal, then-Attorney General Robert Cooper Jr., a Democrat, issued an opinion deeming the initiative unconstitutional [Edit](#) [Sign](#) .

The bill "violates the Separation of Powers provisions of the Tennessee Constitution and unconstitutionally removes the constitutional authority of the Attorney General and Reporter," the opinion reads.

Others have tried to transform the way the state's attorney general is selected.

Sen. Ken Yager, R-Kingston, has introduced several measures over the past years changing the way the attorney general is selected. A failed resolution in 2018 sponsored by Yager would have made the attorney general a legislature-elected position. This year, his initiative requiring legislative confirmation of the Supreme Court's nomination passed the Senate in March, but has stalled in the House.

'Separation of powers' concerns arise

Steve Mulroy, law professor at the University of Memphis, said the bill raises constitutionality concerns. The measure would "steal" power from the executive branch to the legislative branch, he said, which might violate the "separation of powers" principle.

"The overall purpose of the separation of powers is to protect individual liberty by preventing too much concentration of power in any one branch," he said. "So whenever one branch takes power away from another branch, then you raise at least a theoretical danger of over-concentration of power in one branch."

If the bill becomes law, Mulroy said the attorney general's office could still represent Tennessee government in state courts. However, that could mean duplicated efforts if the state is fighting similar legal battles in both state and federal courts.

Skrmetti argued Wednesday the bill could lead to inefficiency by creating two legal counsels for the state.

"In complex cases, there's a lot of coordination between state court and federal court litigation," he said. "This legislation would split the legal representation in Tennessee into two distinct halves and two offices, which would impede the ability to coordinate on that."

House GOP Leadership urges caution

House Republican leaders on Thursday urged lawmakers to move forward with caution. House Majority Leader William Lamberth, R-Portland, said sponsors must be wary of passing unconstitutional laws.

"There are some constitutional issues that we'll have to look into," he told reporters Thursday. "We have to be very careful with a bill in that nature to make sure we don't, literally, create something that will be unconstitutional."

Contrary to Bailey's frustration, Lamberth said he believes the attorney general "has done a phenomenal job" representing the state.

Yager, who voted to advance the bill to another committee, said Thursday he believes the bill in part derives from frustration over the lack of communication between legislators and Slatery's office. Bailey said Wednesday that Skrmetti's testimony was the first time the attorney general's office ever reached out about the issue.

McNally said Slatery is sometimes "caught in the middle of" conflicts between three branches of the government. He said he would like to further study the bill.

"I just have to look at it," he said. "Right now I don't really see a compelling reason for the bill."

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