

It's not just Donald Trump feuding with the courts. States are doing it, too.

By **Amber Phillips** February 12

As President Trump escalates his confrontation with the judiciary branch in tweets and speeches, lawmakers in some half a dozen states are testing their state courts' independence with actual legislation.

Bills have been proposed in Florida, Washington state and Idaho to allow those legislatures to override certain court decisions. In Arizona, the House passed a bill that would give the legislature the power to prohibit state courts from enacting federal court decisions. A series of bills are advancing in Oklahoma to increase the legislature's power over the courts, including a retirement-age restriction that would effectively wipe out most judges currently serving on the state's appeals court.

The trend is also alive in Wyoming, where a bill to strip the courts of the power to hear any cases involving K-12 education funding recently passed the state Senate. Most of these bills are championed by Republican lawmakers in Republican states. But in Hawaii, where every state senator is a Democrat, a bill is advancing to give the Senate power to decide whether to reconfirm judges for multiple terms in office.

The common theme driving this legislation is a concern among lawmakers that state courts have become too activist. "There is nothing the legislature can do in any way to push back against the court," said Florida state Rep. Julio Gonzalez (R), the author of a bill to allow the legislature to override Florida courts on issues of constitutionality. "That's not a check and a balance. That's not a dialogue. It's a monologue from the judiciary to everybody else."

State judicial experts are alarmed by the flurry of proposals to give politicians more power over state courts, which decide some 95 percent of all cases.

"This just shows a complete misunderstanding of what the function of courts are," said Sandy D'Alemberte, a former senior Democratic Florida legislator and former president of the American Bar Association. "It really needs to be there to resist majority sentiment, not be subject to it."

What lawmakers see as activist, judicial experts say is a politicization -- often by lawmakers themselves -- of the courts. It's true that state and federal courts are taking up more and more cases that put them in direct conflict with the other branches of government. But just because the courts take up these cases doesn't mean they're overstepping their bounds. In fact, they argue the courts are doing exactly what the Constitution calls for: Being a check on political branches of government.

"This notion that a legislature can just override a court ruling is quite radical," said Alicia Bannon, who is with the nonpartisan Brennan Center for Justice. "What this does is really shift power toward political institutions in a way I think should make people worried about the ability of courts to enforce the Constitution and protect people's rights."

These past few weeks have been particularly illustrative of the escalating tension between the executive and legislative branches and the judiciary. Ignoring not-so-veiled threats from the president, a federal appeals court unanimously agreed Thursday to pause Trump's temporary travel ban on seven predominantly Muslim countries.

There's actually a long history of push-and-pull between the executive and legislative branches of government and the courts.

President Thomas Jefferson led the charge to impeach Supreme Court Justice Samuel Chase in 1804. In the early 20th century, there was a movement in some states to allow the public to recall court decisions it didn't like. Teddy Roosevelt even championed the idea. But -- no surprise -- after Colorado actually adopted such a law, a state court quickly swatted it down as unconstitutional.

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In the past few years, the political sentiment that courts need an extra check has come roaring back and found a home in an increasingly politically-charged society. North Carolina recently changed its state court elections from nonpartisan to partisan. In Oklahoma, lawmakers smarting from a series of 7-2 state Supreme Court rulings against them considered a bill requiring just one dissenting vote for the court to declare legislation unconstitutional.

Last year, Kansas lawmakers fought a high-stakes game of chicken with its state Supreme Court that got so dramatic it managed to become headline news in the state. Under public pressure, lawmakers backed off a law to defund the state's entire judicial system after the court struck down a separate law. But the following year, some \$1 million poured into a normally sleepy state Supreme Court election, much of it aimed at unseating four of the justices involved in the fight. (The justices narrowly held onto their seats.)

All this isn't to say the judiciary is perfect. Progress Florida, a liberal nonprofit, released a report in January that found special interest money spent on state Supreme Court races more than doubled in the past ten years -- with \$56.4 million expended in 2011 and 2012. "As the cost of races goes up, so does the influence of special interest groups," the report warned.

Bannon said states do have the tools to deescalate these battles before it's too late. Changing the way justices are elected to make it a completely nonpartisan affair would be the largest and most impactful step.

But that would require a total 180 away from the trend we're seeing today, which is a clear desire among politicians to challenge courts' independence in increasingly unprecedented ways.

Amber Phillips writes about politics for The Fix. She was previously the one-woman D.C. bureau for the Las Vegas Sun and has reported from Boston and Taiwan. [Follow @byamberphillips](#)



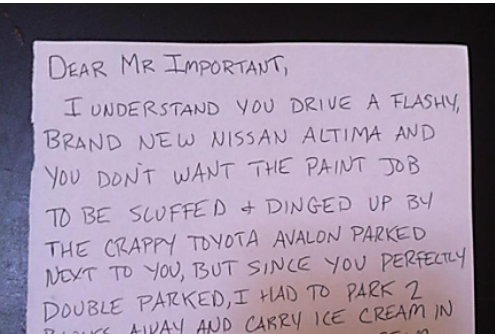
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