

# The Tennessee Journal

The weekly insiders newsletter on Tennessee government, politics, and business

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## Republicans resist efforts to loosen absentee ballot restrictions

When Democrats pushed for creating an early voting period in Tennessee in 1994, Republicans fought the proposal tooth and nail. Allowing ballots to be cast before Election Day would create opportunities for fraud, they argued. The GOP also privately worried the change could give an advantage to Democrats by boosting overall voter turnout.

When the bill came up for a vote in the Senate, it won approval along straight party lines, 18-15. But the GOP's doomsday scenarios didn't come to pass — Republicans flipped both U.S. Senate seats that fall, and Democrats have won only one open statewide race since. Early voting has only grown in popularity, and fraud concerns are no more prevalent than they are for election day.

Fast-forward 26 years, and the debate about a proposal to expand absentee voting during the pandemic is being waged along similar themes. While Democrats say the change would allow voters to avoid getting infected with coronavirus, Republicans argue voting by mail would create opportunities for dirty tricks. And once again, the underlying — but unproven — assumption is that allowing anyone to vote by mail would benefit Democrats more than Republicans.

Before state lawmakers went on their COVID-19 recess in March, Democrats made a last-ditch effort to include \$15 million in the state budget to allow for universal voting by mail. The amendment sponsored by Rep. Gloria Johnson (D-Knoxville) was brushed aside on a 69-20 vote. House Republican Caucus Chairman Jeremy Faison of Cosby likened the proposal to the days when unscrupulous political bosses would pay off voters with booze and cash. Moving to voting by mail would send the signal that “your vote doesn't matter,” he said.

Questions about voting amid the coronavirus have become more acute as the pandemic has spread. More than 50 people who voted or worked at polling places in Wisconsin last month have been diagnosed with COVID-19. While officials there haven't been able to pinpoint how many contracted the virus on the day of the election, the incident underscored concerns potential voters might be scared off from going to the polls in person. But political questions remain at the fore.

A national poll released this week by The Associated Press-NORC Center for Public Affairs Research found support for all-mail elections had jumped from 19% in 2018 to 39% — including 47% of Democrats and 29% of Republicans. About 60% supported allowing people to vote via absentee ballot during the pandemic without having to give a reason. Of those, 73% were Democrats and 48% Republicans. Two out of three Republicans voiced concerns about increased fraud occurring in all-mail elections, while 29% of Democrats felt the same.

**State of play.** Uptake has been marginal in Tennessee: Of the 2.27 million votes in the November 2018 election, just 43,236 were submitted via absentee ballot. That compares with 1.3 million people, or 59%, who went to a polling site to cast early votes.

Under current Tennessee law, anyone age 60 or older can request absentee ballots. So can anyone who will be outside their home county during the early voting period and on the day of the election. U.S. Rep. Steve Cohen (D-Memphis) told the *Daily Memphian* if the law allows people spending time at their vacation homes to vote by mail, “it should be OK for everyone.”

People who obtain a doctor's statement declaring them medically unable to vote in person can also vote by mail. But it remains to be seen whether fears about contracting COVID-19 will be accepted as a sufficient reason for a medical exemption. A prerequisite for obtaining an absentee ballot is voting in person in the first election after registering, a provision that has been criticized as keeping students who turn 18 while at college from being able to vote back home.

**Outlook.** Just six weeks separate the planned June 1 resumption of the legislative session and the July 17 start of early voting for the primary. There's been little sign so far state Republicans are becoming more receptive to liberalizing rules on voting by mail. And they have ample political cover from President Donald Trump, who has been a vocal critic of allowing more absentee voting. If it remains just Democrats advocating for sweeping changes to Tennessee's current vote-by-mail laws, the issue will likely be dead on arrival.

## Tennessee hedge?

### **AG says governor, counties hold authority over COVID-19 response**

When Gov. Bill Lee issued his mandatory stay-at-home order for nonessential business on March 30, he was careful to include language stating nothing in it “repeals, preempts, or otherwise limits” the authority of local governments to take further steps. Now that the governor is unwinding many of those restrictions, the state is clamping down on cities and counties going their own way — other than in Shelby and Davidson counties, where coronavirus cases have been most prevalent.

Technically speaking, the governor’s “Tennessee Pledge” orders apply to 89 of the state’s 95 counties that don’t have their own county health departments. But in practice, four of the six exempted counties (Knox, Hamilton, Sullivan, and Madison) have followed the state-wide guidance. And for cities like Knoxville and Chattanooga that may have wanted to pursue their own policies, a rare legal opinion from state Attorney General Herbert Slatery declared their policies are preempted by the decisions of their county governments — and all are trumped by the governor’s emergency powers, if he chooses to exercise them.

Nashville Mayor John Cooper announced Thursday it will take until at least the end of next week before the state’s largest city can follow the state in reopening restaurants and stores on a limited basis because “public health metrics are not stable enough” to do so.

Shelby County officials announced their “Back to Business” plan for reopening will begin on Monday. The move had been expected to start earlier, but was put off by a week because of a spike in coronavirus cases. That delay had caused tensions between Memphis and suburban cities, where mayors argued an increase in infections largely among inmates shouldn’t prevent economic activity from restarting.

Lee has been able to wash his hands of the debates within Nashville and Shelby County about whether and when to reopen their economies, leaving it to mayors there to take the heat from unhappy business owners and consumers who want to move more quickly. Meanwhile, Lee can gather plaudits from people living in other areas for reopening restaurants, stores, and gyms.

**Elective surgery.** Lee announced “appropriate” elective medical procedures such as joint replacements and colonoscopies could resume on Friday, a welcome development among hospitals, which claimed a loss of \$1 billion in revenues during the shutdown.

Elective procedures had been banned in the name of preserving protective equipment and other medical resources for the treatment of people infected with COVID-19. The same rationale was put forward as the basis for banning most abortions. The 6th Circuit U.S. Court of Appeals over the weekend upheld a lower court’s ruling throwing out the abortion restrictions.

**Secret haircut.** Lee on Tuesday issued an executive order declaring “close-contact personal services”

like barbershops and hair salons would remain shuttered until May 29. But the following morning, the governor told lawmakers in a conference call he had decided to lift the ban starting on May 6 after receiving a flood of phone calls from upset business owners.

The announcement, Lee said, would be made in his daily press conference on Thursday. That didn’t keep legislators from rushing to put the news out on social media, raising questions about why the governor didn’t just make the public announcement in the first place.

**Approval.** A poll conducted by Harvard, Northeastern, and Rutgers universities found 64% of Tennesseans approve of Lee’s handling of the coronavirus response, while 14% disapprove. The online survey of 513 Tennesseans has a margin of error of  $\pm 4$  percentage points.

## To Hull and back

### **Cordell Hull to resume operations, but public will need appointments**

Staffers are scheduled to return to work at the legislative office complex on Monday, six weeks after the Cordell Hull Building was first locked down in response to the coronavirus pandemic. The end of the work-from-home requirement is aimed at getting legislators’ offices back up to speed in advance of the return into session. Social distancing and masks will be required, and visitors will be allowed into the building only if they have an appointment with a lawmaker.

There are still significant differences in expectations about what the resumed session will look like. Senate leadership has made it clear its preference is to focus only on downward adjustments to the budget required by the economic impact of the coronavirus. But a vocal faction in the House wants to instead throw open the doors to the legislation left hanging when lawmakers left town in March.

Under the more limited approach, a small number of committees would meet the last week of May before gaveling into session June 1 for as little as a week. Under the situation-normal approach, the session could last as long as three weeks — or even butt up against the end of the budget year on June 30.

**No precedent.** Disease, civil unrest, and conflict have given rise to efforts to limit access to the Tennessee Capitol over the years, but there are no examples of the statehouse or legislative office complex being shuttered for such an extended period since the Civil War. (Our thanks to legislative historian Eddie Weeks for the deep dive into the record for this retrospective.)

While Tennessee cities declared quarantines during the yellow fever epidemics centered on Memphis in the 1870s, Nashville and the state Capitol operations were not affected. The Spanish flu inflicted a heavy toll on Nashville in 1918, but state government did not appear to have been interrupted. That’s not to say health concerns haven’t been on lawmakers’ minds.

There have been regular complaints about illness around the Capitol complex since long before mold was cited as a major reason to move out of the under-

# Tennessee News Digest

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- Nearly 44,000 people filed for unemployment assistance last week, bringing total new jobless claims to more than 400,000 since the coronavirus pandemic began. The Washington-based Tax Foundation estimated Tennessee's unemployment trust fund could cover 12 more weeks' worth of benefits on April 25.
- Volkswagen has rescinded plans to restart production at its Chattanooga assembly plant on May 3. The German

automaker said it will evaluate the status of its suppliers, market conditions, and the coronavirus outbreak before determining a new target date.

- University of Tennessee President Randy Boyd is recommending no tuition increase for the system's campuses in Knoxville, Chattanooga, and Martin.
- Middle Tennessee State University announced plans to resume on-campus instruction for the fall semester.

- Dura Automotive System filed notice with the state that it will shutter operations in Lawrenceburg and eliminate 254 jobs if it can't refinance or sell its business by Friday. The facility makes windows, door seals, and roof rails.
  - David Freeman, a chairman of the Tennessee Valley Authority's board of directors in the 1980s, was named senior energy adviser to the Knoxville-based Southern Alliance for Clean Energy.
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ground Legislative Plaza and into the Cordell Hull in 2018. A House resolution adopted in 1897 said bad ventilation in the chamber was "the cause of much discomfort and sickness to the members and officers" and called for improving airflow. A June 1873 article in the *Knoxville Daily Chronicle* noted Comptroller John C. Burch was the only state official working at the Capitol amid a cholera outbreak.

The Capitol grounds have been shuttered for various reasons over the decades, but usually not around the clock. During World War I, the Tennessee statehouse was placed under guard at night. The National Guard was stationed around the building following the assassination of Martin Luther King Jr. in 1968. Public access was limited after the 9-11 terrorist attacks in 2001. And a nighttime curfew was imposed in response to Occupy Nashville protesters in 2011.

## Do as we legislate, not as we say

### **Voucher backers don't want intent of law determined by legislative debate**

Metro Nashville Legal Director Bob Cooper, a former state attorney general, this week cited several comments by lawmakers during the debate over the school voucher bill to support his argument that the bill was illegally whittled down to only even apply to two counties. He said comments by the likes of GOP Reps. Jason Zachary of Knoxville and Patsy Hazlewood of Signal Mountain showed they would only vote for the bill if their home counties were left out—which they ultimately were.

Cooper said the final version essentially rendered the bill a private act by whittling it down to just two counties — Davidson and Shelby — in violation of home rule provisions that require local referendums to approve them.

Stephanie Bergmeyer of the state attorney general's office said Chancellor Anne Martin shouldn't give any weight to lawmaker quotes pulled from the hours of legislative debate over the bill, arguing the language of the statute should be enough to signal its intent. That position was echoed by Sen. Brian Kelsey (R-Germantown), appearing on behalf of a law firm supporting the legislation he has long advocated for (despite a short-lived disavowal during his 2018 re-election bid).

At the end of the eight-hour hearing, Martin indicated she would rule on rival motions for summary judgment and dismissal by the end of next week.

## From the campaign trail

### **Sethi ad attacks loan as evidence rival Hagerty is part of 'ruling class'**

U.S. Senate candidate Manny Sethi is ratcheting up his attacks on rival Republican Bill Hagerty through a new digital ad suggesting he received special treatment in procuring a \$2.5 million line of credit while small businesses struggled to obtain coronavirus relief loans.

While Hagerty's loan has nothing to do with the federal Paycheck Protection Program, you wouldn't know it from the ad produced by consultant Fred Davis. Monochrome images of sad-looking people are interspersed with animations of Hagerty cavorting in front of an open vault, drinking champagne in a tuxedo, and being showered with cash in front of the U.S. Capitol.

The ad cites *Tennessee Journal* reporting that Hagerty once served on the board of the bank that granted the line of credit, suggesting he is part of a "ruling class" that allowed him to "prance right up to the front of the line" to get funding for his campaign. Left unsaid, of course, is that Sethi has tapped his own wealth to the tune of \$1.9 million to bankroll his bid for office.

**Executive blowback.** Longtime state Rep. John DeBerry (D-Memphis) has garnered considerable sympathy among Republicans after the Democratic executive committee booted him from the primary ballot because of his habit of voting with the GOP on issues like abortion and school vouchers. Now some are egging DeBerry on to file a bill to curb the party executive committees' power to oust candidates from the ballot.

The party executive committees are made up of two elected representatives (one male and one female) from all 33 state Senate districts. The membership is often more ideologically rigid than members of the General Assembly. For example, the GOP panel has officially called for requiring party registration to vote in primaries, a notion soundly rejected in the House last year. And the recent ouster of DeBerry was vocally opposed by Democratic caucus leaders in the House and Senate.

With one foot out the door, DeBerry would have little to lose by launching an attack on the executive committee system. Republicans could justify votes in favor by pointing to what they have decried as the injustice of the sponsor's ouster. Factions of both parties would like to see their parties more focused on fundraising and campaign support than ideological purity tests.

## Tennessee Notes & Quotes

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■ “Scripture describes being hard pressed on every side but not crushed. That’s where we are in Tennessee — I think that’s where we are in the nation, but the elderly are most-hard pressed in this setting.” — Gov. **Bill Lee** at a White House appearance with President **Trump**.

■ Democratic operative **Holly McCall** announced the *Tennessee Lookout*, a part of the national progressive States Newsroom network, will launch on May 6. The outlet will cover state policy and politics with a focus on health care, education, criminal justice, and the environment. Award-winning *Tennessean* journalist **Anita Wadhvani** and **Nate Rau**, a former colleague at the paper, have been hired as senior reporters. McCall is a former staffer with the *Nashville Business Journal*, but is better known for her more recent political pursuits, including unsuccessful bids for the state House and to become chair of the Tennessee Democratic Party. She was also the state spokeswoman for former Democratic presidential candidate **Michael Bloomberg**.

■ While the *Lookout* touts itself as an “independent, non-partisan” news organization, **McCall’s** Democratic activism has caused some hand-wringing among GOP leadership in the General Assembly. There is some precedent for news organizations with stated ideological leanings covering the statehouse. *TN Report*, funded by the conservative Franklin News Foundation, set up shop at the old Legislative Plaza about a decade ago, making a name for itself — and upsetting some Republicans — through its independent-minded reporting.

■ **Craig Fitzhugh**, the former House minority leader and a 2018 candidate for the Democratic gubernatorial nomination, is running for mayor in his hometown of Ripley. Fitzhugh’s father and grandfather served as mayors of Ripley, the Lauderdale County seat.

■ This year’s Miss Tennessee competition, the first to be held in Memphis in 65 years, has been postponed due to COVID-19. Originally scheduled for the week of June 7, the event has been rescheduled to start Aug. 2. The rival Miss Tennessee Volunteer, which broke off from the national Miss America organization last year because leaders like liquor lobbyist **Tom Hensley** refused to drop the swimsuit competition, canceled its event scheduled for June in Jackson.

■ Travel publisher Lonely Planet has shut down its monthly magazine and closed its London and Melbourne, Australia, offices “almost entirely.” Tobacco billionaire **Brad Kelley**, one of the country’s largest landholders, purchased the travel guidebook publisher from the BBC in 2013. It is based at The Factory at Franklin, which Kelley acquired the previous year.

■ “Vanderbilt’s work has been funded by the Department of Defense, the National Institutes of Health, and **Dolly Parton**.” — A database entry by the medical news site Stat about COVID-19 clinical trials.

■ Consultant **Ward Baker** has been named senior adviser to the Republican State Leadership Committee.

■ Office space rented by a voting machine lobbyist is playing into a drawn-out Shelby County Election Commission debate over its next vendor. *The Memphis Flyer* reports ES&S, the vendor of Diebold election machines, is represented by MNA Government Relations. The firm rents office space in Nashville from the Harris Shelton law firm, where election commission attorneys **John Ryder** and **Pablo Varela** are principals. Ryder said the lobbying firm is simply a tenant and that he had no knowledge of the voting machine bids. A sign in the building’s lobby listing him among MNA employees is simply a “mistake,” Ryder said. ES&S supplies machine-marked ballot technology, while many county Democrats are calling for a voter-marked ballot system.

■ Media organizations have filed a lawsuit alleging the Tennessee Registry of Election Finance violated open meetings laws by holding a vote via email to approve slashing Rep. **Joe Towns’** \$65,000 civil penalty to \$22,000. The 4-2 vote came on the eve of the candidate filing deadline and allowed the Memphis Democrat to pay the reduced fine in time to qualify for the ballot.

■ The lawsuit filed in Nashville Chancery Court does not specifically call for the decision to be reheard in a public forum, the usual remedy for open meetings violations. Such a move would call **Towns’** place on the ballot into question, as it would occur after the filing deadline (he has one primary opponent, **Dominique Primer**). The plaintiffs instead ask for an injunction against future email votes, requiring the Registry to file semi-annual reports about complying with sunshine laws, and any “other relief as the court deems just.”

■ “Businesses are compelled by a desire to create a safe environment for their customers and create a safe environment for their employees. That’s what businesspeople do.” — Gov. **Bill Lee** about why his “Tennessee Pledge” for reopening the economy doesn’t include any enforcement mechanisms to ensure compliance with restrictions and social distancing guidelines.

■ The U.S. Supreme Court in a 5-4 decision ruled that Georgia can’t copyright the annotations to its state code, which point out legislative history, court decisions, and legal opinions affecting state laws. Georgia is among more than 20 states — including Tennessee — that have sought to copyright such annotations. The unannotated Tennessee code is available for free online, but the printed 39-volume set of Tennessee Code Annotated is sold by Lexis-Nexis for \$365.

■ “If everything short of statutes and opinions were copyrightable, then states would be free to offer a whole range of premium legal works for those who can afford the extra benefit. A state could monetize its entire suite of legislative history. With today’s digital tools, states might even launch a subscription or pay-per-law service.” — Chief Justice **John Roberts** for the majority.

■ Drat! Having exhausted the entire Netflix library, we had been looking forward to binge-watching Tennessee Code Annotated on pay-per-view.