

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

August 13, 2024

Opinion No. 24-013

Legislative Delegation of Emergency Power

Question 1

Does the General Assembly have the authority to delegate the power to make laws to another department given the Tennessee Constitution prohibits the executive and judicial departments from exercising legislative authority under article II, section 2 of the Tennessee Constitution?

Opinion 1

Under the separation-of-powers doctrine established by article II, sections 1 and 2 of the Tennessee Constitution, the General Assembly generally cannot delegate its power to make laws, except in two narrow instances.

Question 2

Does the General Assembly have the authority to delegate to another department the power to make rules and regulations that have the force of law, including those that have general application to individuals or entities outside the department, given the Tennessee Constitution prohibits the executive and judicial departments from exercising legislative authority under article II, section 2?

Opinion 2

Yes. Although the General Assembly may not delegate its law-making power to an executive branch agency, it may delegate “the authority to implement the expressed policy of particular statutes”—i.e., executive power. That authority “include[s] the power to promulgate rules and regulations that have the effect of law in [an] agency’s area of operation.” The statute delegating the power to make rules and regulations “must contain sufficient standards or guidelines to enable both the agency and the courts to determine if the agency” is permissibly implementing the statute or unconstitutionally exercising legislative power.

Question 3

Does the General Assembly possess the authority to grant emergency powers to the governor under the Tennessee Constitution?

Opinion 3

Yes. The General Assembly can grant emergency powers to the governor under the Tennessee Constitution, so long as the power it grants is executive, not legislative, in nature. Moreover, the governor's constitutionally vested executive power *may* inherently include emergency power; if that is correct, then it would not offend the separation-of-powers doctrine for the General Assembly to grant the governor emergency powers beyond mere implementation since the Tennessee Constitution would already vest the governor with these powers.

Question 4

Does article II, section 2 of the Tennessee Constitution prohibit the General Assembly from granting emergency powers to another department of state government?

Opinion 4

No. See responses to Questions 2 and 3.

Question 5

Can article III, section 9 of the Tennessee Constitution, which grants the governor power only to convene the General Assembly on extraordinary occasions, be fairly interpreted to prohibit the governor from unilaterally acting in extraordinary occasions or emergency situations?

Opinion 5

No. Article III, section 9, of the Tennessee Constitution grants the governor affirmative power to convene the General Assembly in emergencies and other "extraordinary occasions." It does not limit his authority to exercise constitutionally delegated emergency authority or any emergency authority flowing from his constitutionally vested executive power.

Question 6

Can article III, section 5 of the Tennessee Constitution, which prohibits the governor from acting unilaterally in the case of rebellion or invasion but requires that the governor still defer to the acts of the General Assembly, be fairly interpreted to prohibit the General Assembly from delegating emergency powers to another department?

Opinion 6

No. Article III, section 5, limits the circumstances under which the State's militia may be called into service. It does not prohibit the General Assembly from delegating emergency powers to another department.

ANALYSIS

1.-4. Article II, section 1 of the Tennessee Constitution divides the powers of government into three distinct departments: Legislative, Executive, and Judicial. Article II, section 2 of the Tennessee Constitution provides that “[n]o person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.” These two constitutional provisions, which were adopted in the 1835 Constitution, establish Tennessee’s separation-of-powers doctrine. *See State ex rel. Town of South Carthage v. Barrett*, 840 S.W.2d 895, 897 (Tenn. 1992); *State v. Armstrong*, 35 Tenn. (1 Sneed) 634, 653–54, 658 (1856). The doctrine “prohibits an encroachment by any of the departments upon the powers, functions and prerogatives of the others.” *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 843 n.8 (Tenn. 2008) (citation omitted).

A corollary of this doctrine is the principle that no branch may delegate its authority to another. Article II, section 3 of the Tennessee Constitution vests the State’s “legislative authority” in the General Assembly—a power that encompasses “the authority to make, order, and repeal . . . laws.” *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975) (quoting *Richardson v. Young*, 125 S.W. 664, 668 (Tenn. 1910)). As with the vesting of the federal legislative power in Congress, “that assignment of power to [the General Assembly] is a bar on its further delegation.” *Gundy v. United States*, 588 U.S. 128, 135 (2019); *accord State v. Armstrong*, 35 Tenn. (3 Sneed) 634, 654–56 (1856). And the separation-of-powers clause makes this even clearer: the General Assembly generally may not delegate “purely legislative” power. *Gallaher v. Elam*, 104 S.W.3d 455, 464 (Tenn. 2003) (citing *State v. Edwards*, 572 S.W.2d 917, 919 (Tenn. 1978); *Chattanooga-Hamilton Cnty. Hosp. Auth. v. Chattanooga*, 580 S.W.2d 322, 328 (Tenn. 1979)). That means that “it may not delegate to an executive branch agency”—or any other body—“the exercise of the legislature’s discretion as to what the law shall be.” *Gallaher*, 104 S.W.3d at 464 (citing *Dep’t of Pub. Welfare v. Nat’l Help “U” Ass’n*, 270 S.W.2d 337, 339 (Tenn. 1954)); *see also King v. State*, 10 S.W. 509, 510 (Tenn. 1889) (same as to judiciary); *Gibson Cnty. Special Sch. Dist. v. Palmer*, 691 S.W.2d 544, 548 (Tenn. 1985) (same as to the public).¹

The Tennessee Supreme Court has recognized only two narrow exceptions to this non-delegation principle. First, the General Assembly may delegate its legislative powers when the “Constitution itself authorizes the delegation.” *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 711 n.3 (Tenn. 2001). This includes the General Assembly’s constitutionally

¹ Notably, the Tennessee Supreme Court has held that it may allow the General Assembly to engage in “legislative regulation of inherent judicial authority” out of “inter-branch comity.” *State v. Mallard*, 40 S.W.3d 473, 481-82 (Tenn. 2001) (collecting cases). But to the extent the legislature is exercising “powers properly belonging” to the judiciary, its doing so likely violates the command of article II, section 2, of the Tennessee Constitution and cannot be justified based on comity or any other consideration not grounded in the constitutional text. The U.S. Supreme Court, for example, has made clear that it violates the U.S. Constitution for Congress to “invest itself . . . with either executive power or judicial power.” *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (Taft, C.J.); *see also United States v. Schrode*, 839 F.3d 545, 554 (7th Cir. 2016) (“Article III judges lack constitutional authority to delegate judicial power to non-Article III judges.” (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995))). If that is true of the U.S. Constitution, which lacks an express separation-of-powers provision akin to Tennessee’s, it must be doubly true of the Tennessee Constitution.

granted power to “authorize the several Counties and incorporated towns in [Tennessee], to impose taxes.” Tenn. Const. art. II, § 29; *see also Gibson Cnty.*, 691 S.W.2d at 549 (discussing this power). It also includes the power of a chartered county to “establish the qualifications of the members of its own legislative body” under certain circumstances. *Bailey v. Shelby County*, 188 S.W.3d 539, 546 (2006) (citing Tenn. Const. art. VII, § 1). Second, the General Assembly may delegate legislative power when it is “sanctioned by immemorial usage originating anterior to the Constitution and continuing unquestioned thereunder.” *S. Constructors*, 58 S.W.3d at 711 n.3 (quoting *Kee v. Parks*, 283 S.W. 751, 753 (1926)). This elaborately worded exception has “only two” recognized applications—permitting the General Assembly to confer powers on (a) municipal corporations, and (b) county courts to govern “local matters.” *Kee*, 283 S.W. at 753; *S. Constructors*, 58 S.W.3d at 711 n.3.

Although the legislative branch “may not delegate” the authority to make laws, the General Assembly may delegate “the authority to implement the expressed policy of particular statutes.” *Gallaher*, 104 S.W.3d at 464. And the grant of such authority “may include the power to promulgate rules and regulations that have the effect of law in the agency’s area of operation.” *Id.* (citing *Bean v. McWherter*, 953 S.W.2d 197, 199 (Tenn. 1997)). “Because the enactment of reasonable rules and regulations is administrative in character, it does not amount to the exercise of a legislative function, despite the agency’s exercise of discretion.” *Id.* (citations omitted).

The Tennessee Supreme Court has established a “test” for determining whether the General Assembly has lawfully delegated power to an executive branch agency. *Id.*; *Bean*, 953 S.W.2d at 199. “The test . . . is ‘whether the statute contains sufficient standards or guidelines to enable both the agency and the courts to determine if the agency is carrying out the legislature’s intent.’” *Gallaher*, 104 S.W.3d at 464 (quoting *Bean*, 953 S.W.2d at 199). Courts determine legislative intent based on the “natural and ordinary meaning” of the “statutory text,” *Armbrister v. Armbrister*, 414 S.W.3d 685, 703 (Tenn. 2013), meaning the text itself must “sufficiently guide[] executive discretion” inside the boundaries of article II, § 2 of the Tennessee Constitution, *see Gundy*, 588 U.S. at 136.

Although the Tennessee Supreme Court suggested in *Bean* that the requisite level of statutory specificity might vary with the subject matter, *see* 953 S.W.2d at 199, the central question is whether there has been “any delegation of legislative power,” *Mistretta v. United States*, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting); *see also* Tenn. Const. art. II, § 2. That “cannot be done,” but a legislature may “confer[] authority or discretion as to [the] execution” of the law. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693-94 (1892). And that discretion may include “mak[ing] public regulations . . . directing the details of [a statute’s] execution.” *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928).

The Tennessee Supreme Court has applied these principles illustratively in two cases. In *Gallaher*, the Court held that the General Assembly had constitutionally delegated “rulemaking authority” to the Tennessee Department of Human Services to “establish any rules necessary for the administration of the child support program operated pursuant to [federal statute].” 104 S.W.3d at 464 (quoting Tenn. Code Ann. § 71-1-132(a)(1)). There, the statute “require[d] DHS to establish rules consistent with federal law,” and the applicable federal law imposed certain standards. *Id.* DHS established such rules by adopting guidelines that incorporated those federal standards, thus executing the General Assembly’s instruction. *Id.* at 464–65. Similarly, in *Bean*, the Court found

that the statute’s provision of definitions for classifying Tennessee wildlife and of non-exclusive lists of species for each class provided “clearly adequate” parameters for the agency to classify animals “possessing characteristics consistent” with those guidelines, thus supporting the General Assembly’s “delegation of the authority to add and delete species” from each class. 953 S.W.2d at 199–200. In both cases, the General Assembly permissibly tasked an agency with “fill[ing] up the details” of a statutory direction. *Gundy*, 588 U.S. at 157 (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. 1, 43 (1825)).

Applying these principles here, the General Assembly may grant emergency powers to the governor or another department of state government, so long as those powers are not legislative but executive in nature. No constitutional provision expressly justifies a delegation of emergency power to the governor or another department; nor does the “immemorial usage” exception apply, given that its applications involve delegations to local governmental units, not departments of state government. So the default non-delegation rule applies. In other words, if the General Assembly delegates no more than the authority to “direct[] the details of [an emergency statute’s] execution,” *J.W. Hampton & Co.*, 276 U.S. at 406, then its delegation will pass separation-of-powers muster.²

There is one significant caveat to this analysis. To our knowledge, the Tennessee Supreme Court has not determined whether the executive power itself—which the Tennessee Constitution vests in the governor, Tenn. Const. art. III, § 1—encompasses emergency power. Some scholars posit that emergency power is inherently executive. *See, e.g.*, Jim Rossi, *State Executive Lawmaking in Crisis*, 56 Duke L.J. 237, 240, 260–61 (2006); *see also* Saikrishna Prakash, *The Imbecilic Executive*, 99 Va. L. Rev. 1361, 1363–64 (2013) (collecting authorities). And if that’s right, then it might not violate the separation-of-powers doctrine to grant the executive “discretion[ary]” power in emergencies since such matters would “already [be] within the scope of executive power” and thus would not represent an impermissible delegation of legislative authority. *Gundy*, 588 U.S. at 159 (Gorsuch, J., dissenting) (citation omitted). Such a delegation would also conceivably fall within the exception for a delegation “authorize[d]” by the Tennessee Constitution “itself.” *S. Constructors*, 58 S.W.3d at 711 n.3.

The legislative versus executive character of emergency power is—and has been—subject to disagreement, however. *See* Jules Lobel, *Emergency Power & the Decline of Liberalism*, 98 Yale L. J. 1385, 1386–92, 1404–05 (1989); *see also* Rossi, *supra*, at 238. And some scholars argue the U.S. Constitution, which creates a stronger executive than Tennessee’s governor, “rendered the Chief Executive almost entirely impotent in crises” by giving him few of—and Congress many

² Tennessee courts have dismissed recent suits alleging the general emergency statutory provisions unconstitutionally delegate power to the governor because, among other reasons, the provisions limit the governor’s exercise of that authority in important ways. *See* Order 11-13, *Allen v. Lee*, No. 20-405-I (Davidson Ch. Ct. May 26, 2020), *vacated as moot*, No. M2020-00918-COA-R3-CV (Tenn. Ct. App. July 14, 2021) (holding Tenn. Code Ann. § 58-2-107 does not violate the separation-of-powers doctrine); *see also* *Off the Wagon Tours, LLC v. Metropolitan Gov’t of Nashville & Davidson County*, No. 20-0766-I (Davidson Ch. Ct. May 6, 2021), *appeal dismissed per stipulation*, No. M2021-00629-COA-R3-CV (Tenn. Ct. App. Jan. 28, 2022). Other state courts rejected similar, non-delegation-based challenges to gubernatorial emergency powers during the COVID-19 pandemic. Richard Briffault, *States of Emergency: COVID-19 and Separation of Powers in the States*, 2023 Wis. L. Rev. 1633, 1648–54 (2023) (collecting cases). *But see* *In re Certified Questions from U.S. District Court, W.D. Mich., S. Div.*, 958 N.W.2d 1, 20–24 (Mich. 2020) (holding non-time-limited delegation of power to Michigan’s governor under the Emergency Powers of the Governor Act to “promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property” unlawfully delegated legislative power to the executive and thus violated the separation of powers).

of—the “powers necessary and proper to overcome emergencies.” Prakash, *supra*, at 1365–69. Indeed, the Tennessee Constitution’s provision for the governor to “convene the General Assembly by proclamation” “on extraordinary occasions,” Tenn. Const. art. III, § 9—i.e., in emergencies—“strongly hint[s] that [the governor] lack[s] a generic emergency power.” See Prakash, *supra*, at 1384. Instead, the Tennessee Constitution may reflect the state constitutional context pre-dating the American Revolution—one in which “constitutions granted [governors] little crisis authority.” *Id.* The Tennessee Supreme Court has not weighed in on this issue.

5. Article III, section 9 of the Tennessee Constitution, which grants the governor power to convene the General Assembly only on extraordinary occasions, cannot be fairly interpreted to prohibit the governor from unilaterally acting in emergencies.

Tennessee courts interpret constitutional provisions by effectuating their “plain and ordinary meaning.” *Estate of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010). The “entire instrument” must be considered and its various provisions “harmonize[d] ... in order to give effect to them all.” *Id.* “Every clause should be given effect.” *Vollmer v. City of Memphis*, 792 S.W.2d 446, 448 (Tenn. 1990).

Article III, section 9, establishes the governor’s authority to convene a special session of the legislature “on extraordinary occasions.” Tenn. Const. art. III, § 9.

As its plain text indicates, this provision gives the governor broad discretion to determine when circumstances are sufficiently “extraordinary” to warrant a special session of the General Assembly. See *id.* The governor has, for example, previously convened the General Assembly to consider legislation it has already rejected. *Williams v. City of Nashville*, 15 S.W. 364, 365–66 (1891). And the governor’s authority to exercise this power does not depend on whether the General Assembly is in or out of session; he may reconvene the General Assembly when it is in recess or has adjourned. *Walker v. Dunn*, 498 S.W.2d 102, 106 (Tenn. 1972).

Article III, section 9’s text does not expressly restrict the governor’s authority; rather, it provides an affirmative grant of power. And section 9 places no limits on the General Assembly’s power to grant the governor emergency power. To the contrary, it indicates that the governor may convene the General Assembly for the “purpose[.]” of granting the governor power to address the “extraordinary occasion[.]” at hand. Tenn. Const. art. III, § 9.

Although this provision may “hint” that the governor’s executive power does not include independent emergency power, Prakash, *supra*, at 1384, an implication, “however probable or plausible,” does not equate with a command. See *Prescott v. Duncan*, 148 S.W. 229, 234–35 (1912); see also *Evans v. McCabe*, 52 S.W.2d 159, 161–62 (1932) (discussing rejection of unnecessary constitutional implication). And the Tennessee Constitution explicitly vests the governor with “executive power,” Tenn. Const. art. III, § 1, which may or may not include emergency powers. See *supra*. Thus, the General Assembly may limit—or expand—the governor’s power in emergency situations by statute, consistent with the separation of powers clause and other relevant constitutional provisions. But article III, § 9, does not independently restrain the governor’s power.

6. Article III, section 5, of the Tennessee Constitution does not restrict the General Assembly’s authority to delegate emergency management powers to another department.

Article III, section 5 limits the circumstances under which the militia “shall ... be called” but does not speak to the General Assembly’s power to delegate general emergency powers. The provision’s second clause states that the militia “shall not be called into service except in case of rebellion or invasion” and, even then, at the General Assembly’s declaration “only.” Tenn. Const. art. III, § 5. But the provision’s text in no way limits the General Assembly’s power to confer authority on another department to exercise emergency powers unrelated to the militia.

To the contrary, the adoption of article III, section 5’s second clause appears to have been a reaction to perceived gubernatorial overreach—not an attempt to limit the General Assembly’s power. As it originally appeared in the Constitution of 1796, article III, section 5, simply vested the governor with authority as “Commander in Chief of the Army and Navy of this State and of the Militia.” The second clause was added later in 1870—likely as a check on the governor’s power to call out the militia without the General Assembly’s consent and in reaction to the perceived abuse of that power by legendarily contentious Reconstruction-era Governor William Brownlow. *See* Lewis L. Laska, *A Legal and Constitutional History of Tennessee, 1772-1792*, 6 Mem. St. U. L. Rev. 563, 638 (1976). Thus, article III, section 5, does not limit the General Assembly’s power to delegate emergency powers to another department.

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