

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
SECOND FLOOR, CORDELL HULL BUILDING
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

March 13, 2000

Opinion No. 00-046

Constitutionality of HB2296

QUESTION

Does Section 8(d) of House Bill 2296 violate the separation of powers clause of the Constitution of Tennessee?

OPINION

No. Section 8(d) of House Bill 2296 does not violate the separation of powers clause of the Constitution of Tennessee.

ANALYSIS

Section 8(d) of House Bill 2296 provides as follows:

If a licensing authority fails to deny, suspend, or revoke a license when so ordered by a court pursuant to this part, the other parent may petition the court to compel the authority's compliance and may seek any appropriate sanctions against such authority.

You have asked whether this provision of the bill would create a conflict between the executive and judicial branches of government. It could well do so in cases in which the licensing authority does not agree with the court's decision or does not want to comply with the court's order. Nevertheless, the more important question is whether the proposed language somehow violates the separation of powers clause of the Constitution of Tennessee. For the reasons stated herein, we do not believe that the proposed language violates the constitutional prohibition on the infringement of executive branch power by the judiciary.

As one justice of the Tennessee Supreme Court has noted:

The Tennessee Constitution, Article II, § 1, expressly states that "the

powers of the government shall be divided into three distinct departments: the Legislative, Executive, and Judicial,” and by Article II, § 2, “no 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.” [Footnote omitted]. Underwood v. State, 529 S.W.2d 45 (Tenn. 1975), recognized that “the doctrine of separation of the powers, as set out in Article II, §§ 1 and 2, of the Constitution of Tennessee, is a fundamental principle of American constitutional government.” Id., at 47. Moreover, “it is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct. . . .” Richardson v. Young, 122 Tenn. 471, 492, 125 S.W. 664, 668 (1909). The tension and play among these powers provide restraint and maintain the limits placed on the government in all its departments to protect the rights and liberties of the citizens and to deter abuses of power. [Footnote omitted]. See Bank of the State v. Cooper, 10 Tenn. 599, 611 (1831) (Opinion of Peck, J.). Each department acts within its own sphere as an independent and co-equal branch of government and can be subject to the will of no other department when performing its particular functions. The primacy of these fundamental principles is undisputed but because the defining powers of each department are not always readily identified, recognizing an encroachment by one department upon another is sometimes difficult. What is necessary is to find the operating principles at stake in any given case and determine their application to those circumstances based on the evils against which they were intended by the people of the state to provide protection. Those principles decide the case or controversy presented by the facts.

Summers v. Thompson, 764 S.W.2d 182, 188-89 (Tenn. 1988) (Concurring Opinion, J. Drowota).

The Tennessee Supreme Court has also noted that:

Of course, the doctrine of separation of the powers, as set out in Article II, §§ 1 and 2, of the Constitution of Tennessee, is a fundamental principle of American constitutional government. Nonetheless, it has long been recognized that it is impossible to preserve perfectly the theoretical lines of demarcation between the executive, legislative and judicial branches of government. *Bank of Commerce and Trust Company v. Senter*, 149 Tenn. 569, 260 S.W. 144, 151 (1924); *Richardson v. Young*, 122 Tenn. 471, 493, 494, 125 S.W. 664 (1910). There is necessarily a certain amount of

overlapping. The three departments are interdependent.

“The Constitution does not define in express terms what are legislative, executive, or judicial powers.

“Theoretically, the legislative power is the authority to make, order, and repeal, the executive, that to administer and enforce, and the judicial, that to interpret and apply, laws.” *Richardson v. Young*, supra, at 668.

Underwood v. State, 529 S.W.2d 45, 47 (Tenn. 1975).

The United States Supreme Court has described the respective roles of the three branches of government and their interaction as follows:

While it is the province and duty of the judicial department to interpret the law, it is equally the exclusive province of the legislature to formulate policies, mandate programs, and to establish their relative priority, and, once the legislature, exercising its delegated powers, has decided the policy in a given area, it is for the executive department to administer the laws and for the courts to enforce them when enforcement is sought. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194, 98 S. Ct. 2279, 2301-02, 57 L. Ed. 2d 117 (1978); see also *Richardson v. Young*, 122 Tenn. at 493, 125 S.W. at 668.

In this instance, the judiciary is not encroaching upon the powers reserved to the executive branch of government. Rather, the legislature is delegating to the judicial branch the authority to take action against legislatively created licenses in appropriate cases as an enforcement tool which can be used against parties who fail or refuse to comply with a lawful court order concerning visitation.¹ While the judicial branch has the inherent authority to enforce its own orders, there is no constitutional impediment to the legislature’s granting the courts additional authority to enforce their orders pursuant to police powers. See *Anderson County Quarterly Court v. Judges*, 579 S.W.2d 875, 878 (Tenn. Ct. App. 1978); Carrigan, Inherent Powers of the Courts, Nat’l. C. St. Judiciary 1, at 2 (1973). The judicial branch of government has already been granted statutory contempt powers by the legislature. See Tenn. Code Ann. §§ 29-9-101 to 108. Nor would any administrative agency which failed or refused to comply with a lawful court order after being duly notified of the order that required action against a license, as defined by the bill, be excused from compliance based upon a separation of powers argument. The agency would either have to comply with the order or seek relief from the order. Failure or refusal to comply could be punished as contempt of court. Tenn. Code Ann. § 29-9-102(3). Since the executive power is to administer and enforce the laws enacted

¹The legislature has previously granted the courts the authority to take action against similarly defined licenses where the licensee fails or refuses to pay child support as ordered. Tenn. Code Ann. §§ 36-5-703, 704.

by the legislature as interpreted and applied by the courts, the provision of the bill in question does not appear to violate the doctrine of separation of powers between the judicial and executive branches of government. Neither the court's authority to order an administrative agency to deny, suspend or revoke a license nor the court's enforcement of such an order by compelling agency compliance or even by the imposition of sanctions would violate the separation of powers doctrine of the Constitution of Tennessee.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

STUART F. WILSON-PATTON
Assistant Attorney General

Requested by:

Honorable Robert D. Patton
State Representative
7th Legislative District
209 War Memorial Building
Nashville, TN 37243-0107