S T A T E O F T E N N E S S E E
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Opinion No. 12-14

Constitutionality Of Legislation Requiring Governor To Designate "Tennessee's Day Of Prayer"

QUESTION

Would pending legislation that would require the Governor to designate a certain date as "'Tennessee's Day of Prayer,' on which the people of this State may turn to prayer, meditation or otherwise give thanks, in accordance with their own faiths and consciences" be found by a court to violate the First Amendment's Establishment Clause?

OPINION

No, this Office believes that legislation requiring the Governor to designate "Tennessee's Day of Prayer" could not be successfully challenged in court as being unconstitutional.

ANALYSIS

This Office has been asked to assess the constitutional validity of House Bill 2321/Senate Bill 2516 of the 107th General Assembly (hereinafter "SB2516") which is currently pending before the General Assembly. This legislation amends the Tennessee Code Annotated by adding a new section designated 4-1-410, which provides:

> The governor shall designate the first Thursday during the month of May of each calendar year as "Tennessee's Day of Prayer" on which the people of this state may turn to prayer, meditation or otherwise give thanks, in accordance with their own faiths and consciences.

Id. Section 1. This designation coincides with the designation by the President of the United States of the same day as a "National Day of Prayer."[1] The only obligation imposed by this

[1] 36 U.S.C. § 119 specifies:

> The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals.

legislation is on the Governor alone. No citizens are obligated to pray, meditate, give thanks, or take any action.

This Office opined that a similar Senate Joint Resolution in 2005 designating a specific date as "Tennessee Day of Prayer" to coincide with the "National Day of Prayer" did not violate the First Amendment or any other constitutional provisions. Tenn. Op. Atty. Gen. No. 05-063 (April 27, 2005) ("Constitutionality of Senate Joint Resolution 105 & House Joint Resolution No. 122"). [2] This Office reasoned that neither of these resolutions violated the Establishment Clause of the First Amendment, which states that "congress shall make no law respecting an establishment of religion." First, neither resolution required or compelled any kind of action concerning religion. Nor did either resolution impose any penalties or sanctions of any kind. Thus these resolutions were not "laws" respecting an establishment of religion. *Id.* at *2-3. Furthermore, even if the resolutions could be considered "laws" for purposes of the Establishment Clause, these resolutions' recognition of historic circumstances, including the historic and traditional practice of issuing resolutions or proclamations designating days of prayer, would not violate the Establishment Clause. *See Marsh v. Chambers,* 463 U.S. 783, 786-95 (1983) (the historic circumstances contemporaneous with the passage of the Establishment Clause insulated the practice of the Nebraska Legislature paying a chaplain to open its sessions). This Office noted illustrations of the "unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789." Tenn. Op. Atty. Gen. No. 05-063, at *2-3. *See also Lynch v. Donnelly,* 465 U.S. 668, 674, 677 (1984). In recognition of the historic public designation of days of thanksgiving and prayer, our national motto, "In God We Trust," and the common practice of opening invocations prior to United States Supreme Court and other court sessions, this Office concluded that a Senate Joint Resolution designating a "Tennessee Day of Prayer" did not violate the Establishment Clause of the First Amendment.

For these same reasons this Office is of the opinion SB2516 should withstand a constitutional challenge. The current legislation does not favor any religion, and on its face includes secular purposes by encouraging the people of this State to not only turn to prayer, but also meditation or otherwise give thanks "in accordance with their own faiths and consciences."

It is also improbable that any party could establish standing to challenge the constitutionally of this legislation under the Establishment Clause. In *Freedom From Religion Foundation, Inc., v. Obama,* 641 F.3d 803, 804-07 (7th Cir. 2011),[3] an organization of non-

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[2] The companion 2005 House Joint Resolution 122 designated a specific day as a "day of special prayer for widows" and "ask[s] that all Tennesseans pause to remember and emphasize with the plight of our bereaved sisters."

[3] The Seventh Circuit Court of Appeals reversed and dismissed the lower court's finding that the statute and proclamation recognizing a National Day of Prayer violated the Establishment Clause. *See Freedom From Religious Foundation, Inc v. Obama,* 705 F.Supp.2d 1039 (W.D. Wisc. 2010). The district court first applied the Establishment Clause test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which held that government action is invalid if (1) it has no secular purpose; (2) its primary effect advances or inhibits religion; or (3) it fosters an excessive entanglement with religion. The first two prongs are often described as the "endorsement test," and the inquiry is whether the statute actually conveys a message of endorsement of religion. 705 F.Supp.2d at 1048. The district court concluded that the legislative history and the specific language of the federal statute failed to support a secular purpose and effectively endorsed religion. *Id.* at 1050-55. The district court did not accept the arguments that the National Day of Prayer is to acknowledge the role of religion in American life, which is not objectionable, or

religious persons and several of its members who objected to the President's proclamation of the National Day of Prayer were held to lack standing to challenge either the federal statute or the President's proclamations. The federal law imposes duties only on the President, and the President's proclamations are addressed to all citizens, with no one being obliged to pray or take any other action. No one is injured if they choose not to follow the President's request in the proclamation. *Id.* at 805-06. Moreover, the judicial branch does not censure a President's speech, noting that those who do not agree with the President's statements may speak in opposition but may not silence the speech of the President of which they disapprove. *Id*. at 806. This reasoning would apply to Tennessee's pending legislation.

In light of the dismissal of the challenge to the federal statute creating a "National Day of Prayer," and incorporating our analysis in Tenn. Op. Atty. Gen. No. 05-063, we believe that the proposed legislation could not be successfully challenged in court as being unconstitutional.

The use of the directive language that the Governor "shall" rather than "may" designate a certain date as "Tennessee's Day of Prayer" may implicate a separation of powers issue between the legislative and executive branches of government. The Governor of the State constitutes one of the three co-ordinate branches of the government and "the supreme executive power of this state shall be vested in the governor." Tenn. Const., Art. 3, § 1; *State ex rel. Latture v. Frazier*, 86 S.W. 319, 320 (Tenn. 1905) (finding that while the Legislature may appoint or name the Governor to act upon any board created by it, it is optional with the Governor whether he will serve or not, and he cannot be compelled by mandamus to act); *Jonesboro Fall Branch & Blair's Gas Turnpike Co. v. Brown*, 67 Tenn. 490, 491 (1875) (finding that governor cannot be compelled by mandamus to issue certain bonds which the legislature has directed to be issued). "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*, 525 S.W. 664, 668 (Tenn. 1910). Accordingly, the Governor may exercise his discretion in regard to designating a "Tennessee Day of Prayer" pursuant to this legislation.

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that it is otherwise acceptable under *Marsh v. Chambers*, 463 U.S. at 786-95, which upheld legislative opening prayers as an example of "ceremonial deism" and in light of the "unambiguous and unbroken history" of the practice. 705 F.Supp.2d at 1055-64.

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