

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

September 14, 2015

Opinion No. 15-66

Constitutionality of Tenn. Code Ann. § 71-5-126

Question 1

Does the process established by Tenn. Code Ann. § 71-5-126 contravene the separation of powers provision of the Tennessee Constitution?

Opinion 1

No. Tennessee Code Annotated § 71-5-126 provides that the “governor shall not make any decision or obligate the state of Tennessee in any way with regard to the expansion of optional enrollment in the . . . medicaid program, pursuant to the Patient Protection and Affordable Care Act . . . unless authorized by joint resolution of the general assembly.” That provision does not contravene article II, section 2, of the Tennessee Constitution because it involves nothing more than the legislature exercising its legislative authority through constitutionally permissible means.

Question 2

Does the absence of a joint resolution passed pursuant to Tenn. Code Ann. § 71-5-126 prohibit the governor from negotiating an agreement with the federal government to expand Medicaid or from implementing that agreement?

Opinion 2

Because the General Assembly has authorized the executive branch to negotiate and cooperate with the federal government regarding expansion of the Medicaid program, the absence of a joint resolution passed pursuant to Tenn. Code Ann. § 71-5-126 would not prohibit the governor from negotiating an agreement with the federal government to expand Medicaid. Absence of authorization by the General Assembly in the form of a joint resolution would, however, prohibit the governor from making a final decision to bind the State of Tennessee to that agreement or to implement that agreement.

ANALYSIS

By statute, the General Assembly has authorized the executive branch to take certain preliminary steps with respect to any potential expansion of the Medicaid program. For example, the Commissioner of Health¹ is authorized to “review[], for the purposes of reforming, the state’s medicaid program” and to “apply[] for needed federal waivers” and “develop[] . . . plans for consideration by the governor and the general assembly outlining options the state has under federal law concerning, but not limited to, eligibility, scope and duration of services, optional services, and rate structures.” Tenn. Code Ann. § 71-1-126. The Commissioner is also authorized to “identify, apply for and negotiate for federal waiver authority for matching funds to support the provision of coverage . . . , which may include innovative approaches and solutions.” Tenn. Code Ann. § 71-5-602.

None of these statutory provisions purports to give the executive branch final authority to expand the Medicaid program, and other constitutional and statutory provisions make clear that all appropriations of public funds—including federal funds received by the state—for the Medicaid program must be approved by the General Assembly. As a general matter, the Tennessee Constitution provides that “no public money shall be expended except pursuant to appropriations made by law.” Tenn. Const. art. II, § 24. This constitutional provision gives plenary authority to the legislative branch to make appropriations for all expenses. *State v. Thomason*, 221 S.W. 491, 493 (Tenn. 1920). It requires that all state revenues, whatever the source, be appropriated by the General Assembly before the funds may be spent. The appropriations requirement applies to federal funds that the State receives as well as to funds generated by the State’s own taxing power. *See* Tenn. Att’y Gen. Op. 84-079 (Mar. 7, 1984). At least annually, the governor is required to “recommend” to the General Assembly a budget for the Medicaid program that may include, among other things, funds to “[e]xtend coverage to potential new enrollees, or categories of new enrollees.” Tenn. Code Ann. §§ 71-5-102(b)(2), (b)(2)(B). But such funds still must be specifically appropriated by the General Assembly “through provisions of the general appropriations act.” *Id.* § 71-5-102(b)(2).

In 2014, the General Assembly enacted Tenn. Code Ann. § 71-5-126 to clarify that final authority to expand optional enrollment in the Medicaid program pursuant to the federal Patient Protection and Affordable Care Act rests with the General Assembly. That statute provides that

[t]he governor shall not make any decision or obligate the state of Tennessee in any way with regard to the expansion of optional enrollment in the medical assistance program, also known as the medicaid program, pursuant to the Patient Protection and Affordable Care Act, Public Law 111-148, as interpreted by the United States Supreme Court in *National Federation of Independent Business v.*

¹ Although the statute still refers to the Commissioner of Health, the Commissioner of Health no longer has authority with respect to the TennCare program. By Executive Order No. 23 (Oct. 19, 1999), the control and administration of the TennCare program and all its related functions were transferred from the Department of Health to the Department of Finance and Administration. Thus, Executive Order No. 23 operates effectively to substitute “Commissioner of Finance and Administration” for the Commissioner of Health in these statutory provisions. The Bureau of TennCare is housed within the Department of Finance and Administration and administers the State’s Medicaid program.

Sebelius to be unconstitutional when applied to states as a mandatory expansion, unless authorized by joint resolution of the general assembly.

This request seeks opinions on two questions: (1) whether Tenn. Code Ann. § 71-5-126 contravenes the separation of powers provision of the Tennessee Constitution, and (2) whether, absent a joint resolution passed pursuant to Tenn. Code Ann. § 71-5-126, the governor is prohibited from negotiating an agreement with the federal government to expand Medicaid or from implementing any such agreement.

1. The Tennessee Constitution provides for the separation of powers among the three branches of state government—legislative, executive, and judicial. *See* Tenn. Const. art. II, § 1. “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.” *Id.* art. II, § 2. Complete separation is not required. There are “some powers which, on account of the complexity of governmental functions . . . may be, with equal propriety and correctness, committed to more than one department.” *Richardson v. Young*, 125 S.W. 664, 668 (Tenn. 1910) (internal quotation marks omitted).

The Tennessee Constitution vests the legislative authority of the State in a “General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people.” Tenn. Const. art. II, § 3. The General Assembly exercises its law-making, i.e., legislative, authority through the enactment of legislation. *See Richardson*, 125 S.W. at 668 (“[T]he legislative power is the authority to make, order, and repeal . . . laws.”).

Legislation may take the form of either a bill or a joint resolution. Article II, section 18, of the Tennessee Constitution provides that

[a] bill shall become law when it has been considered and passed on three different days in each House and on third and final consideration has received the assent of a majority of all the members to which each House is entitled under this Constitution, when the respective speakers have signed the bill . . . and when the bill has been approved by the Governor or otherwise passed under the provisions of this Constitution.

Article III, section 18, of the Tennessee Constitution requires that a bill that passes both Houses of the General Assembly be presented to the governor for his signature. Section 18 further provides that

[i]f he approve, he shall sign it, and the same shall become a law; but if he refuse to sign it, he shall return it with his objections thereto, in writing, to the house in which it originated; and said House shall cause said objections to be entered at large upon its journal, and proceed to reconsider the Bill. If after such reconsideration, a majority of all the members elected to that House shall agree to pass the Bill, notwithstanding the objections of the Executive, it shall be sent, with said objections, to the other House, by which it shall be likewise reconsidered. If

approved by a majority of the whole number elected to that House, it shall become a law.

With respect to joint resolutions, Article III, section 18, of the Tennessee Constitution provides that

[e]very joint resolution or order (except on question of adjournment and proposals of specific amendments to the Constitution) shall likewise be presented to the Governor for his signature, and on being disapproved by him shall in like manner, be returned with his objections; and the same before it shall take effect shall be repassed by a majority of all the members elected to both houses in the manner and according to the rules prescribed in case of a bill.

Although duly enacted joint resolutions are not referred to as laws, *see Gilbreath v. Willett*, 251 S.W. 910, 913 (Tenn. 1923), joint resolutions that are legislative in character are subject to the same requirement of presentment to the governor for his signature and the same process for legislative override of the governor's veto. Tenn. Const. art. III, § 18; *see also Richardson*, 125 S.W. at 678.

An act of the General Assembly is presumed to be constitutional. *See, e.g., Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003); *State v. Robinson*, 29 S.W.3d 476, 479-80 (Tenn. 2000); *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997). Courts are charged with upholding the constitutionality of statutes “whenever possible,” *Robinson*, 29 S.W.3d at 480, and are required to “indulge every presumption and resolve every doubt in favor of constitutionality,” *Riggs*, 941 S.W.2d at 51.

The process established by Tenn. Code Ann. § 71-5-126 does not contravene the separation of powers provision of the Tennessee Constitution because it involves nothing more than an exercise of legislative authority by the General Assembly through constitutionally permissible means. Under Tenn. Code Ann. § 71-5-126, the governor is prohibited from “mak[ing] any decision or obligat[ing] the state of Tennessee in any way with regard to the expansion of optional enrollment in the . . . medicaid program . . . unless authorized by joint resolution of the general assembly.” The limited effect of that provision is to clarify that final authority to expand the Medicaid program pursuant to the federal Patient Protection and Affordable Care Act rests with the General Assembly and must be exercised in the form of a duly enacted joint resolution. Tenn. Code Ann. § 71-5-126 does not allow the legislature to exercise any authority that properly belongs to another branch and therefore does not violate article II, section 2, of the Tennessee Constitution.

Nor is the process established by Tenn. Code Ann. § 71-5-126 analogous to the one-House veto the U.S. Supreme Court invalidated on separation of powers grounds in *I.N.S. v. Chadha*, 462 U.S. 919 (1983). The statutory scheme at issue in *Chadha* delegated purportedly final authority to the Attorney General of the United States to suspend the deportation of an alien, but it further provided that either the Senate or the House of Representatives could veto the Attorney General's suspension decision simply by passing a resolution to that effect. *See* 462 U.S. at 923-25. The U.S. Supreme Court held that this one-House veto violated the separation of powers doctrine because it allowed Congress to exercise legislative authority without complying with the bicameralism and presentment requirements of the U.S. Constitution. *See id.* at 957-58. Unlike the one-House veto that was at issue in *Chadha*, Tenn. Code Ann. § 71-5-126 requires that the

General Assembly authorize “any decision . . . with regard to the expansion of optional enrollment in the . . . medicaid program” through constitutionally permissible means—i.e., enactment of a joint resolution, including passage by both houses of the General Assembly and presentment to the governor. Tennessee Code Annotated § 71-5-126 does not circumscribe the authority of the executive to review, investigate, negotiate, or otherwise consider these issues, nor does it vest that authority in the General Assembly. In any event, expansion of the Medicaid program would require further action by the General Assembly through the appropriations process, which includes appropriating federal funds received by the State.

2. As discussed above, the General Assembly has authorized the executive branch to “negotiate for federal waiver authority for matching funds to support the provision of coverage” under the Medicaid program, Tenn. Code Ann. § 71-5-602, and to “[c]ooperate with the federal government . . . in establishing, extending, strengthening or reforming services to assist persons and families in need of” services under the Medicaid program, *id.* § 71-1-105(a)(1). Tennessee Code Annotated § 71-5-126 prohibits the governor from making “any decision or obligat[ing] the state of Tennessee in any way with regard to” expansion of the Medicaid program absent a joint resolution of the General Assembly. Accordingly, Tenn. Code Ann. § 71-5-126 would not prohibit the governor from considering, investigating, or negotiating an agreement with the federal government to expand optional enrollment in the Medicaid program pursuant to the Patient Protection and Affordable Care Act. It would, however, prohibit the governor from making any final decision to bind the State of Tennessee to an agreement or to implement that agreement absent authorization by the General Assembly in the form of a duly passed joint resolution.

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