

## Analysis and Questions

On April 20, 2020, the Office of the Tennessee Attorney General opined that under Tenn. Code Ann. § 58-2-107(a)(1), the Governor may “delegate to a local governmental entity or to the local health department ‘such powers as the governor may deem prudent.’” Opinion 20-07. The opinion further says, “In short, the General Assembly clearly intended the Governor’s emergency management powers to be exclusive and to override any action taken by political subdivisions of the State.”

Executive Order 54, Paragraph 2, states that “by virtue of the power and authority vested in me by the Tennessee Constitution and other applicable law,” the Governor authorized the “county mayors in the 89 counties that do not have a locally run county health department . . . to issue orders or measures requiring or recommending the wearing of face coverings within their jurisdictions, consistent with Paragraph 3 of this order.”

That order appears to have been extended by Executive Orders 63 and 67, dated September 29, 2020 and October 30, 2020, respectively.

Tennessee Code Ann. § 58-2-107(a)(1), upon which the attorney general’s opinion relies, reads in full:

The governor is responsible for addressing the dangers presented to this state and its people by emergencies. In the event of an emergency beyond local control, the governor, or, in the governor's absence, the governor's successor as provided by law, may assume direct operational control over all or any part of the emergency management functions within this state, and such person has the power through proper process of law to carry out this chapter. The governor is authorized to delegate such powers as the governor may deem prudent.

There is no mention of “local government” in the last quoted sentence, though the attorney general cites that same section and quotes the last three words of it as sustaining the proposition that this general power to delegate means “delegate to a local government,” but those words are strictly those of the attorney general and are not in the quoted statute.

However, Section (h) of Tenn. Code Ann. § 58-2-107 specifically refers to local government and provides as follows:

The governor shall delegate emergency responsibilities to the officers and agencies of the state and of the political subdivisions thereof prior to an emergency or threat of an emergency, and shall utilize the services and facilities of existing officers and agencies of the state and of the political subdivisions thereof, including their personnel and other resources, as the primary emergency management forces of the state, and all such officers and agencies shall cooperate with and extend their services and facilities to the agency, as it may require.

### **Questions Regarding the Governor’s Statutory Authority:**

1. In statutory construction, does a specific provision and authority given by statute control over an interpretation of a general provision and a general authority given by statute?
2. By what provision of law or by what Executive Order did the Governor delegate authority to county mayors to order county residents to wear facial coverings “prior to the emergency” that precipitated Executive Orders 54, 63, and 67?
3. If there is no such law or Executive Order, has the Governor exceeded the authority given him by the Legislature in Tenn. Code Ann. § 58-2-107(a) as interpreted in light of (h)?
4. If the Governor exceeded the statutory authority given him by delegating authority to county mayors to require residents to wear facial coverings, are Executive Orders 54, 63, and 67 *ultra vires* and, therefore, to that extent unlawful and unenforceable?
5. If the Governor exceeded the authority given him by law by delegating authority to county mayors to require residents to wear facial coverings, do county mayors otherwise have the authority the governor purported to delegate by Executive Orders 54, 63, and 67 and if so, on the basis of what authority?

### **Questions Concerning the Governor’s Constitutional Authority:**

The questions that follow relate to the following provisions in Tennessee’s Constitution that were not analyzed in attorney general Opinion 20-07:

Article I, Section 1. That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.

Article I, Section 2. That government being instituted for the common benefit, the doctrine of nonresistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.

Article II, Section 1. “The powers of the government shall be divided into three distinct departments: legislative, executive, and judicial.”

Article II, Section 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.”

ARTICLE VII, Section 1 “The qualified voters of each county shall elect for terms of four years a legislative body, a county executive, a sheriff, a trustee, a register, a county clerk and an assessor of property. Their qualifications and duties shall be prescribed by the General

Assembly. Any officer shall be removed from malfeasance or neglect of duty as prescribed by the General Assembly.”

Article XI, Section 16. The declaration of rights hereto prefixed is declared to be a part of the Constitution of the state, and shall never be violated on any pretense whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the general powers of the government, and shall forever remain inviolate.

1. By what act of the people of Tennessee did the people transfer to the Governor the power to delegate to a county mayor the authority that would be the predicate upon which that county mayor could order county residents or those traveling in or doing business in that county to wear a facial covering.
2. By what provision of the Tennessee Constitution can the General Assembly delegate to the executive branch of state government the authority the General Assembly has to give a county mayor, as part of his or her duties, the authority to decide whether to order residents of the county or those traveling in or doing business in that county to wear a facial covering?
3. If the answers to these questions is that these Executive Orders do not create a *duty* relative to county mayors, but only an *authority* to act in certain ways, by what constitutional authority can a governor create an authority in local elected officials that is not given them by the state Constitution or by direct act of the General Assembly?
4. If Tenn. Code Ann. § 58-2-107(a)(1) is said to be that act of the General Assembly by which the governor could delegate authority to a county mayor to order the wearing of facial coverings, was given, then was that authority exceeded by virtue of section (h) thereof?

### **Questions Concerning the Rights of the People to Bind the Powers of Their Government**

In Opinion 20-14, dated July 24, 2020, the Office of the Attorney General’s cited *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) for the proposition that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” However, in that case, the local governing authority acted pursuant to authority *given by the state legislature*, not the executive branch.

The attorney general’s office also cited *Antietam Battlefield KOA v. Hogan*, No. CCB-20-1130, 2020 WL 2556496, at \*5 (D. Md. May 20, 2020), appeal docketed, No. 20-1579 (4th Cir. May 22, 2020) (quoting *Jacobson*, 197 U.S. at 31), for the proposition that “courts are to overturn only those orders that . . . are “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”

1. Has the United States Supreme Court or the Supreme Court of the state of Tennessee ever held that “an epidemic of disease” allows a member of the executive branch or the legislature to disregard the allocations of powers made to various branches of the

government by the people in their state Constitution that were placed there to prevent the exercise of “arbitrary power and oppression.”

2. With respect to the constitutional validity of Executive Orders 54, 63, and 67, has the United States Supreme Court or the Supreme Court of the state of Tennessee ever held that “an epidemic of disease” allows the legislative branch to delegate its legislative and law and policy-making authority to the executive branch?
3. More specifically, with respect to the constitutional validity of Executive Orders 54, 63, and 67, has the United States Supreme Court or the Supreme Court of the state of Tennessee ever held that “an epidemic of disease” allows the legislative branch to delegate to a different branch of the government its responsibility for prescribing and its duty to prescribe to certain officials the powers upon which prescribed duties must of necessity be predicated?

### **Questions Concerning the Rights of County Residents to Equal Protection of the Law**

Tenn. Code Ann. § 58-2-120 provides that “In the event of an emergency declared pursuant to this chapter, any person or representative thereof violating any order, rule or regulation promulgated pursuant to this chapter commits a Class A misdemeanor.”

1. Given that some county mayors, acting pursuant to Executive Orders 54, 63, and 67, will order residents of a county to wear facial coverings and others will not, would the county mayor who issues such an order or his or her county be subject to a claim under 28 U.S.C § 1983 by a violator of such order, if criminally prosecuted, that the violator has been denied the equal protection of the laws because not all Tennessee residents are subject to being prosecuted for a state crime related to the wearing or not wearing of facial coverings?
2. Given that some county mayors, acting pursuant to Executive Orders 54, 63, and 67, will order residents of a county to wear facial coverings and others will not, would the county mayor who issues such an order or his or her county be subject to a claim under 28 U.S.C § 1983 by a violator of such order, if criminally prosecuted, that the violator has been denied the equal protection of the laws because in some counties (perhaps Davidson) the penalty for not wearing a facial covering will be less than in other counties (Williamson)?
3. Can a state crime or the existence of a state crime be constitutionally predicated on decisions from county mayors that result in the same activity being a state crime or not a state crime depending on which county the person may be in at the time charged?