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Opinion No. 13-25

Prohibiting Observation of Elections by United Nations Representatives

QUESTION

Does House Bill 589/Senate Bill 721 of the 108th Tennessee General Assembly, 1st Sess. (2013) (hereinafter "HB589"),[1] which amends the Tennessee Election Code to provide that "[r]epresentatives of the United Nations shall not observe elections in the state" and that a violation of this prohibition is a Class C misdemeanor, violate the United States Constitution?

OPINION

HB589 is susceptible to a facial constitutional challenge as violating the Supremacy Clause of the United States Constitution by impairing the exercise of the federal government's authority to act in the area of foreign affairs.[2] The federal government as part of its foreign affairs policy has decided to participate in the United Nations and has chosen to participate in reciprocal international programs regarding the observation of elections in participating countries by representatives of other participating countries. The Supremacy Clause precludes a State from interfering with the United States government's exercise of its foreign affairs policy under federal law. Moreover, pursuant to the Supremacy Clause, the United Nations and its officials, who may be observing elections within the United States as part of their official duties, would be immune pursuant to federal law from prosecution under Tennessee law for an alleged violation of HB589's prohibition.

ANALYSIS

HB589 would amend the general provisions of the Tennessee Election Code, codified at

[1] This Office is unaware of any amendments to HB589 as of this date.

[2] This opinion assumes representatives of the United Nations would possess the requisite federal law authority to observe Tennessee elections. This Office cannot anticipate all possible factual stations in which HB589, if enacted, might be applied or any "as applied" constitutional challenges that might develop. *See generally Waters v. Farr*, 291 S.W.3d 873, 922-23 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part) (discussing in depth distinctions between "as applied" and "facial" constitutional challenges). Accordingly, such "as applied" challenges are outside the scope of this opinion.

Tenn. Code Ann. §§ 2-1-101 to -118, to create a new section at Tenn. Code Ann. § 2-1-119 to provide that "[r]epresentatives of the United Nations shall not observe elections in the state."[3]

The Election Clause of the United States Constitution gives states the responsibility for establishing the time, place, and manner of holding congressional elections. However, a state's discretion regarding the manner of holding such federal elections is limited in that the state system cannot directly conflict with federal law. U.S. Const., art. 1, § 4 cl. 1. *See also Foster v. Love*, 522 U.S. 67, 68 (1997).

The federal government has made the decision within its authority over foreign affairs to participate in the United Nations. *See, e.g.*, 22 U.S.C. § 287 (authorizing the President to appoint an Ambassador to represent the United States, as the President may direct, regarding the United States' participation in the United Nations); 22 U.S.C. § 287e (authorizing the payment of federal funds for payment of the United States' share of United Nations operating expenses). As explained by the federal government:

> The United Nations is an international organization that was set up in accordance with the Charter drafted by governments represented at the Conference on International Organization meeting at San Francisco [which was adopted as a treaty of the United States, *see* 59 Stat. 1033 (1945)]. The Charter . . . came into force on October 24, 1945, when the required number of ratifications and accessions had been made by the signatories [including the United States]. . . . The United Nations now consists of 191 member states, of which 51 are founding members [including the United States]. The purposes of the United Nations set out in the Charter are to maintain international peace and security; to develop friendly relations among nations; to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting respect for human rights; and to be a center for harmonizing the actions of nations in the attainment of these common ends.

The United States Government Manual, Executive Branch, International Organizations, United Nations, 2011 GOVMAN 512, 2011 WL 8897241 (2011).

Historically, it does not appear that representatives of the United Nations have observed elections in Tennessee. Rather since 2004 (initially at the request of President George W. Bush), the federal Executive Branch has requested international representatives of the Organization for Security and Co-operation in Europe ("OSCE") to observe some federal elections within the United States. The United States is a member of this organization, which includes 56 participating nations from Europe, Central Asia and North America. *See generally* 22 U.S.C. §§

[3] The law of Tennessee currently establishes provisions and procedures whereby "each political party and any organization of citizens interested in a question on the ballot or interested in preserving the purity of elections and in guarding against abuse of the elective franchise may appoint poll watchers." Tenn. Code Ann. § 2-7-104(a). State law also provides that no person may be admitted to a polling place except election officials, voters, persons assisting voters, press, poll watchers, others bearing written authorization for the county election commission, and children accompanying parents or legal guardians. *Id.*§ 2-7-103.

3002, 3003, & 3005. OSCE members, including the United States, committed since 1990 to hold free and democratic elections and to allow one another to observe their elections. *See* 1990 OSCE Copenhagen Document, ¶ 8. The OSCE's policy is to comply with national, state and local laws when conducting its election observations. *Id.*

The Supremacy Clause of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land." U.S. Const. art. VI, cl. 2. The United States Supreme Court has found that this provision entrusts the field of foreign affairs and international relations solely to the federal government – the President and Congress. *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (citing *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941)) (invalidating a state probate statute prohibiting inheritance by certain nonresident aliens as an unconstitutional intrusion by a state into the field of foreign affairs). As the United States Supreme Court has explained:

> The *Zschernig* majority relied on statements in a number of previous cases open to the reading that state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict. The Court cited the pronouncement in *Hines*, 312 U.S. at 63, that "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *See* [*Zschernig*,] 389 U.S., at 432 . . . ; *id.*, at 442–443, 88 S.Ct. 664 (Stewart, J., concurring) (setting out the foregoing quotation). Likewise, Justice Stewart's concurring opinion viewed the [state] statute as intruding "into a domain of exclusively federal competence." *Id.*, at 442 . . . ; *see also* [*United States v.*] *Belmont*, 301 U.S. [324,] 331 [(1937)] ("[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states" (citing [*United States v.*] *Curtiss–Wright Export Corp*., 299 U.S. [304,] 316 [(1936)])).
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> [T]he [*Zschernig*] majority and [concurring] Justices . . . basically agreed: state laws "must give way if they impair the effective exercise of the Nation's foreign policy," [389 U.S.], at 440 . . . (opinion of the Court). *See also* [*United States v.*] *Pink*, 315 U.S. [203,] 230–231 [(1942)] ("[S]tate law must yield when it is inconsistent with, or impairs . . . the superior Federal policy evidenced by a treaty or international compact or agreement"); *id.*, at 240 (Frankfurter, J., concurring) (state law may not be allowed to "interfer[e] with the conduct of our foreign relations by the Executive").

American Insurance Ass'n v. Garamendi, 539 U.S. 396, 417-19 (2003).[4]

[4] The Court also noted the authority of the President of the United States to act in the area of foreign affairs, stating:

The federal government has made the foreign policy decision to participate in the United Nations, has decided to participate in international reciprocal programs for the observing of elections and has agreed that international parties may observe federal elections in the United States. Therefore, a state law prohibiting representatives of the United Nations from observing elections in Tennessee is constitutionally suspect under the Supremacy Clause. Even though United Nations representatives are not currently seeking to observe Tennessee elections, the prohibition in HB589 would intrude upon or interfere with the conduct of foreign relations by the federal government.[5]

Moreover, pursuant to federal law and the Supremacy Clause, the United Nations and its official representatives would have immunity from prosecution for a violation of HB589. United Nations officials are granted immunity from prosecution pursuant to Article V, Section 18 of the Convention on Privileges and Immunities of the United Nations (the "U.N. Convention"), Feb. 13, 1946, 21 U.S.T. 1418 (the United States, with certain conditions not relevant to this opinion, agreed to participate in this Convention on April 29, 1970). This convention states in relevant part that United Nations officials are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity." *Id.* art. V, § 18(a). Section 20 of the Convention provides that: "Privileges and immunities," such as immunity from prosecution, "are granted to officials in the interests of the United Nations, and not for the personal benefit of the individuals themselves." *Id.* art. V, § 20. Only the Secretary General may waive the immunity of a United Nations official. *Id.* Moreover, the International Organization Immunities Act ("IOIA"), 59 Stat. 669, 22 U.S.C. §§ 288 to 288l, expressly applies to "officers and employees of [international] organizations," and states that such individuals "shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their

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> [United States Supreme Court] cases have recognized that the President has authority to make "executive agreements" with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic. *See Dames & Moore v. Regan*, 453 U.S. 654, 679, 682-683 . . . ; *United States v. Belmont*, 301 U.S. [at] 330-331 . . . ; *see also* L. Henkin, Foreign Affairs and the United States Constitution 219, 496, n. 163 (2nd ed. 1996) ("Presidents from Washington to Clinton have made many thousands of agreements . . . on matters running the gamut of U.S. foreign relations").

Garamendi, 539 U.S. at 415. *But see Medellin v. Texas*, 552 U.S. 491 (2009) (finding when a treaty was not deemed self-executing that Congress must have enacted implementing statutes or must have approved or acquiesced to the President's authority to act in order to establish binding domestic law that would preempt the state court procedural rule at issue).

[5] As the United States Supreme Court observed:

> No State can rewrite [United States'] foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies whether they be expressed in constitutions, statutes, or judicial decrees. . . . "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear."

United States v. Pink, 315 U.S. at 233-34 (quoting *United States v. Belmont*, 301 U.S. at 331).

functions as . . . officers, or employees except insofar as such immunity may be waived by the . . . international organization concerned." *Id.* § 288d(b). Accordingly, the United Nations or its officials who may be observing elections in the performance of their official duties, could not constitutionally be charged with a Class C misdemeanor.

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