



## TEXAS DISTRICT AND COUNTY ATTORNEYS ASSOCIATION

505 W. 12th St., Ste. 100, Austin, TX 78701 • 512/474-2436 (ph) • 512/478-4112 (fx) • www.tdcaa.com

# Texas Prosecution 101

(Written in 2004; revised and reissued in 2009, 2014, 2018)

---

TDCAA has drafted this FAQ-style memorandum to help educate the public and correct some common misconceptions about the prosecution of criminal cases in Texas. For additional information, please contact Rob Kepple ([Kepple@tdcaa.com](mailto:Kepple@tdcaa.com)) or Shannon Edmonds ([Edmonds@tdcaa.com](mailto:Edmonds@tdcaa.com)).

---

### *Who prosecutes crime in Texas?*

Locally elected county attorneys, district attorneys, and criminal district attorneys are responsible for prosecuting crime in Texas.

The Texas Constitution divides state government into three distinct branches: Legislative, Executive, and Judicial.<sup>1</sup> Our state constitution grants the authority to prosecute criminal cases to locally-elected district and county attorneys and places those officials within the *judicial* branch of state government.<sup>2</sup> This arrangement differs from that found in some other states and the federal government, which use a centralized model of prosecution under the direction of an attorney general in the *executive* branch of government. In Texas, the state office of attorney general (OAG) is part of the executive branch and is tasked with being the state's chief lawyer in many types of cases, but not local criminal prosecutions.<sup>3</sup> This unusual Texas model often leads to public confusion.

### *Why is this distinction between branches important?*

In Texas, an official in one branch of state government cannot exercise the authority of an official in another branch of state government.

In addition to establishing three distinct branches of government, the Texas Constitution strictly prohibits one branch of government from exercising the powers of another branch absent specific permission granted elsewhere in the state constitution.<sup>4</sup> This doctrine of “separation of powers” is one of the bedrock principles of American government that supersedes any considerations regarding a particular officeholder.<sup>5</sup> Common separation-of-powers arguments

---

<sup>1</sup> [ARTICLE II, SECTION 1, TEXAS CONSTITUTION](#). Pursuant to that article, the legislative branch is created in [ARTICLE III](#), the executive branch is created in [ARTICLE IV](#), and the judicial branch is created in [ARTICLE V](#).

<sup>2</sup> [ART. V, SECS. 21 & 30, TEXAS CONSTITUTION](#). Municipalities may also hire city attorneys to prosecute fine-only crimes and violations of city ordinances in municipal courts, but a discussion of those crimes is outside the scope of this memorandum.

<sup>3</sup> [ART. IV, SEC. 22, TEXAS CONSTITUTION](#).

<sup>4</sup> “[N]o person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.” [ART. II, SEC. 1, TEX. CONST.](#)

<sup>5</sup> “The founding fathers of this nation and this state plainly understood that the best way to control governmental power is to divide it. They knew that it was only by balancing the powers of one branch of government against the powers of the other two that any degree of freedom for the people could be preserved.” *Terrazas v. Ramirez*, 829

include claims that a judge or court is “legislating from the bench” or that an executive branch agency is assuming a legislative function through administrative rulemaking. When applied to the prosecution of criminal cases, this separation-of-powers principle restricts the ability of the legislative or executive branch to interfere with the original criminal jurisdiction granted to local district and county attorneys under the state constitution.<sup>6</sup>

## ***Can the Texas Attorney General also prosecute crimes?***

Yes, but only when a local prosecutor asks for, or consents to, the OAG’s involvement.

Despite the original criminal jurisdiction granted to local prosecutors by the state constitution, nothing prohibits an official in one branch of government from lending assistance to officials in other branches of government. The Texas Legislature has codified numerous statutes authorizing the OAG to assist local prosecutors or prosecute certain cases with the consent of the local prosecutor.<sup>7</sup> The cooperative working arrangements permitted under these statutes have benefited both the state and its local communities. But again, these OAG prosecutions are done with the consent of a local district or county attorney because the office of the attorney general has no constitutional authority to independently prosecute crime.

Perhaps the most recent test of this limited authority occurred in a 2012 Dallas County case in which OAG prosecutors obtained a conviction against a local justice of the peace for election fraud.<sup>8</sup> On appeal, the defendant challenged the OAG’s authority to investigate and prosecute criminal violations of the Election Code, but the court of appeals upheld the prosecution because local prosecutors implicitly consented to the OAG’s prosecution by not objecting, thereby avoiding any separation of powers conflict.<sup>9</sup> This decision was also consistent with a prior court decision striking down a statute granting *exclusive* authority to the OAG to investigate and prosecute election fraud cases as an unconstitutional violation of the separation of powers doctrine. Accordingly, the OAG can prosecute criminal cases with the express or implied consent of a district or county attorney, but not otherwise.<sup>10</sup>

---

S.W.2d 712, 731 (Tex. 1991)(Cornyn, J., concurring)(rejecting an Attorney General’s purported settlement of a redistricting dispute as a violation of the separation of powers doctrine).

<sup>6</sup> *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987) (“[U]nder the separation of powers doctrine, the Legislature may not remove or abridge a district or county attorney’s exclusive prosecutorial function, unless authorized by an express constitutional provision.”)

<sup>7</sup> See [GOVERNMENT CODE §41.102](#) (prosecutor may request assistance of OAG for performing any of that prosecutor’s duties); specific (and redundant) examples include [TEXAS PENAL CODE §1.09](#) (offenses that involve state property), [§12.47](#) (hate crimes), [§35A.02](#) (Medicaid fraud), and [§39.015](#) (abuse of office).

<sup>8</sup> <http://www.dallasnews.com/news/crime/headlines/20120227-former-dallas-county-jp-carlos-medrano-convicted-in-illegal-voting-case.ece>.

<sup>9</sup> *Medrano v. State*, 421 S.W.3d 869, 879 (Tex. App.—Dallas 2014, pet. ref’d) (“By enacting [Election Code] chapter 273, the legislature did not remove the authority of county and district attorneys to prosecute election code violations; it merely provided that the AG could do so ....”). In addition, the Rockwall County Criminal District Attorney served as one of the attorneys of record for the State in Medrano’s appeal.

<sup>10</sup> *Shepperd v. Alaniz*, 303 S.W.2d 846, 850 (Tex. Civ. App.—San Antonio 1957, no writ). In *Shepperd*, a local district attorney obtained an injunction to prevent the attorney general from investigating and prosecuting an election fraud case that the district attorney had already initiated. In siding with the local prosecutor, the appellate court noted, “It has always been the principal duty of the district and county attorneys to investigate and prosecute the violation of all criminal laws, including the election laws, and these duties cannot be taken away from them by the Legislature and given to others. If Sec. 130 of the Election Code should be construed as giving such powers exclusively to the Attorney General, then it would run afoul of Sec. 21 of Article 5 of the Constitution and would be void.” (Note: Election Code §130 was subsequently re-codified as part of Chapter 273 without substantive change.)

## ***If the Attorney General isn't the state's "chief prosecutor," what does he do?***

Plenty!

As the chief civil lawyer for the State, the OAG defends state laws and the state constitution from legal attack; represents the State (and its officers, agencies, and employees) against civil lawsuits; approves public bond issues; provides legal advice and opinions to boards, committees, and agencies of state government; and performs related duties.<sup>11</sup> But compared to the federal Department of Justice (USDOJ), which houses more than 50 different agencies under the supervision of the U.S. Attorney General, the Texas OAG's responsibilities are much narrower.<sup>12</sup> In Texas, many USDOJ-type functions are assigned to local officials (like county or district attorneys) or to state agencies like the Department of Public Safety (DPS), the Department of Criminal Justice (TDCJ), and the Board of Pardons and Paroles (BPP), which carry out their duties independently of the OAG under the direction of separate commissions or boards appointed by the Governor. This preference for decentralized governmental authority is common throughout our state constitution, and it stands in purposeful contrast to the structure of the federal government.<sup>13</sup> But even though the Texas attorney general has more limited powers than his federal counterpart—especially in the area of criminal justice—the OAG is still considered to be one of the most powerful political offices in the state.<sup>14</sup>

## ***Conclusion***

For more than 150 years, Texas district and county attorneys have been independent, locally-elected officials charged with the duty to seek justice through criminal prosecution.<sup>15</sup> This system of locally-controlled, limited government protects the people of Texas against the perceived abuses of centralized power that led to the adoption of our current state constitution more than 140 years ago. It is a system consistent with the belief that “[c]oncentrated power has always been the enemy of liberty,”<sup>16</sup> a sentiment still shared by many Texans today. Therefore, any proposal to fundamentally change the nature of criminal prosecution in Texas or alter the balance of power between the separate branches of our state government should be weighed carefully before tampering with the work of our constitution's drafters.

---

<sup>11</sup> [ART. IV, SEC. 22, TEXAS CONSTITUTION](#).

<sup>12</sup> <http://www.justice.gov/agencies/index-org.html>.

<sup>13</sup> *Handbook of Texas Online*, “[Constitution of 1876](#),” Joe E. Ericson and Ernest Wallace.

<sup>14</sup> *Handbook of Texas Online*, “[Attorney General](#),” James G. Dickson, Jr.

<sup>15</sup> “It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done.” [ARTICLE 2.01, TEXAS CODE OF CRIMINAL PROCEDURE](#). See also, *Handbook of Texas Online*, “[District Attorney](#),” Vivian Elizabeth Smyrl.

<sup>16</sup> President Ronald W. Reagan (as quoted in [New Republic](#), Dec. 16, 1981).