



TEXAS DISTRICT AND COUNTY ATTORNEYS ASSOCIATION

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Texas Prosecution 101

TDCAA offers this FAQ-style memorandum as part of our continuing mission to educate the public and correct common misconceptions about the prosecution of crime in Texas.¹

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 of 1876 divides state government into three distinct branches: Legislative, Executive, and Judicial.² Within that structure, 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.³ 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 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* criminal prosecutions.⁴ This unusual Texas model often leads to public confusion.

Why is this distinction between branches important?

In addition to establishing three distinct branches of government, the Texas Constitution strictly prohibits an official in one branch of government from exercising the powers of another branch absent specific permission granted elsewhere in the state constitution.⁵

¹ The original version of this memo was written in 2004. Later revisions were released in response to changes in statutes and case law in 2009, 2014, 2018, 2020, and 2022, but the substantive conclusions in the memo have remained unchanged.

² The legislative department is created in [ARTICLE III](#), the executive department is created in [ARTICLE IV](#), and the judicial department is created in [ARTICLE V, TEXAS CONSTITUTION](#).

³ [ART. V, SECS. 21 & 30, TEX. CONST.](#) Municipalities may also employ 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.

⁴ [ART. IV, SEC. 22, TEX. CONST.](#)

⁵ “[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.](#)

The doctrine of “separation of powers” is one of the bedrock principles of American government that supersedes any particular political party or officeholder.⁶ Common separation-of-powers arguments include claims that a court is “legislating from the bench” or that a chief executive (such as a president or governor) is assuming a legislative or judicial function through administrative rulemaking. When applied to the prosecution of criminal cases in Texas, 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 by the state constitution.⁷

Can the Texas Attorney General prosecute crimes?

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

This has long been the understanding shared by most legal scholars and our courts, and in December 2021, a criminal case brought by the OAG resulted in a clear re-affirmation of the separation of powers in the prosecution context. In *State v. Stephens*, an all-Republican Texas Court of Criminal Appeals struck down a unique state law authorizing the OAG to unilaterally prosecute election-related criminal offenses in an 8–1 decision: “Because Texas Election Code §273.021 delegates to the Attorney General a power more properly assigned to the judicial department, we conclude that the statute is unconstitutional.”⁸ As a result, the defendant’s convictions for campaign finance-related crimes were overturned.⁹

Although the decision in *Stephens* resulted in hand-wringing in some political circles, it was consistent with a long string of cases on this topic, including an appellate court decision from the 1950s striking down a predecessor statute to Election Code §273.021 as an unconstitutional violation of the separation of powers doctrine.¹⁰ However, it is important to note that neither the *Stephens* decision nor prior case law prevents the OAG from investigating and prosecuting

⁶ “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 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).

⁷ *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.”)

⁸ Nos. PD-1032-20, PD-1033-20, 2021 Tex. Crim. App. LEXIS 1194 (Crim. App. Dec. 15, 2021).

⁹ The *Stephens* cases involved cases filed and prosecuted by the OAG against the Jefferson County Sheriff without the involvement of the Jefferson County Criminal DA. The record in *Stephens* implies that the OAG made a purposeful decision *not to ask* the local prosecutor for his consent to prosecute the cases. A simple phone call or email to the local DA may have salvaged the convictions obtained in *Stephens*, but doing so would have required the OAG to contradict its prior public claims that it did not need such approval. The result was otherwise valid convictions being needlessly overturned.

¹⁰ *Shepperd v. Alaniz*, 303 S.W.2d 846, 850 (Tex. Civ. App.—San Antonio 1957, no writ). In *Shepperd*, a district attorney was granted an injunction to prevent the OAG from investigating and prosecuting an election fraud case that the district attorney had already initiated because “[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.”

election fraud—it merely requires any eventual prosecution by OAG to be done collaboratively with the officials who are constitutionally tasked with that duty.

Indeed, the Texas Legislature has codified numerous statutes authorizing the OAG to prosecute certain types of criminal cases with the consent of the local prosecutor.¹¹ The cooperative working arrangements allowed under these statutes benefit both the state and its local communities. But constitutionally, prosecutions by OAG lawyers must be done at the request or with the consent of a local district or county attorney because the OAG has no authority to unilaterally conduct a criminal prosecution.¹² That is the responsibility of the prosecutors elected by the local communities directly affected by those alleged crimes.

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.¹³

Some of those “related duties” assigned by the legislature include such important jobs as administering the state’s Crime Victims Compensation program, collecting billions of dollars in court-ordered child support, and conducting general law enforcement activities. In regard to those duties, the OAG has been given robust police powers by the legislature¹⁴ and operates a Criminal Investigation Division that employs almost 150 peace officers with statewide jurisdiction.¹⁵ The OAG’s role as a statewide law enforcement agency is yet another reason why the separation of powers is relevant in criminal prosecution, because the Texas Constitution is clear in its intent to provide checks and balances on the state’s police powers.

Our state constitution’s intentional limitations upon the executive branch become even more clear when compared to the federal system and the U.S. Department of Justice (USDOJ), which houses more than 50 different federal agencies under the supervision of the U.S. Attorney

¹¹ See [GOVERNMENT CODE §41.102](#) (prosecutor may request assistance of OAG for performing any of that prosecutor’s duties); specific (and redundant) examples can also be found in [PENAL CODE §1.09](#) (offenses that involve state property), [§12.47](#) (hate crimes), [§35A.02](#) (Medicaid fraud), and [§39.015](#) (abuse of office).

¹² *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002) (re-affirming that district and county attorneys have the sole authority to represent the State in criminal cases while recognizing as “an implied request for assistance” the long practice whereby the OAG may respond to certiorari proceedings in the U.S. Supreme Court when the county or district attorney does not respond.)

¹³ [ART. IV, SEC. 22, TEX. CONST.](#)

¹⁴ See, e.g., [GOV’T CODE §402.009](#) (authority to employ and commission peace officers); [CODE OF CRIM. PRO. ART. 2.12\(22\)](#) (OAG officers are peace officers).

¹⁵ [OAG Operating Budget for FY 2022](#).

General, including those that have both investigation and prosecution roles.¹⁶ But in Texas, many USDOJ-type functions are assigned to local officials (such as county or district attorneys) or to other executive branch agencies including the Department of Public Safety (DPS), Department of Criminal Justice (TDCJ), and 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 a hallmark of our state constitution, and it stands in purposeful contrast to the modern structure of the federal government.¹⁷ 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.¹⁸

Conclusion

Texas district and county attorneys are independent elected officials charged with the duty to seek justice through criminal prosecution.¹⁹ 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 almost 150 years ago.²⁰ It is a system consistent with the belief that “[c]oncentrated power has always been the enemy of liberty,”²¹ a sentiment still shared by many Texans today. Therefore, any proposal to fundamentally change the nature of criminal prosecution in Texas should be weighed carefully before it tampers with the balance of power between the separate branches of our state government that has served our state so well.

¹⁶ <http://www.justice.gov/agencies/index-org.html>.

¹⁷ *Handbook of Texas Online*, “[Constitution of 1876](#),” Joe E. Ericson and Ernest Wallace.

¹⁸ *Handbook of Texas Online*, “[Attorney General](#),” James G. Dickson, Jr.

¹⁹ “It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done.” [CODE OF CRIM. PRO. ART. 2.01](#).

²⁰ *Saldano*, 70 S.W.3d at 877.

²¹ President Ronald W. Reagan (as quoted in [New Republic](#), Dec. 16, 1981).