



TEXAS DISTRICT AND COUNTY ATTORNEYS ASSOCIATION

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Texas Prosecution 101

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Recent events in Austin have led to increased public interest in the investigation and prosecution of “public integrity” crimes. In response, TDCAA has drafted this FAQ-style memorandum in an attempt to educate the public and correct some common misconceptions about the Texas criminal justice system. For additional information, please contact Rob Kepple (Kepple@tdcaa.com) or Shannon Edmonds (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.

Like our federal constitution, the Texas Constitution divides state government into three distinct branches: Legislative, Executive, and Judicial.¹ But unlike the federal system, Texas’ state constitution vests the authority to prosecute criminal cases with the district and county attorneys in each county, and it places those local offices within the *judicial* branch of state government.² This arrangement differs from that found in many other states and the federal government, which use centralized systems of prosecutors who often act under the direction of an attorney general. But in Texas, the state office of attorney general (OAG) is part of the *executive* branch of state government and is tasked with being the state’s chief lawyer in cases other than local criminal prosecutions.³ 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.⁴ This doctrine of “separation of powers” is one of the bedrock principles of American government, and it is a principle that supersedes any considerations regarding a particular officeholder.⁵ Common separation-of-powers arguments include claims that a judge or court is “legislating from the bench” or that an executive branch officer or agency is assuming a legislative function through administrative rulemaking or signing statements. 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.⁶

Can the Texas Attorney General also prosecute crimes?

Yes, but only when a local prosecutor asks for the OAG's help or does not object to the OAG's prosecution of a criminal case.

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. Accordingly, 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.⁷ 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.

One recent test of this limited authority occurred in a Dallas County case in which the OAG obtained a conviction against a local justice of the peace for election fraud.⁸ 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, thereby avoiding any separation of powers conflict.⁹ This decision was also consistent with a prior court decision holding that a statute granting *exclusive* authority to the OAG to investigate and prosecute election fraud cases would be an unconstitutional violation of the separation of powers doctrine.¹⁰ Accordingly, the OAG can prosecute criminal cases with the express or implicit consent of a district or county attorney, but not otherwise.

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 executive branch boards and agencies of state government, and performs other similar duties.¹¹ But compared to the federal Department of Justice (USDOJ), which houses more than 50 different federal agencies under the supervision of the federal Attorney General, the OAG's responsibilities are more narrow.¹² For instance, 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 purposeful and pervasive throughout our state constitution, and it stands in contrast to the structure of the federal government.¹³ But even though the Texas attorney general has more limited powers than his federal counterpart—especially in the area of criminal justice—the office is still considered one of the most powerful in the state.¹⁴

What are public integrity crimes?

Crimes committed by or against government officials, employees, or agencies.

The term “public integrity” is not a statutory category, but it has become a popular description for a variety of crimes that involve government officials, employees, property, or funds. These crimes often involve allegations of public corruption, illegal conduct by state or local officials or employees, or election fraud. The broad nature of public integrity crimes means that the vast majority of these investigations do not involve high-level elected officials. In fact, almost all public integrity investigations involve nothing more than run-of-the-mill criminal conduct that happens to be committed by a government employee or against a government agency.

Who prosecutes public integrity crimes?

Public integrity cases are prosecuted by the district or county attorney elected to serve the county in which the public integrity crime was committed.

As with all criminal cases, the venue (location) for prosecuting a public integrity offense lies in the county in which the offense occurred, and the jurisdiction (responsibility) for prosecuting that offense lies with the appropriate local prosecutor in that county. However, public integrity cases frequently require special investigation and prosecution skills that differ from those needed for general crimes. For this reason, some local prosecutors’ offices include special divisions called “public integrity units” (or something similar), just as they may have a sex crimes unit, family violence division, or DWI enforcement team. But in general, all local prosecutors have the same powers and responsibilities to prosecute public integrity crimes that occur within their geographic jurisdiction, and they use local funds to carry out those investigations and prosecutions.

What is special about Travis County’s former Public Integrity Unit?

The Travis County District Attorney’s Office (TCDAO) has the same basic public integrity jurisdiction and authority as any other local prosecutor, but the state legislature has expanded its jurisdiction for certain types of crimes and it provided state funds for the prosecution of those crimes from the early 1980s through 2013.

Despite having the same authority as any other local prosecutor, Travis County is the seat of state government, so there is a much higher concentration of state agencies, officials, employees, and property in Travis County than in other counties. This results in a disproportionate number of public integrity cases being investigated and prosecuted by the TCDAO. In addition, the state legislature has created venue in Travis County for the criminal prosecution of certain types of fraud involving sales taxes, cigarette/cigar/tobacco taxes, motor fuels taxes, insurance, and elections,¹⁵ and it has (until recently) appropriated funds to that office to prosecute some of those cases.¹⁶ The legislature has followed a similar model for prosecuting prison crimes. Specifically, the Special Prosecution Unit of the Walker County Criminal District Attorney’s Office receives state funds to prosecute offenses committed in state prisons and

offenses committed by or against state prisoners (regardless of the location) because TDCJ facilities are headquartered in Huntsville, the county seat of Walker County.¹⁷

In both of these examples, the prosecutorial authority of those offices runs concurrently with that of local county and district attorneys (who frequently welcome the assistance of prosecutors with greater expertise in those highly specialized cases). Thus, while the state can—and recently did—abolish the TCDAO’s Public Integrity Unit through the appropriations process, the fact remains that all local prosecutors—including Travis County—are still responsible for prosecuting the public integrity crimes that occur in their local jurisdictions with the limited resources available to them.¹⁸

What other models exist for prosecuting public integrity crimes?

There are other models, but all have flaws.

In some other states and in the federal government, an Attorney General often heads a Department of Justice or similar agency that uses a centralized criminal prosecution model of appointed (rather than locally elected) prosecutors who are answerable to that official. Among the problems frequently faced by these public integrity prosecutors are:

- a lack of independence from potential targets of a public integrity investigation;
- a conflict of interest created by some prosecutors’ competing duty to advise or defend those same government officials when they are sued; and
- a politicization of public integrity prosecutions by prosecutors seeking higher office.

In the wake of the Watergate scandal of the 1970s, these problems led the federal government to create an office of independent counsel to investigate and prosecute certain public integrity crimes. However, events in Washington, D.C., over the past three decades led Congress to allow the Independent Counsel Act to sunset because it was a time-consuming, unaccountable, and unduly expensive way to address public integrity crimes.¹⁹ As a result, many states are still searching for a more perfect model of public integrity prosecution.

Conclusion

The public perception of prosecution and prosecutors is often far removed from reality. Since the inception of our state constitution, Texas district and county attorneys have been independent officials charged with the duty to seek justice through criminal prosecution.²⁰ 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 state constitution almost 140 years ago. It is a system consistent with the belief that “Concentrated 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 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.

ENDNOTES

¹ [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](#).

² [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.

³ [ART. IV, SEC. 22, TEXAS CONSTITUTION](#).

⁴ “[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.](#)

⁵ “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).

⁶ *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.”)

⁷ 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); see also [GOVERNMENT CODE §41.102](#) (prosecutor may request assistance of OAG for performing prosecutor’s duties).

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

⁹ *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 independently”). In addition, the Rockwall County Criminal District Attorney served as one of the attorneys of record for the State in Medrano’s appeal.

¹⁰ *Shepperd v. Alaniz*, 303 S.W.2d 846, 850 (Tex. Civ. App.—San Antonio 1957, no writ). In *Shepperd*, a local district attorney successfully 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 current Chapter 273 without substantive change.)

¹¹ [ART. IV, SEC. 22, TEXAS CONSTITUTION](#).

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

¹³ See Joe E. Ericson and Ernest Wallace, “CONSTITUTION OF 1876,” *Handbook of Texas Online* (<http://www.tshaonline.org/handbook/online/articles/mhc07>), accessed September 04, 2014.

¹⁴ James G. Dickson, Jr., “ATTORNEY GENERAL,” *Handbook of Texas Online* (<http://www.tshaonline.org/handbook/online/articles/mba03>), accessed September 04, 2014.

¹⁵ See [TAX CODE §154.519-.520](#), [TAX CODE §155.215](#), [TAX CODE §162.407](#), [INSURANCE CODE §85.051](#), and [ELECTION CODE §§251.004](#) (non-residents) and [273.024](#) (statewide elections). Venue for the prosecution of certain environmental crimes has also been given to Travis County, but those are not usually considered public integrity crimes; see [WATER CODE §7.189](#) and [HEALTH & SAFETY CODE §365.005](#).

¹⁶ General Appropriations Act, 2014-2015 Biennium, Article IV, Judiciary Section, Comptroller’s Department, Strategy D.1.4 and Rider 3 (pp. IV-36 to IV-38)(subsequently vetoed).

¹⁷ General Appropriations Act, 2014-2015 Biennium, Article IV, Judiciary Section, Comptroller’s Department, Strategy D.1.4 and Rider 4 (pp. IV-36 to IV-39). See also, [Government Code §§41.301-310](#). The Special Prosecution Unit also handles cases involving the state’s juvenile justice system and the civil commitment of sexually violent offenders.

¹⁸ In addition to being in the judicial branch of government, Texas prosecutors' offices are funded almost entirely by county, not state, funds. For example, the state's total annual appropriation to all local prosecutors' offices is usually less than what Harris County budgets for the Harris County District Attorney's Office alone.

¹⁹ See Tasha Vincent, "The Evolution of Witch-Hunting? The Life and Death of the Independent Counsel Act," <http://www.infoplease.com/spot/indepccounsel1.html>, accessed September 05, 2014.

²⁰ "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](#).

²¹ President Ronald W. Reagan. <http://www.nationalcoldwar/exhibition.org/the-cold-war/biographies/ronald-reagan/>.