IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NOS. PD-1032-20 &
PD-1033-20

THE STATE OF TEXAS

v.

ZENA COLLINS STEPHENS, Appellee

EX PARTE ZENA COLLINS STEPHENS, Appellant

DISSENT FROM THE DENIAL OF STATE'S MOTION FOR REHEARING
FOLLOWING OPINION ON
PETITION FOR DISCRETIONARY REVIEW
FROM THE FIRST COURT OF APPEALS
CHAMBERS COUNTY

SLAUGHTER, J., filed a dissenting opinion.

DISSENTING OPINION

The people of Texas made the constitution, and they have a right to change it if it is found to work harshly and unjustly, but courts have no choice but to enforce and obey its mandates.

Swyane v. Chase, 30 S.W. 1049, 1053 (Tex. 1895).

> The Constitution is the repository of the people's will. Its provisions are fixed as of the date[] of its adoption. These provisions are the same at all times thereafter. They are superior to all laws enacted thereunder. That many of the provisions of the Constitution are inconvenient and work hardships at times is well recognized. As citizens we might wish relief in many respects from its rigor, but as a court we must respect its mandates.

Ferguson v. Wilcox, 28 S.W.2d 526, 535 (Tex. 1930).

Introduction

Our *Stephens* opinion should not have surprised anyone. Since 1836, the district and county attorneys have represented the State in all criminal prosecutions in the trial courts; the Texas Attorney General (hereinafter sometimes "AG") has never undertaken that duty.[1] From the birth of Texas until the present day, the AG's constitutional role in criminal prosecutions has always been limited to an advisory role or to giving assistance to the county or district attorney, and even then, only when requested.

When tasked with answering the direct constitutional question regarding the AG's authority to unilaterally initiate criminal prosecutions, neither the Texas Supreme Court nor this Court has ever held that the AG has that authority. In fact, for well over 100 years, both Texas high courts have consistently held that under our Constitution's separation-of-powers provision and the expressly-assigned duties of the AG and district and county attorneys, the Legislature is prohibited from assigning the *duty* of criminal prosecution in the trial courts to the AG.[2]

---

[1] *See* Bill Aleshire, *The Texas Attorney General: Attorney or General?*, 20 REV. LITIG. 187, 208 (2000) (citing TEX. CONST. OF 1845, ART. IV, § 12 (amended 1850) (stating that the office of the Attorney General was created in 1836); *see also* Act approved Dec. 13, 1836, 1st Cong., R.S. § 1, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1137 (Austin, Gammel Book Co. 1898) (defining the duty of the Attorney General to follow the instructions of the Governor); Act of May 11, 1846, 1st Leg., *reprinted in* 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1512–15, 1601–04 (Austin, Gammel Book Co. 1898) (describing the duties of the AG and District Attorneys, respectively); Act of Aug. 26, 1856, 6th Leg., Adj. S., ch. 151, ch. 2, §§ 28–29, *reprinted in* 4 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1100–01 (Austin, Gammel Book Co. 1898) (laying out the duties of the AG and District Attorneys).

[2] *Infra* Section IV.D. Note that there is a distinction between powers and duties. While the Legislature may be able to assign to the AG the *power* of criminal prosecution, it may not assign the *duty* to do so. And, even if the Legislature can constitutionally assign to the AG the power of criminal prosecution, the AG's actions in asserting that power may nevertheless violate the Texas Constitution on an as-applied basis.

The analysis underlying these judicial decisions is based on a strict interpretation of our Texas Constitution. Under our current Constitution, the district and county attorneys are assigned the duty to represent the State in all matters before the trial courts, including all criminal prosecutions.[3] In contrast, the AG is assigned the duty to represent the State in the Supreme Court and in other courts only for certain limited types of cases (all of which are currently civil law matters). Given the fact that the Constitution places the DAs and AG in separate governmental departments, the Legislature is prohibited, pursuant to the separation-of-powers provision, from assigning away any part of the DAs' duty to the AG, unless such assignment involves the limited types of cases specifically enumerated within the AG's constitutional duties.[4]

In fact, even the AG's Office (through various AG opinions) and our own Legislature (through numerous statutes) have for decades declared that district and county attorneys have the exclusive duty to prosecute all criminal cases in the trial courts.[5] Given these opinions and statutes, it is quite puzzling why the AG and various legislators argue in briefs to this Court against their own opinions and statutes.[6]

The AG and several *amici* also suggest that the legislative enactment of an Election Code provision somehow trumps our Texas Constitution. One *amicus* brief even claims that the AG "has had the authority to prosecute certain election-law violations" for 70 years. Another *amicus* brief

---

[3] TEX. CONST., ART. V, § 21 (providing that the district and county attorneys "shall represent the State in all cases in the District and inferior courts in their respective counties").

[4] TEX. CONST., ART. II, § 1.

[5] *See* Section V.

[6] I also find it puzzling that, whereas many of the *amici* are known to support strict adherence to the original intent of the Texas Constitution and limiting government powers to only those expressly enumerated in the Constitution, those same entities now demand that this Court overturn its decision in this case. These entities also urge this Court to judicially expand executive branch duties. But, as shown in more detail below, the Court's analysis on original submission faithfully adhered to the framers' intent underlying the relevant constitutional provisions in light of the arguments raised. Although I ultimately believe that the Court overlooked a reasonable interpretation of the statute that would uphold its constitutionality, the Court's original opinion cannot be faulted for declining to adopt the position taken by the AG and *amici*, which would permit the Legislature to freely reassign specifically-enumerated constitutional duties in conflict with the plain meaning of the separation-of-powers provision.

takes it a step further and claims that "for seventy years[] *Texans* have given the Attorney General the authority to originate the prosecution of election law violations." (emphasis added).

First, I am shocked that anyone would equate the government with "we the people." The Legislature is not the same as "we the people." Texans—and not the government—are the source of all inherent power.[7] Through the adoption of the Texas Constitution, Texans delegated these political powers to the three departments of government and divided them among its officers. "It must be presumed that [Texans] in selecting the depositaries of a given power . . . intended that the [officer in which the power or duty was entrusted] should exercise an exclusive power, with which the legislature could not interfere by appointing some other officer to the exercise of the [same] power [or duty]."[8] Thus, when Texans bestowed upon the district and county attorneys the duty to represent the State in all cases in the trial courts, only Texans can change that delegation of authority through a properly-proposed and adopted constitutional amendment. The Legislature cannot make that change and neither can the courts.[9]

Second, the AG's claim of 70 years of legislatively-granted authority for criminal prosecution of election law violations is misleading. It ignores the fact that in 1957, when first presented with the issue, a court of appeals held that the DA's constitutional authority to investigate and criminally prosecute election law violations was superior to the AG's claim of statutory

---

[7] TEX. CONST. ART. I, § 2 ("All political power is inherent in the people and all free governments are founded on their authority, and instituted for their benefit."); *Ex parte Francis*, 165 S.W. 147, 173 (Tex. Crim. App. 1914) ("Where the people have decided to exercise their authority directly in making the laws or putting them in operation, they have reserved that right in the Constitution. This is a command by the people to the Legislature, and not a delegation of power to the people by the Legislature. The people reserved this power. The Legislature acts by command of the people in enacting these laws. The people reserve the right to put them in operation.").

[8] *State v. Moore*, 57 Tex. 307, 314 (1882).

[9] "If the people want a change in the Constitution, there is a method provided in that instrument by which it can be accomplished. It cannot be done by the Legislature, nor by the courts." *Keller v. State*, 87 S.W. 669, 677 (Tex. Crim. App. 1905).

authority under former Section 130 of the Texas Election Code, a predecessor to the statute at issue in this case.[10] The court in *Shepperd v. Alaniz* declared:

> 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 [] 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 [the provision bestowing authority upon the district and county attorneys] and would be void.[11]

Thus, at least as far back as 1957, the AG's authority to exclusively or unilaterally prosecute Election Code violations was in serious doubt. And while the Dallas Court of Appeals later upheld the present-day statute over a separation-of-powers challenge, that decision did not come to pass until 2014—more than fifty years after *Shepperd*.[12] In short, suggesting that the AG's exclusive authority in this regard has always been widely accepted and has never been called into question is highly inaccurate.

The AG and *amici*, through briefs and by other actions, have spurred hundreds, if not thousands, of individuals from across this state and other states to engage in attempts at impermissible *ex parte* communications with the Court.[13] These parties ask (and in several cases demand), in the name of public policy, that we violate our oath to uphold and defend our Texas

---

[10] *See Shepperd v. Alaniz*, 303 S.W.2d 846 (Tex. Civ. App.—San Antonio 1957, no writ). The statute at issue in *Shepperd*, former Election Code Section 130, provided, among other things, that "[t]he Attorney General of Texas is hereby authorized to appear before a grand jury and prosecute any violation of the election laws of this State by any candidate, election official, or any other person, in state-wide elections, or elections involving two (2) or more counties. He may institute and maintain such prosecution alone or in conjunction with the county or district attorney of the county where such prosecution is instituted." Vernon's Revised Civil Statutes, Election Code Art. 9.02(2) (1952). The provisions in this section were later divided up into numerous different statutes that now essentially make up Chapter 273 of the Election Code, including the statute at issue in this case, Election Code Section 273.021. *See* Act of May 16, 1985, 69th Leg., R.S., Ch. 211, § 1, eff. Jan. 1, 1986 (recodifying Election Code).

[11] *Shepperd*, 303 S.W.2d at 850.

[12] *See Medrano v. State*, 421 S.W.3d 869 (Tex. App.—Dallas 2014, pet. ref'd).

[13] Under the Code of Judicial Conduct, judges are not allowed to consider these type of *ex parte* communications, and I certainly have not.

Constitution. But bowing to current public clamor and overruling the will of the people expressed in the Constitution is the antithesis of our job.

> No change in public opinion on questions of policy can ever be given weight in construing provisions of a Constitution, where the meaning is clear, for the adoption of the construction that might be deemed wise at one time and unwise at another would abrogate the judicial character of the court, and make it the reflex of the popular opinion or the passions of the day.
>
> The popular will . . . must be found in the Constitution. It stands there as the expression of the will of the majority of our voting population. It is here the "inherent power" of the people speaks. When the writer [of a judicial opinion] desires to [discern] the popular will or the public sentiment in regard to organic law, his recourse is and will be to the provisions of the Constitution, and not to public clamor.

Keller, 87 S.W. at 676–77.

Despite the many misleading and false statements made in several of the briefs filed in this case, I do support a rehearing. To be clear, my position is not based on anything raised by the parties or *amici* but is instead based upon my own in-depth analysis of Texas history and the law. Upon further consideration of the issues, I believe there may be a plausible way to construe Election Code Section 273.021 in a very narrow manner to find it constitutional in some circumstances, thereby foreclosing a facial challenge. I address this position below after first establishing the foundation of my position.

Analysis

Texans are well known for having tremendous state pride. That pride stems from our state's rich history of fighting for freedom and independence from governmental overreach. This independent spirit is woven into the fabric of the Texas Constitution. Therefore, to fully understand the meaning of our Constitution, we must first understand our history.

I. Texas History Leading up to the 1876 Constitution

Texas was a Mexican territory for many years. In 1824, Mexico joined Texas with Coahuila to form a new unified state of Coahuila y Tejas.[14] Non-Mexican settlers did not identify themselves as Mexicans but instead as Texians.[15] Concerned about losing control over Coahuila y Tejas to the Texians, Mexico began exerting more restrictions and control over the state, including banning further immigration from the United States.[16]

In 1833, General Antonio Lopez de Santa Anna staged a coup and became the new Mexican president.[17] Santa Anna had initially been in favor of the Mexican Constitution of 1824,[18] which was similar to the United States Constitution.[19] But as president, he nullified the 1824 Constitution,[20] enacted a more centralized Mexican government, and rejected Texas's desire for self-governance.[21] Texas responded with the Convention of 1833 and sent 56 delegates to meet with Santa Anna.[22] These delegates[23] sought a number of concessions, including making Texas its own Mexican state independent from Coahuila.[24] While Santa Anna made some concessions,[25] he

---

[14] John Gsanger, & Reilly Gsanger, *The Seventh Amendment's Balance Between Community-based Justice and the Appellate Courts*, 27 APP. ADVOC. 676, 681 (2015).

[15] *See* Luz E. Herrera, & Pilar Margarita Hernández Escontrías, *The Network for Justice: Pursuing A Latinx Civil Rights Agenda*, 21 HARV. LATINX L. REV. 165, 177 n.79 (2018); *see also* Daniel Rice, *Territorial Annexation As A "Great Power,"* 64 DUKE L.J. 717, 739 n.148 (2015).

[16] *Texas History Timeline*, BULLOCK TEXAS HISTORY STATE MUSEUM (last visited July 15, 2022), https://www.thestoryoftexas.com/discover/texas-history-timeline.

[17] Ruben R. Barrera & Dan A. Naranjo, *Bridge Over Troubled Waters: Resolving the Rio Grande (Rio Bravo) Water Dispute*, 47 ST. MARY'S L.J. 461, 468 (2016).

[18] Ford W. Hall, *An Account of the Adoption of the Common Law by Texas*, 28 TEX. L. REV. 801, 804 (1950).

[19] Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 97 (1988).

[20] Gsanger, *supra* note 18, at 681.

[21] *Barrow v. Boyles*, 61 S.W.2d 783, 786 (Tex. 1933).

[22] *Giles v. Basore*, 278 S.W.2d 830, 834 (Tex. 1955); *see also Texas History Timeline*, *supra* note 20.

[23] One of these delegates was Stephen F. Austin, whom Santa Anna imprisoned for suspicion of inciting insurrection. He was later released. *See Texas History Timeline*, *supra* note 16; *see also* James C. Harrington & Anne More Burnham, *Texas's New Habeas Corpus Procedure for Death-Row Inmates: Kafkaesque - and Probably Unconstitutional*, 27 ST. MARY'S L.J. 69, 79 (1995).

[24] Harrington, *supra* note 27, at 79.

[25] *Giles*, 278 S.W.2d at 834.

refused to grant Texas statehood.[26] In 1835, Texans began revolting against Mexico and battles ensued.[27] In 1836, Texas delegates met at Washington-on-the-Brazos, where they drafted and adopted the Texas Declaration of Independence and wrote a Texas Constitution.[28] More battles ensued, including the Battle at the Alamo and Battle of Goliad.[29] Ultimately, in April 1836, Texas won the Battle of San Jacinto and captured Santa Anna, thereby ending the revolution and establishing the independent Republic of Texas.[30]

Texas remained an independent republic until 1846, when U.S. President James Polk annexed Texas to the United States.[31] In response, Mexico initiated the U.S.-Mexican War. The war ended in 1848 with the Treaty of Guadalupe-Hidalgo in which Mexico recognized Texas as part of the United States.[32] But when the Civil War broke out, independence-minded Texas seceded and fought with the confederacy,[33] in part because of perceived federal overreach, excessive national control, and the belief that the federal government would further erode the perceived rights of the southern states.[34]

Following the end of the Civil War in 1865, Texas was in political turmoil.[35] The federal government placed Texas and several other southern states that fought with the Confederacy under

---

[26] Harrington, *supra* note 27, at 80.

[27] Barrera, *supra* note 21, at 468.

[28] Jason A. Gillmer, *Shades of Gray: The Life and Times of A Free Family of Color on the Texas Frontier*, 29 LAW & INEQ. 33, 67 (2011).

[29] Barrera, *supra* note 21, at 468.

[30] *Id.*

[31] Ralph H. Brock, *"The Republic of Texas is No More": An Answer to the Claim that Texas was Unconstitutionally Annexed to the United States*, 28 TEX. TECH. L. REV. 679, 692 (1997).

[32] Barrera, *supra* note 21, at 469.

[33] Brock, *supra* note 35, at 731 n.243.

[34] *Declaration of Causes: February 2, 1861, A Declaration of the Causes Which Impel the State of Texas to Secede from the Federal Union*, TEXAS STATE LIBRARY & ARCHIVES COMMISSION, https://www.tsl.texas.gov/ref/abouttx/secession/2feb1861.html (last visited July 15, 2022).

[35] Brent M. Hanson, *Judicial Hot Potato: An Analysis of Bifurcated Courts of Last Resort in Texas and Oklahoma*, 12 TENN. J.L. & POL'Y 161, 167–68 (2018) (footnotes omitted) ("After the Civil War, Texas began a tumultuous period

martial law and created military districts.[36] It also ousted many elected and appointed officials and replaced them with leaders loyal to the Union.[37] Before Texas could rejoin the United States, it had to ratify a new state constitution with certain required provisions.[38] It was also required to elect U.S. senators and congressmen acceptable to the federal government.[39]

In 1866, Texans ratified a proposed constitution[40] and elected U.S. senators and congressmen.[41] This document contained a separation-of-powers provision similar to the one that had appeared in some form in the Texas Constitution since 1836. It provided for the division of the powers of government into three distinct departments (legislative, executive, and judicial), and stated that "no person, or collection of persons, being of one of those departments, shall exercise any power, properly attached to either of the others, except in the instances herein expressly permitted."[42] The federal government, however, rejected the constitution for failure to include the

---

of constitutional change in its judiciary. During Reconstruction, Texas was subject to federal military occupation and ousted all five supreme court justices on September 10, 1867. Between 1866 and 1876 Texas had three different constitutions.").

[36] *Id.*; Joseph A. Ranney, *A Fool's Errand? Legal Legacies of Reconstruction in Two Southern States*, 9 TEX. WESLEYAN L. REV. 1, 6 (2002).

[37] Ranney, *supra* note 40, at 6 ("The Texas Supreme Court went through no less than four metamorphoses during Reconstruction. Shortly after the collapse of the Confederacy in the spring of 1865, President Andrew Johnson removed the court's Confederate-era justices along with all other state officials. . . . Texas's military commander, removed the Restoration Court members and replaced them with an appointed Military Court consisting of five new judges, all Unionists.").

[38] *See Daniel v. Hutcheson*, 22 S.W. 933, 935 (Tex. 1893); *see also* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 129, 144–45 (2004) (footnotes omitted) ("The readmission of the Southern states was attached to a number of significant conditions, including the ratification of the Fourteenth Amendment, and a requirement that the suffrage of all state citizens who had voting rights under the Reconstruction state constitutions—which provided for black suffrage—never be abridged. Three of the Southern states were given additional conditions: a requirement that blacks not be excluded from public office, and a requirement that the states not reduce any rights blacks might have to public education under their existing Reconstruction constitutions.").

[39] *Daniel*, 22 S.W. at 935.

[40] *Id.*

[41] One of these senators was Oran Milo Roberts, who was Chief Justice of the Texas Supreme Court. After Democrats returned to power following Texas' rejection of the Reconstruction government, Roberts was again appointed to serve as Chief Justice of the Texas Supreme Court. *See* James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279, 281, 286–87 (1959).

[42] TEX. CONST. OF 1866, ART. II, §1.

required provisions[43] and refused to seat the Texas representatives.[44] Thereafter, federal military leaders removed hundreds of local elected officials from across the state.[45] Hundreds more were forced out of office when they refused to take the congressionally-enacted "Test Oath."[46]

In 1868, a new Texas constitutional convention, led mostly by federally-backed Unionists, was held under Congressional Reconstruction rules and eventually resulted in the Constitution of 1869.[47] This Constitution was different from any previous Texas Constitution. While it contained the same separation-of-powers provision as the previous Constitution, it provided for a strong, centralized, and more bureaucratic system of government.[48] The executive department expanded from seven to eight officers with the addition of a "Superintendent of Public Instruction."[49] Most of the government's power was concentrated in the executive branch with the Governor serving as the "Chief Magistrate."[50]

The Governor no longer had term limits and had extensive power to control the judiciary.[51] The 1869 Constitution provided for just three Texas Supreme Court justices, all of whom were appointed by the Governor for nine-year terms, whereas the previous 1866 Constitution provided for five justices who were elected for ten-year terms.[52] The 1869 Constitution also eliminated all

---

[43] *TAC Americas, Inc. v. Boothe*, 94 S.W.3d 315, 321 n.3 (Tex. App.—Austin 2002).

[44] Norvell, *supra* note 45, at 281.

[45] *State v. El Paso Cnty.*, 618 S.W.3d 812, 830 (Tex. App.—El Paso 2020), mandamus dismissed (Nov. 20, 2020).

[46] *In re Griffin*, 25 Tex.Supp. 623, 625 (1869). The Test Oath was a requirement for anyone holding any elected office wherein the official had to swear that he had never voluntarily taken up arms against the United States or given "aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto." *Ex parte Garland*, 71 U.S. 333, 333 (1866).

[47] *Daniel*, 22 S.W. at 935; *see* Ranney, *supra* note 40, at 6–7.

[48] Ron Beal, *Power of the Governor: Did the Court Unconstitutionally Tell the Governor to Shut Up?*, 62 BAYLOR L. REV. 72, 77 (2010).

[49] TEX. CONST. OF 1869, ART. IV, §1.

[50] TEX. CONST. OF 1869, ART. IV, §1.

[51] TEX. CONST. OF 1869, ART. IV, § 4, ART. V, §§ 2, 6, 10, 11, 14.

[52] *Compare* TEX. CONST. OF 1869, ART. V, § 2, *with* TEX. CONST. OF 1866, ART. IV, § 2.

of the locally-elected county courts, expanded the number of district courts, and allowed the Governor to appoint all district judges for eight-year terms.[53]

The creation of a strong, centralized government led by Unionists was the source of anger and resentment among the fiercely-independent Texans, who wanted a weaker, decentralized system of government where locally-elected officials had more control and were more accountable to their communities.[54] Despite this sentiment, a ratification election went forward under federal supervision.[55] Based on Congressional Reconstruction rules, many Democrats were deemed ineligible to vote.[56] Many others, disheartened by federal control and military-supervised elections, refrained from voting.[57] As a result, Unionist Republican Edmund Davis was elected Governor in a tight race,[58] and the proposed Constitution passed.[59] Congress accepted the election results.[60] In 1870, Texas was readmitted into the Union and military rule in Texas ended.[61]

---

[53] TEX. CONST. OF 1869, ART. V, §§ 6–7.

[54] *See* S. S. McKay, "Constitution of 1869," *Handbook of Texas Online*, TEXAS STATE HISTORICAL ASSOCIATION, https://www.tshaonline.org/handbook/entries/constitution-of-1869 ("Its centralizing tendencies, abandonment of state's rights, and specific restrictions on the use of state resources to support private corporations such as the railroads, however, prompted significant opposition throughout its existence.").

[55] *See Peak v. Swindle*, 4 S.W. 478, 479–80 (Tex. 1887).

[56] *See* Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 102 (2016) ("In 1869 the federal government sought to return control of Texas to an elected state government. An election—in which former Confederate soldiers were generally prohibited from voting for the new government—was held to fill the state government created by the 1868 Constitutional Convention."); *see also Texas Governor Edmund Jackson Davis Records: An Inventory of Governor Edmund Jackson Davis Records at the Texas State Archives*, TEXAS ARCHIVAL RESOURCES ONLINE, https://txarchives.org/tslac/finding_aids/40016.xml (last visited July 15, 2022) ("Troops stationed at the polls probably prevented many Democrats from voting: only about half of the registered white voters actually cast a ballot, and many polling places were either not opened, or ordered closed.").

[57] *See* Mikal Watts Brad, *The Original Intent of the Education Article of the Texas Constitution*, 21 ST. MARY'S L.J. 771, 820 (1990) (quoting W. Benton, *Texas Politics—Constraints And Opportunities* 18–19 (5th ed. 1984)) ("Considering the military supervision of elections and the disenfranchisement of so many Democrats, it would have been fruitless for the Democratic Party to have nominated a candidate.").

[58] Frassetto, *supra* note 60, at 101–02 ("In 1869, Radical Republican Edmund Davis was elected Governor of Texas . . . by [a margin of] less than 800 votes . . . .").

[59] *See Peak*, 4 S.W. at 480.

[60] *Id.* at 479–80.

[61] *Daniel*, 22 S.W. at 936.

Governor Davis fully utilized his executive authority. He created a state police force; increased the number of district courts; appointed district judges and placed them in charge of directing police forces to maintain law and order; subordinated local school districts to a centralized state board of education; implemented martial law in areas of lawlessness; and increased taxes.[62] Democrats initiated a call to action and labeled Davis' administration "Tyranny, Taxes, and Corruption."[63]

In 1874, after defeating the Republicans in statewide elections,[64] Texas Democrats formed a new constitutional convention.[65] Having lived under federal military control and then the 1869 Constitution with its strong centralized government, most Texans wanted a new direction.[66] Thus, much of the focus of the new constitutional convention was on decentralizing the government, weakening the executive branch, returning power to locally-elected officials, reducing taxes, and

[62] Frassetto, *supra* note 60, at 102–10.

[63] William J. Chriss, J.D., Ph.D., *The Texas Constitutions*, 2020 ADVANCED CIV. APP. PRAC. 13-III, 2020 WL 5607192.

[64] Notably, after the 1873 election where Democrats swept the election, some Republicans alleged voter fraud. An ousted Republican sheriff arrested Joseph Rodriguez claiming he voted twice. The Harris County District Attorney initially served as the prosecutor, but after he resigned, the Travis County District Attorney stepped in. The Attorney General took no part in the prosecution. Ultimately, the Davis-appointed Texas Supreme Court declared that the entire election was unconstitutional, and Davis initially refused to leave office. Democrats threatened to immediately inaugurate the electorate victor, Richard Coke, as Governor. When U.S. President Ulysses Grant refused to intervene, Davis stepped down. *See* Curtis Bishop, "Coke-Davis Controversy," *Handbook of Texas Online*, TEXAS STATE HISTORICAL ASSOCIATION, https://www.tshaonline.org/handbook/entries/coke-davis-controversy; *see also* Carl H. Moneyhon, "Ex Parte Rodriguez," *Handbook of Texas Online*, TEXAS STATE HISTORICAL ASSOCIATION, https://www.tshaonline.org/handbook/entries/ex-parte-rodriguez.

[65] *Davenport v. Garcia*, 834 S.W.2d 4, 16 (Tex. 1992).

[66] *El Paso Cnty.*, 618 S.W.3d at 830; Beal, *supra* note 52, at 77.

making government less expensive.[67, 68] In 1876, Texas voters ratified our current Constitution (which over the years has undergone amendments).[69]

II. Roles of the AG and DA under Early Texas Constitutions

The Texas Office of the Attorney General (OAG) is unique in that it has never had the same broad authority or wide variety of duties as AG positions in other states.[70] Instead of being constitutionally created, the Texas OAG was first created by executive ordinance in 1836.[71] Under this ordinance, the AG was to be appointed by the Governor and his duties were to be defined by the Legislature.[72] The AG's statutory duties were described in general terms and were shared with the other heads of department, i.e., the secretaries of state, war, navy, and the treasury.[73]

---

[67] Beal, *supra* note 52, at 78 (footnote omitted) ("The Governor was also only provided a two-year term. This was due to the framers' intent to weaken state government and their belief that long terms were conducive to tyranny."); Ranney, *supra* note 36, at 29 ("The 1875 convention was dominated by delegates who were primarily interested in agricultural reform and reduced taxes; as a result, the 1876 constitution's defining characteristic was a vision of state government much narrower than that of the 1869 constitution. The 1876 constitution limited permissible rates of taxation at both the local and state level, reenacted a pre-war limit on state debt, imposed strict limits on municipal debt, prohibited state and local aid to private enterprise for the first time, and placed restrictions on the purposes for which state government could use tax revenues. The constitution also returned the supreme court to elective status, and reduced the terms of various officials.").

[68] This sentiment was included in the 1876 Constitution's Bill of Rights where it proclaimed: "Texas is a free and independent State, subject only to the Constitution of the United States; and the maintenance of our free institutions and the perpetuity of the Union depend upon the *preservation of the right of local self-government unimpaired to all the States*." TEX. CONST., ART. I, § 1 (emphasis added). Compare this to the 1869 Constitution's Bill of Rights, which provided: "The Constitution of the United States, and the laws and treaties made, and to be made, in pursuance thereof, are acknowledged to be the supreme law; that this Constitution is framed in harmony with, and in subordination thereto; and that the fundamental principles embodied herein can only be changed, subject to the national authority." TEX. CONST. OF 1869, ART. I, § 1.

[69] John Walker Mauer, *State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876*, 68 Tex. L. Rev. 1615, 1624 (1990).

[70] *See generally Powers and Duties*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, https://www.naag.org/issues/powers-and-duties/ (last visited July 15, 2022); *see also* Appendix B.

[71] James G. Dickson, Jr., "Attorney General," *Handbook of Texas Online*, TEXAS STATE HISTORICAL ASSOCIATION, https://www.tshaonline.org/handbook/entries/attorney-general.

[72] Executive Ordinance, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1053 (Austin, Gammel Book Co. 1898).

[73] Joint Resolution Defining the Duties of the Heads of Departments of the Government, approved December 13, 1836, 1 Laws of the Rep. of Tex., 1st Cong., 77, 77, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1137 (requiring the members of the president's cabinet to: "reside permanently at the seat of government"; "conform

Thereafter, the OAG appeared in the Judicial Department of the 1845 Constitution.[74] Under that Constitution, the AG was to be appointed by the Governor and his duties assigned by the Legislature.[75] Those duties were primarily to represent the State in all proceedings in the Texas Supreme Court; to defend the State in the district courts against claims for payment; to counsel the district attorneys when requested to do so; and to perform any other duties prescribed by law.[76] The AG became an elected position under the 1866 Constitution, but the office remained in the Judicial Department with duties assigned by the Legislature.[77]

The 1869 Constitution implemented by the Unionists sought to impose a strong, centralized government,[78] and therefore the AG again became a gubernatorially-appointed position and was moved to the Executive Department.[79] The AG's duties under the 1869 Constitution were to: (1) "represent the interests of the State in all suits or pleas in the Supreme Court;" (2) "instruct and direct the official action of the District Attorneys so as to secure all fines and forfeitures, all escheated estates, and all public moneys to be collected by suit;" (3) "when necessary, give legal

---

to and execute the instructions of the president, whether general or particular"; and "give respectively and collectively, such needful aid and counsel whenever required to do so by the chief magistrate of the republic . . .").

[74] TEX. CONST. OF 1845, ART. IV, § 12.

[75] *Id.*

[76] Act approved May 11, 1846, 1st Leg., *reprinted in* 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1512–15 (Austin, Gammel Book Co. 1898). Specifically, the statute obligated the AG to: (1) "prosecute and defend all actions in the supreme court of the State, in which the State may be interested, and also to perform such other duties as may be prescribed by the constitution and laws of the State;" (2) "counsel and advise the several district attornies [sic] in the State, in the prosecution and defence [sic] of all actions in the district courts, wherein the State is interested, whenever requested by them to do so;" and (3) "appear and defend the interests of the State, in any suits now pending, or which may be hereafter instituted in the district court, by empresarios for the settlement of their claims." *Id.* The statute imposed various other more minor duties on the AG as well, including: gathering information and reporting it to other specified governmental offices; transmitting to the proper district attorneys "all certified accounts, bonds or other demands which may have been delivered to [the AG] by the comptroller of public accounts for prosecution and suit;" upon proper request from the Governor or other specified officials, authoring "an opinion in writing, in all cases touching the public interest, or concerning the revenue or expenses of the State;" and preparation of forms for contracts for the state's use. *Id.*

[77] TEX. CONST. OF 1866, ART. IV, § 13.

[78] *See* McKay, *supra* note 58.

[79] TEX. CONST. OF 1869, ART. IV, §§ 1, 23.

advice in writing to all officers of the government;" and (4) "perform such other duties as may be required by law."[80] The catchall provision "perform such other duties as may be required by law" was also included within the duties of other executive officers.[81]

Unlike the Office of the Attorney General which was created by executive order, the office of the District Attorney was constitutionally created under the 1836 Republic of Texas Constitution. The DA's office was included in the Judicial Department, but the duties were to be prescribed by law.[82] In the 1845 Constitution, the DA and AG were included in the same section of the Judicial Department which provided:

> The governor shall nominate, and, by and with the advice and consent of two-thirds of the senate, appoint an attorney general, who shall hold his office for two years; and there shall be elected by joint vote of both houses of the legislature a district attorney for each district, who shall hold his office for two years; and the duties, salaries, and perquisites of the attorney general and district attorneys shall be prescribed by law.[83]

Despite the change in the constitutional provision governing the DAs, their duties as prescribed by law did not change. They still had the exclusive duty to represent the State in both civil and criminal cases in the trial courts while the AG exclusively represented the State in the Texas Supreme Court. *See, e.g.*, *State v. Johnson*, 12 Tex. 231, 236 (1854) (citing Hartley's Digest of the Laws of Texas, Art. 616)[84] ("It is prescribed by law that it shall be the duty of the District Attorney to attend all Terms of the District Court in his district, to conduct all prosecutions for crime and

---

[80] TEX. CONST. OF 1869, ART. IV, § 23.

[81] TEX. CONST. OF 1869, ART. IV, §§ 17, 20, 21, 22.

[82] TEX. CONST. OF 1836, ART. IV, § 5 ("There shall be a district attorney appointed for each district, whose duties, salaries, perquisites, and terms of service shall be fixed by law.").

[83] TEX. CONST. OF 1845, ART. IV, § 12.

[84] *See* Act of May 13, 1846, 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1602 (Austin, Gammel Book Co. 1898) (describing statutory duties of district attorneys and stating, "That it shall be the duty of each district attorney to attend all terms of the district court in the district in which he may have been elected, to conduct all prosecutions for crimes and offences cognizable in such court, to prosecute and defend all other actions in which this State is interested, and to perform such other duties as may be prescribed by the Constitution and laws of the State.").

offenses cognizable in such Courts."); *see also State v. Allen*, 32 Tex. 273 (1869) (involving a civil lawsuit filed and settled on behalf of the State by the DA in the district court but appealed to the Texas Supreme Court by the AG).[85]

In *State v. Southern Pacific R.R. Co.*, 24 Tex. 80 (1859), the Texas Supreme Court provided a description of the respective roles of the AG and the DA under the 1845 Constitution. The Court was tasked with resolving whether the AG and the DA, who jointly initiated a civil suit to forfeit the charter of a railroad, had the authority to file such suit.[86] In examining this question, the Court noted that despite being assigned to the Judicial Department, the AG and DA were both "executive officers" with separate duties. *Id.* at 116–17 ("The governor, attorney general, and district attorney, are all executive officers, each acting in their appropriate sphere."). The Court also noted that the duties of the AG and DA were prescribed by statute and not by the Constitution. *Id.* at 117 ("The constitution, after providing for their appointment [by the Governor], prescribes, that the 'duties . . . of the attorney general and district attorneys, shall be prescribed by law.'"). The statutory "duty of the attorney general, [is] to prosecute and defend all actions in the supreme court of the state, in

[85] In *Allen*, the Texas Comptroller of Public Accounts turned over to the DA an account in which the debtors owed the State $15,000. *Allen,* 32 Tex. at 274. Pursuant to his statutory duties, the DA filed a lawsuit in the district court to recover the money owed but ultimately settled with the debtors for $500. *Id.* On appeal to the Texas Supreme Court, the AG, pursuant to his statutory duty, represented the State. *Id.* He argued that pursuant to statute, the DA had no authority to the settle the account for less than the full amount. *Id.* at 274–75. The Court agreed and reversed. *Id.* at 275–76 (citing to the applicable statute that provided "that no admission made by the district attorney in any suit or action in which the state is a party, shall operate to prejudice the interest of the state"). While this case was decided in May 1869, it was still under the Constitution and laws of the 1845 Constitution because the 1869 Constitution was not operative until December of that year. *See Clegg v. State*, 42 Tex. 605, 607 (1875) (recognizing that "the Constitution must be held to have gone into effect from its adoption by the vote of the people, on the 3d of December, 1869").

[86] This opinion was written by Texas Supreme Court Justice Oran Milo Roberts. In 1844, Roberts was appointed to the position of district attorney by President Sam Houston. In 1846, he was appointed as a district judge. He served in the 1866 constitutional convention. In 1856, Roberts was elected to the Texas Supreme Court and also served as its chief justice. In 1865, because of his support and involvement in the Confederacy, Roberts was removed from office as part of the Congressional Reconstruction. In 1866, Roberts was named U.S. Senator, but Congress refused to seat him. After Democrats returned to power in Texas, in 1874, Roberts was first appointed and then elected to the Texas Supreme Court. He again served as its chief justice. In 1878, Roberts was elected and served two terms as the Governor. Ford Dixon, "Roberts, Oran Milo," *Handbook of Texas Online*, TEXAS STATE HISTORICAL ASSOCIATION, https://www.tshaonline.org/handbook/entries/roberts-oran-milo (last visited July 15, 2022).

which the state may be interested; and also to perform such other duties as may be prescribed by the constitution and laws of the state.'" *Id.* (quoting the applicable statute for the AG's duties).

By contrast, for the DA, the applicable statute prescribed that "it [is] the duty of the district attorney to attend all terms of the district court, 'to conduct all prosecutions for crimes and offenses cognizable in such court, to prosecute and defend all other actions in which this state is interested, and to perform such other duties as may be prescribed by the constitution and laws of the state.'" *Id.* (quoting the applicable statute for the DA's duties) (emphasis omitted). The Court stated that while the AG and DA had joined forces to bring the lawsuit at issue, it was the DA's and not the AG's duty to represent the State in the district court. *Id.* at 119 (stating that while it was unnecessary for the Court to determine the respective roles of the AG and DA, "it seems to fall, more appropriately, within the province of the district attorney, to prosecute this, or any other suit for the state in district court").

The Court also remarked on the "privilege" of discretion as to whether a case would be filed or prosecuted. It stated that this "privilege arises out of the very nature of an executive office, and is an incident to its duties." *Id.* at 118. "Duty gives the command, and the power to act, and necessarily confers the right to determine the necessity or propriety of action." *Id.* at 119. Regarding this discretion as it relates to the independent roles of the AG and DA, the Court observed that harmony, communication, and cooperation between these two executive officers is expected. *Id.* at 117. But it also acknowledged that there may be occasions where they disagree "as to the proper course to be pursued." *Id.* While such disagreement would be an "inconvenience," the Court remarked that because of each officer's independence from the other and their different statutory duties, such disagreement may sometimes "prevent suits from being brought occasionally, which might otherwise be brought." *Id.* Thus, in 1859, just as it was in 1836, it was the DA's duty to initiate lawsuits or prosecutions on behalf of the State in the district courts. The

AG could provide advice and assistance to the DA, but only if the DA asked for it. If the DA chose not to initiate litigation in a particular case and the AG disagreed with that decision, *Southern Pacific R.R. Co.* suggests that the AG had no authority to initiate the lawsuit over the DA's objection.

In the 1866 Constitution, both the DA and AG remained in the Judicial Department but were separated into different sections. The DA became an elected position with a term of four years, but his duties were still to be "prescribed by law" and did not change. TEX. CONST. OF 1866, ART. IV, § 14; *see, e.g.*, *State v. McLane*, 31 Tex. 260, 261 (1868) (noting that the district attorney is "the officer appointed by the state authorities to conduct its causes [and is therefore] the one, and the only one, who can assume the power to dismiss a criminal cause"). Later that year, the Legislature assigned to the county attorneys the duty "to represent the state in all cases wherein she might be a party in the county court and before committing magistrates, in the absence of the district attorney." *State v. Currie*, 35 Tex. 17, 19 (1872) (citing Section 38, Act of October 25, 1866).

The 1869 Constitution also did not change anything with respect to the duties of the DAs. They remained assigned to the Judicial Department and were still to be elected for four years with their duties to be "prescribed by law." TEX. CONST. OF 1869, ART. V, § 12. Over the course of the several constitutions, the DAs' core duties never changed. *See, e.g.*, *Davis v. State*, 44 Tex. 523, 524 (1876) (noting that in a criminal prosecution, the "State is a party litigant, and speaks and acts through its appropriate district attorney . . . This power is embraced in the authority expressly conferred on him 'to conduct all prosecutions for crimes and offenses cognizable in such court.'") (citing to statute applicable to DAs before the adoption of the 1876 Constitution); *see also Moore*, 57 Tex. at 316 (noting that "under all the constitutions of this state . . . it was always contemplated that the district attorneys should represent the state in all cases in the district and inferior courts").

III. Roles of the AG and DA under the 1876 Constitution

The 1876 Constitution remains in force today and contains the provisions under consideration in this case (although subject to multiple amendments over the intervening decades). As discussed above, the focus of the 1876 Constitution was to decentralize the government and weaken the executive branch to place more control in the hands of local elected officials and prevent further governmental overreach. Along those lines, all statewide-elected officers, other than judges, were placed in the executive branch. This included the AG, whose duties under this Constitution were more restricted and more specifically enumerated. The AG was no longer allowed to "direct the official action of the District Attorneys," and instead of specifying that he could provide legal advice to "all officers of the government," he was limited to giving such advice only "to the governor and other executive officers."

TEX. CONST. OF 1869, ART. IV, § 23	TEX. CONST. OF 1876, ART. IV, § 22 (original)
There shall be an Attorney General of the State having the same qualifications as the Governor, Lieutenant Governor, Comptroller of Public Accounts and Treasurer, who shall be appointed by the Governor, with the advice and consent of the Senate. He shall hold his office for the term of four years. He shall reside at the capital of the State during his term of office. He shall represent the interests of the State in all suits or pleas in the Supreme Court, in which the State may be a party; superintend, instruct and direct the official action of the District Attorneys so as to secure all fines and forfeitures, all escheated estates, and all public moneys to be collected by suit; and he shall, when necessary, give legal advice in writing to all officers of the government; and perform such other duties as may be required by law.	The attorney general shall hold his office for two years and until his successor is duly qualified. He shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and, from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage, not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the governor and other executive officers, when requested by them, and perform such other duties as may be required by law. He shall reside at the seat of government during his continuance in office. He shall receive for his services an annual salary of two thousand dollars, and no more, besides such fees as may be prescribed by

	law; provided, that the fees which he may receive shall not amount to more than two thousand dollars annually.

As for criminal prosecution in the trial courts, nothing in the 1876 Constitution could be construed as assigning that duty to the AG.[87] *See Saldano v. State*, 70 S.W.3d 873, 878 (Tex. Crim. App. 2002) ("The office of the attorney general of Texas has never had authority to initiate a criminal prosecution.").[88] The AG's involvement in criminal law, assigned by statute, was limited solely to representing the State on appeal in the Court of Appeals, which eventually became this Court. *Id.* at 880. And even that involvement ended in 1923 with the creation of the office of the State Prosecuting Attorney, whose office now represents the State in this Court. *Id.*

[87] The only exception would be if the Legislature were to enact a statute that criminalized activity by a "private corporation [which] exercis[es] any power or demand[s] or collect[s] any species of taxes, tolls, freight or wharfage, not authorized by law." Such a law would fall within the AG's constitutional duty to prosecute, but he would have no constitutional authority to prosecute any other criminal law violations in the trial courts. *See* TEX. CONST. ART. IV, § 22.

[88] Judge Yeary's dissenting opinion on rehearing notes that when the *Saldano* case was decided, Texas Election Code § 273.021 had already been enacted and therefore "the Court would have had to admit that the AG had in fact been delegated prosecution authority in at least one narrow set of circumstances." This statement, however, presumes that the *Saldano* Court believed § 273.021 was constitutional. Yet, the court of appeals in *Shepperd* had already noted decades earlier that "[i]t 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 [] 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 [the provision bestowing authority upon the district and county attorneys] and would be void." *Shepperd v. Alaniz*, 303 S.W.2d 846, 850 (Tex. Civ. App. 1957). The *Saldano* Court also knew that the Texas Constitution's ratifying voters understood that it had always been the role of the DAs to prosecute criminal law offenses in the trial courts; it had never been the AG's duty. Moreover, the *Saldano* Court knew of the dozens of statutes wherein the Legislature had declared that the DAs had *exclusive* criminal prosecutorial authority or that the DA *shall* prosecute *all* criminal cases in the trial courts. *See* Part V-A and Appendix A, *infra*. Judge Yeary does not take any of that into account. But Judge Yeary does seem to agree with me that our Constitution leaves room for the Legislature to enact criminal law statutes that would fall within the AG's enumerated duties under the Constitution giving him authority to unilaterally prosecute such cases. To date, however, at least to my knowledge, no such statutes have yet been enacted, and to my knowledge the AG has never sought to criminally prosecute any corporation or person "as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law." TEX. CONST. ART. IV § 22. Therefore, when the *Saldano* Court stated that "[t]he office of the attorney general of Texas has never had authority to initiate a criminal prosecution," because § 273.021 had not yet officially been declared unconstitutional, it really should have said that the AG has never had the *duty* to initiate a criminal prosecution. But to call the *Saldano* Court's statement "demonstrably false" is an over-exaggeration, especially given the issues presented in that case and the state of the law at the time. Further, the argument I make for rehearing is one that has not yet been argued by any party, nor has it been fully considered. Thus, Judge Yeary's indignation regarding this Court's reliance on *Saldano* is misplaced.

The DAs and county attorneys, by comparison, remained in the judicial branch and their duty to represent the State in all district and inferior courts became an express constitutional duty rather than merely being "prescribed by law:"

> The county attorneys shall represent the State in all cases in the District and inferior courts in their respective counties, but if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall in such counties be regulated by the Legislature.

TEX. CONST. ART. V, § 21. This language has remained unchanged since its adoption.

Regarding the language that the Legislature shall "regulate" the respective duties of the district and county attorneys, this merely means that the Legislature has the authority to determine which of these officers will represent the State in which courts and on what types of cases. For example, in many counties the county attorney represents the State in the trial courts for only civil law matters, while the district attorney or criminal district attorney represents the State in the trial courts for criminal law matters. *See, e.g.*, TEX. GOV'T CODE § 43.180 (providing that the District Attorney for Harris County represents the State in criminal matters in the district and inferior courts of the county); TEX. GOV'T CODE § 45.201 (providing that the County Attorney for Harris County represents the State in civil matters). In other counties, the district attorneys represent the State in district courts while the county attorneys represent the State in the inferior courts such as the county courts of law and justice of the peace courts. *See, e.g.*, TEX. CODE CRIM. PROC. ART. 2.01 ("Each district attorney shall represent the State in all criminal cases in the district courts of his district . . . ."); *Id.* ART. 2.02 ("The county attorney shall attend the terms of court in his county below the grade of district court . . . ."). The Legislature's power to "regulate" in this context does not allow it to take away any part of the constitutionally-assigned duty from these officers and give that duty to another officer in a different department of government. *See, e.g.*, *Ex parte Patterson*, 58 S.W. 1011, 1012–13 (Tex. Crim. App. 1900) ("The power to regulate does not properly include the power to suppress or prohibit, for the very essence of regulation is the existence of something to

be regulated. The power to regulate includes the power to restrain, so long as the restraint imposed is reasonable. The restraint must not so confine the exercise of [a right or duty] as to amount to a prohibition.").

Further, the express separation-of-powers provision in the Texas Constitution ensures that the Legislature's power is kept in check so that the will of the people can prevail:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no 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.

TEX. CONST. ART. II, § 1. This provision in some form has been included in every Texas Constitution since 1836. It means that the Legislative Department is prohibited from enlarging, restricting, or destroying the powers of another department unless the Constitution itself, in expressly-worded terms, gives the Legislature such power. *Lytle v. Halff*, 12 S.W. 610, 611 (Tex. 1889) ("The declaration is that the executive, legislative, and judicial departments shall exist,—this is the fiat of the people,—and neither one nor all of the departments so created can enlarge, restrict, or destroy the powers of any one of these, except as the power to do so may be expressly given by the constitution."). Nothing in the Constitution provides the Legislature with the power to restrict or reassign the duty of the district and county attorneys to represent the State in any type of criminal prosecution, except in those instances falling within the AG's express constitutional duty to "take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage, not authorized by law." TEX. CONST. OF 1876, ART. IV, § 22. Moreover, when the people adopted the Constitution, they believed that the duty to represent the State in all criminal prosecutions would lie exclusively with the district and county attorneys. *See, e.g.*, *Moore*, 57 Tex. 307.

Despite the 1876 Constitution being the first to expressly assign to the district and county attorneys the duty of representing the State in all cases in the trial courts, that duty has effectively remained the same throughout the entirety of Texas history and has never changed. This is highlighted in *State v. Moore*, written a mere six years after the ratification of our current Constitution. 57 Tex. 307 (1882). In *Moore*, the Texas Supreme Court examined the constitutional relationship between the duties of the AG and those of the district and county attorneys. The opinion was written by Justice John William Stayton, who would later become chief justice. Justice Stayton served in the 1875 Constitutional Convention.[89] He participated in the debates and assisted in the document's drafting.[90] Thus, his opinion in *Moore* is entitled to great deference regarding the original meaning and intent of the Framers and the understanding of the applicable provisions by the ratifying voters.

Moore arose out of an initial dispute regarding whether the Travis County Attorney, E.T. Moore, or the AG had the constitutional authority to initiate lawsuits against defaulting tax collectors. The comptroller of public accounts had turned over to the AG "certain accounts against . . . defaulting collectors." *Moore*, 57 Tex. at 309–10. The AG then initiated civil lawsuits in Travis County district court against these collectors. Moore filed motions with the district court arguing that the suits had been filed "against his consent, and without his knowledge" and that "under the constitution and laws of the state, it was his duty and privilege to . . . prosecute and control these suits to the exclusion of all other officers or attorneys." *Id.* at 310. The district court granted Moore's motion and "gave control to the county attorney to the exclusion of the attorney general." *Id.*

---

[89] Craig H. Roell, "Stayton, John William," *Handbook of Texas Online*, TEXAS STATE HISTORICAL ASSOCIATION, https://www.tshaonline.org/handbook/entries/stayton-john-william (last visited July 15, 2022).

[90] *Id.*

After receiving final judgments on the lawsuits and collecting on them, Moore claimed commissions on these collections. *Id.* The AG filed suit on behalf of the State against Moore alleging that Moore had no right to retain the commissions. *Id.* at 309. The suit was ultimately appealed to the Texas Supreme Court. The Court addressed two issues: (1) the respective constitutional powers and duties of the AG in the executive department and the district and county attorneys in the judicial department; and (2) whether pursuant to this analysis, the statute at issue properly allowed the AG to litigate the matter regarding the county attorney retaining commissions in the district court. Because the first issue is the only one relevant to this opinion, my discussion of *Moore* is limited to that issue.

Justice Stayton, on behalf of the Court, started his analysis by recognizing:

> While it is true that our government is departmental in character, and that the officers of the different departments are to a very large extent independent of and free from the control of the heads of other departments, yet in the very nature of things, in the details of business, occasions will and do arise, where officers of the executive department do and ought to exercise a power at least advisory over some officers, who, although classed in a different department, exercise powers in fact partaking more of the character of executive power than of judicial power; among these are the district and county attorneys, sheriffs and constables.

Id. at 310–11. The opinion then referred back to the language of *State v. Southern Pac. R.R. Co.*, (*see* Section II above), and noted:

> "In this state . . . direct control [of law officers by the executive] . . . is cut off by the independence of the law officers of the state . . . . And, although absolute subjection does not exist, harmony between executive officers who are impelled by a common duty is to be expected generally, unless a difference of opinion should exist as to the proper course to be pursued. That is an inconvenience which is consequent upon maintaining the independence of inferior officers. . . . While our statutes seem designed to make a division of powers and duties between them (attorney general and district attorneys), in representing the interest of the state in the several courts, they evidently contemplate a correspondence for advice and information between them."

Id. at 311 (quoting *Southern Pac. R.R. Co.*, 24 Tex. at 117).

Building on the reference to *Southern Pacific R.R.*, the *Moore* Court noted that "[f]rom the 11th day of May, 1846, until the present time, this relationship has, under the statutes of this state, been recognized, and it is not believed that the fact that, under the present constitution, [the AG and the DAs] have been placed in different departments, severs that relationship, their duties being of the same character[.]" *Id.*

Thus, when considering the 1876 Constitution's separation-of-powers provision along with the catchall phrase in the provision enumerating the duties of the AG (that he "shall perform such other duties as may be required by law"), the Court reasoned that "the legislature has the power to make the attorney general, as it has done, the adviser of district and county attorneys. He is the superior law officer of the state." *Id.* at 311–12. Therefore, the Court acknowledged that under the statute at issue in the case, which obligated the AG to "institute or cause to be instituted" suit against any defaulting tax collector,[91] "the attorney general would have the power to institute and prosecute a [civil] suit for the recovery of money due to the state, in any county of the state *in which there might not be a county or district attorney*." *Id.* at 312 (emphasis added). The reason being that "otherwise occasions might arise in which no official representation could be had by the state." *Id.* Additionally, the Court stated, "[U]nder the act we have no doubt that the attorney general might prosecute [such cases], in connection with the proper district or county attorney." *Id.* But the Court also cautioned that "such action upon [the AG's] part . . . could not . . . deprive [the county and district attorneys] of their freedom and independence of action as to method of managing and conducting the case[.]" *Id.* Thus, in any county where there was a county or district attorney, the AG's role was limited to an advisory position "unless the legislature has the power

[91] Specifically, the statute provided that the AG "shall, at least once a month, inspect the accounts in the offices of the state treasurer and comptroller of public accounts of all officers and of individuals charged with the collection or custody of funds belonging to the state, and proceed immediately to institute or cause to be instituted against any such officer or individual who is in default or arrears, (suit) for the recovery of funds in his hands; and he shall also institute immediately criminal proceedings against all officers or persons who have violated the laws by misapplying or retaining in his (their) hands funds belonging to the state." *Moore*, 57 Tex. at 313–14 (quoting art. 2802a, R.S.).

to impose upon him the powers which the constitution expressly confers upon county and district attorneys." *Id.* The Court then went on to analyze whether the legislature had such power.

To answer this question, the Court examined the constitutional language defining the respective duties of the attorney general and the county and district attorneys. *See* TEX. CONST. ARTS. IV, § 22; V, § 21. It observed that because some of the duties expressly assigned to the AG required him to represent the State in the district and inferior courts, the Constitution did not intend "to confer upon county attorneys the power, or to impose upon them the duty, of representing the state *in all suits* in the district and inferior courts[.]" *Moore*, 57 Tex. at 313 (emphasis in original). But the Court also determined that the catchall phrase in Article IV, section 22, that the AG shall "perform such other duties as may be required by law," did not "confer . . . power upon the legislature to give to the attorney general power to perform those acts which the constitution itself conferred upon county attorneys[.]" *Id.* at 314. Instead, the catchall phrase was intended only "to give the legislature power to confer upon the attorney general such powers as might be deemed necessary in regard to matters which had not been expressly conferred by the constitution upon some other officer." *Id.* As the Court noted, the Constitution's phrase that the AG shall "'perform such other duties as may be required by law,' is general," whereas the declaration that "'the county [and district] attorneys shall represent the state in all cases in the district and inferior courts in their respective counties' is specific, and under the well settled rule of construction, if there was a conflict, the latter [more specific] would have to prevail." *Id.* at 315–16.

Thus, to the extent that the Constitution was 'silent' regarding some of the powers and duties the statute conferred upon the attorney general, such powers and duties could be constitutionally exercised by the AG and there could be "no objection to their exercise."[92] *Id.* at

[92] The Court included some examples where the Legislature granted powers and assigned duties to the attorney general by statute that were constitutionally permissible because they did not infringe on the powers and duties expressly granted by the Constitution to other officers. These included: the "duty to examine the charters of contemplated

314. But, with respect to powers that the Constitution had expressly assigned to another officer, the Court cautioned, "It must be presumed that the constitution, in selecting the depositaries of a given power, unless it be otherwise expressed, intended that the depositary should exercise an exclusive power, with which the legislature could not *interfere* by appointing some other officer to the exercise of the power." *Id.* (emphasis added). "Any other construction would lead to the doctrine that the constitution had empowered the legislature to alter the constitution itself, without an express grant of such power." *Id.*

While the Court recognized that the AG and the district and county attorneys all exercise executive powers and each could have been assigned to the Executive Department, the Constitution only assigned the AG there; instead, the DAs are constitutionally assigned to the Judicial Department. *Id.* at 314–15. But the Constitution expressly "grants to the [AG] certain powers, the exercise of which can only be had in the judicial department[.]" *Id.* at 315. Thus, those powers fall within the separation-of-powers clause's exception for "the instances herein expressly permitted." *Id.* In sum, because the Constitution expressly grants to county and district attorneys the duty to "represent[] the State *in all cases in the district and inferior courts*," which is "broad" and "comprehends alike cases civil and criminal," the AG is limited to representing the State in the district and inferior courts only "so far as the constitution itself confers" such power upon him. *Id.*

The Court further addressed the Legislature's lack of authority to reassign constitutionally-assigned powers. It remarked that certainly the Constitution could be written to allow the Legislature to "withdraw power from the hands in which the constitution placed it" and give that power to another officer. *Id.* "[B]ut to enable the legislature to do so, the power must be given [by

---

railway corporations;" serving as a "member of the board to contract for public printing;" serving as a "member of the board to have land for new capital [sic] surveyed, sold and capital built . . . and many other powers and duties[.]" *Moore*, 57 Tex. at 314.

the Constitution] in express terms, and it cannot be implied." *Id.* In other words, for the Legislature to have the power to reassign constitutionally-designated powers or duties, the voters would have to adopt a constitutional amendment that expressly allows the Legislature to do so; the Legislature cannot do it unilaterally because the Constitution does not give it that power. The Court concluded its analysis by noting that "under all the constitutions of this state, none of which defined the duties of the attorney general or of district or county attorneys so specifically as does the present [Constitution], it will be seen that it was always contemplated that the district attorneys should represent the state in all cases in the district and inferior courts, except certain actions which were designated" by the Constitution itself. *Id.* at 316. It ultimately held on this issue that "the [district] court did not err in holding that it was the right and the duty of the county attorney to represent the state in the several suits" against the defaulting tax collectors to the exclusion of the AG. *Id.*

IV. Power of the Legislature to assign "other duties" to the AG

The AG and *amici* claim that the constitutional catchall phrase contained within Article IV, section 22, that the AG shall "perform such other duties as may be required by law," allows the Legislature to assign the duty to criminally prosecute "election law" violations to the AG. They also claim that the Legislature has assigned this role to the AG for 70 years and the Texas Supreme Court has upheld the Legislature's ability to do so. They are wrong on all counts.

A. In 1876, ratifying voters understood that "other duties" assigned by the Legislature must be: (1) of the same character as the officer's department (i.e., executive), (2) must properly pertain to the business of that particular office, and (3) cannot interfere with a duty expressly assigned by the Constitution to an officer in a different department.

No party or *amicus* disputes the position that the Constitution assigns the duty to prosecute criminal law violations to the DAs (and county attorneys). But they argue that the constitutional provision that the AG shall "perform such other duties as may be required by law" authorizes the Legislature to take some prosecutorial duties away from the DAs (and county attorneys) and give

them to the AG. It does not, unless the prosecutorial duty is limited to the AG "tak[ing] such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage, not authorized by law." TEX. CONST. ART. IV, § 22. Other than this one exception, the Legislature is prohibited by the Constitution from restricting the district and county attorneys' constitutional duty to represent the State in all criminal prosecutions in the trial courts. *Lytle*, 12 S.W. at 611. All power belongs to the people, and it is their assignment of power and duties through the Texas Constitution that ultimately controls.[93] Further, as recognized by the predecessor to this Court, the Court of Appeals, the Constitution is "a chart containing limitations upon power." *Holley v. State*, 14 Tex. Ct. App. 505, 515 (1883). Thus:

> [W]henever the Constitution declares how power may be exercised over any subject, then no power can be exercised over that [same] subject in any manner not clearly within the plain import of the language of the Constitution. Mere silence or failure to provide for some particular feature of the subject cannot be construed into a neglect or omission, or an ignoring of that feature. Nor do we think it can rightly be said that the Constitution is silent. It has spoken in words as plain as language could well make it. . . . [W]here the means for the exercise of a granted power [or assigned duty] are given [in the Constitution], no other or different means can be implied as being more effective or convenient. [And] when the Constitution defines the circumstances under which a right may be exercised . . . the specification is an implied prohibition against legislative interference.

Id. at 515–16. Accordingly, where the Constitution has given an express duty such as assigning to the district and county attorneys the duty to represent the State in *all cases* in the district and inferior courts, the provision that the AG shall "perform such other duties as may be required by law" does not give the Legislature power to carve out exceptions to the DAs expressly-assigned

[93] Our *Stephens* opinion applied the construction rule of *ejusdem generis* to conclude that the "other duties" assigned by the Legislature to the AG must be executive branch duties. *State v. Stephens*, NOs. PD-1032-20 & PD-1033-20, 2021 WL 5917198, at *16 (Tex. Crim. App. Dec. 15, 2021). I agree with that conclusion overall, but the Court should have also looked to the meaning of the phrase at the time Texans adopted the Constitution to ensure that the meaning we assign to the phrase is the meaning understood by the people who voted to ratify this constitutional language.

constitutional duty by assigning the exercise of a part of that duty to another officer unless the Constitution specifically and in plain words states that the Legislature has such power.

The 1876 ratifying voters already understood the respective roles of the AG and DAs. They knew that the DAs had always had the exclusive duty of criminal prosecution in the trial courts and that the AG represented the State in the Texas Supreme Court. But they also understood the meaning of the catchall phrase "perform such other duties as may be required by law." That is because this catchall phrase was neither new to the 1876 Constitution, nor was it exclusively within the duties of the AG. That phrase, or something similar, was used within the constitutional provisions pertaining to several governmental officers in every Texas Constitution since 1845. *See, e.g.*, TEX. CONST. OF 1845, ART. V, § 16 (enumerating duties of the Secretary of State and concluding with "and shall perform such other duties as may be required of him by law."). The ratifying voters also would have understood the meaning of this phrase based on court opinions interpreting it. One such opinion was *Kuechler v. Wright*, 40 Tex. 600 (1874).

In *Kuechler*, in a concurring opinion, Texas Supreme Court Chief Justice Oran Milo Roberts[94] noted that the 1869 Constitution assigned various duties to the Executive Department's Commissioner of the General Land Office, which included that he "perform such other duties as may be required by law." 40 Tex. at 657–59 (Roberts, C.J., concurring). Chief Justice Roberts construed that phrase to mean that the Legislature could only assign duties that are of the same character as the officer's department (i.e., executive), must properly pertain to the business of that particular office, and cannot interfere with a duty expressly assigned by the Constitution to an officer in a different department. *Id.*

Nothing changed this catchall phrase's meaning or the people's understanding of it between the adoption of the 1869 Constitution and the 1876 Constitution. Accordingly, the phrase

[94] *Supra* note 89.

means exactly the same thing today. Thus, the only "other duties" that may be assigned by the Legislature to the AG are those which are: (1) executive duties; (2) fall within the types of duties associated with the AG's office; and (3) do not interfere with another officer's constitutionally-assigned duties.

While not stated as directly as in *Kuechler*, a similar interpretation of the catchall phrase was used in 1882 in *Moore*, discussed above, in which the Court specifically examined the duties of the AG under the 1876 Texas Constitution. As in *Kuechler*, the *Moore* Court found that the phrase "perform such other duties as may be required by law," while broad enough to "confer all the power claimed," was not intended to confer " power upon the legislature to give to the attorney general power to perform those acts which the constitution itself conferred upon county attorneys." 57 Tex. at 314. The *Moore* Court further noted that when a statute "grants some powers and imposes some duties upon the attorney general in regard to matters upon which the constitution is silent . . . there can be no objection to their exercise." *Id.* But, given that it was the express constitutional duty of the district and county attorneys to represent the State in all cases in the trial courts (except in those matters expressly constitutionally assigned to the AG), the Constitution was not silent in this respect. Thus, the catchall phrase could not be used as a basis to justify the AG's attempt to unilaterally take such action in the district court when doing so would conflict with the county attorney's exercise of his constitutionally-assigned duties. *Id.* at 314–15.

As both *Kuechler* and *Moore* demonstrate, the meaning of the "perform such other duties" clause was clear both before and after the voters adopted the 1876 Texas Constitution. The Legislature could assign to the AG other duties that pertained to that office so long as the Constitution was otherwise silent about them. But where the Constitution had already expressly assigned duties to a specific officer, the Legislature was not allowed to interfere with such constitutionally-assigned duties by assigning them to the AG. Therefore, under the express

language of the Constitution, the AG has the duty to represent the State in the trial courts for matters involving or related to: "the charter rights of all private corporations," the "prevent[ion of] any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage, not authorized by law," and "judicial forfeiture of such charters."[95] But because the Constitution expressly assigns to the district and county attorneys the duty to represent the State in the trial court for all other matters, the Legislature cannot assign that duty to the AG if doing so would interfere with the district and county attorneys' constitutional duty. Neither the Legislature nor the courts have any authority to override the Constitution and the will of the people on this.

B. *Brady* is inapplicable.

The AG and most of the *amici* rely on *Brady v. Brooks*, 89 S.W. 1052 (Tex. 1905), for the contrary proposition that the Legislature has the power through the general catchall phrase, "perform such other duties as may be required by law," to assign any other duties to the AG that it wishes regardless of whether such duties are already constitutionally assigned, so long as doing so does not "destroy" another office. As discussed below, I find *Brady* to be lacking in proper constitutional analysis and question its precedential value. But even *Brady* expressly states that while the Legislature could assign certain civil litigation matters to the AG, it could not assign duties that would interfere with the district and county attorneys' primary duty of criminal prosecution.

In *Brady*, then Chief Justice Ruben Gaines, writing for the Court, criticized *State v. Moore* (which solely involved civil law). *Id.* at 1054. The issue in *Brady* was whether the AG had the authority to initiate lawsuits in the district courts to recover certain taxes and penalties owed to the State of Texas. In the legislative session immediately preceding the cases, the Legislature passed

[95] TEX. CONST. ART. IV, § 22.

the "Kennedy Bill" and the "Love Bill," which required, upon request of the Comptroller, that the AG file lawsuits in Travis County to recover state taxes and penalties from railroads and certain other individuals and corporations engaging in specified occupations. *Id.* at 1053. Relying in part on *State v. Moore*, the Travis County district and county attorney noted that the Texas Supreme Court had already held that the Texas Constitution authorized them to prosecute these cases in the district court to the exclusion of the AG. *Id.* at 1053–54.

In his opinion, Chief Justice Gaines first characterized *Moore*'s holdings as follows: (1) "the county attorney was entitled to prosecute the suit [at issue] to the exclusion of the Attorney General; and" (2) "there was no law then in force which allowed the county attorney commissions in a case of that character." *Id.* at 1054. But Gaines then went on to say that the holding in *Moore* regarding the county attorney's authority to prosecute the lawsuit to the exclusion of the AG was mere *dictum* and was therefore not "conclusive authority" on the issue. *Id.*

Gaines further stated that Chief Justice Stayton's opinion in *Day Land & Cattle Co. v. State*, 4 S.W. 865 (Tex. 1887), already "practically overruled" his opinion in *Moore*. *Id.* This statement in *Brady* is clearly wrong. In *Day Land & Cattle Co.*, both the AG and the DA jointly filed a lawsuit in district court to cancel certain land grants to which the defendants claimed to be entitled but which appeared to be owned by the State. The *Day Land & Cattle Co*. Court, in *dictum,* stated that there was no statute that provided for such a lawsuit at the time it was filed, meaning there was no cause of action that authorized the AG or the DA to bring the lawsuit and there was no "implied power resulting from the general grants of power or imposition of duties." *Day Land & Cattle Co.*, 4 S.W. at 867. Therefore, "in a government in which the duties of all officers, as well as their powers, are defined by written law, no power ought to be exercised for which warrant is not there found." *Id.* But then the Court noted that the Legislature ratified the action by the AG and DA by enacting a statute declaring "that nothing in this act shall . . . requir[e] . . . the attorney

general to dismiss any suit [such as the one at issue in the case] now pending . . . nor to prevent him from bringing other suits for such purposes." *Id.* (quoting the relevant statute). Looking to this aspect of *Day Land & Cattle*, the *Brady* Court opined that "if the Legislature had the power to ratify the act of the Attorney General in bringing and prosecuting that suit, it had the power to have conferred original authority upon that officer to do so." *Brady*, 89 S.W. at 1055. The *Brady* Court, however, failed to consider the fact that both the AG and DA jointly brought the lawsuit, and thus neither the DA nor the AG raised a constitutional challenge to the other's authority to represent the State in the district court. Accordingly, *Day Land & Cattle Co.* had nothing to do with the Constitution's separation-of-powers provision as it pertained to the question of the Legislature's authority to confer duties or powers upon the AG that were already constitutionally assigned to the DAs.

The *Brady* opinion then reasoned, without providing any historical analysis of the language of the Constitution,[96] that Article 5, Section 21 (stating that when there is both a county attorney and a DA within the same county, their "respective duties shall be regulated by the Legislature") might mean "that the framers of the Constitution may have had in mind duties to be performed rather than a privilege to be conferred." *Id.* It went on to say, "Might it not at the same time be

[96] Chief Justice Gaines, in the Court's opinion, did pay lip service to the Framers and the ratifying voters. But this was *dicta* and was provided without any historical consideration or analysis:

> Now it is not unreasonable to presume that when the framers of the Constitution came to formulate the section which defines the duties of county and district attorneys, if the objection had been urged that the powers conferred were too broad and would deprive the state of having suits of the greatest importance prosecuted by its Attorney General, the reply would have been that the power expressly given to the Legislature to impose upon the Attorney General duties in addition to those expressly defined was sufficient to enable that body to provide that that officer should represent the state in any class of cases where his services should be deemed requisite. So as to the voters who adopted the Constitution. If the same objection had been interposed by them to the Constitution as submitted for their ratification, namely, that section 21 of article 5 gave too much authority to the officers therein named, they would in all probability have been satisfied upon that matter, by having it pointed out to them, that section 22 of article 4 authorized the Legislature to restrict the powers given by section 21, by conferring them in part upon the Attorney General. The voters as a rule are unlearned in the law and as persons of that class would reasonably construe the Constitution upon which they vote, such ought to be the construction of the courts.

Brady, 89 S.W. at 1056.

considered, that the Legislature would have the power to relieve [the county and district attorney] in exceptional cases of a part of such duties, and to devolve them upon the Attorney General by virtue of section 22 of article 4."[97] *Id.* It further stated:

> We attach no importance to the fact that the definition of the duties and powers of the Attorney General are placed in article 4, which is the article devoted to the executive department of the state government. The duties imposed upon him are both executive and judicial . . . in the sense, that he is to represent the state in some cases brought in the courts. . . . So article 5, the judiciary article, embraces the definition of the duties of the sheriffs and clerks of the courts whose powers and duties are executive. Section 22 of article 4 might appropriately have been placed in article 5, *and we think it should be construed precisely as if it had been so placed*.

Id. at 1056 (emphasis added). This statement by the *Brady* Court flies in the face of the express constitutional language, the historical context giving rise to the Constitution, the inclusion of an express separation-of-powers provision, and the people's delegation of officers to specific departments of the government. *See Ginnochio v. State*, 18 S.W. 82, 84–85 (Tex. App. 1891) ("This separation of the powers is not merely theoretical. They are practical and imperative, else the words employed are powerless, and the will of the people of the great sovereignty of Texas, expressed in their written constitution, is but an empty and meaningless fulmination. . . . It is the solemn duty of courts to uphold the constitution as it is written, permit no encroachments by one department upon another, and yield none of its own power and authority to any other department, nor assume any not confided to it."). In fact, the *Brady* opinion does not even mention or reference

---

[97] At the time of the opinion, Article IV, Section 22, provided:

> The Attorney General shall hold his office for two years and until his successor is duly qualified. He shall represent the state in all suits and pleas in the Supreme Court of the State in which the state may be a party, and shall especially inquire into the charter rights of all private corporations, and, from time to time, in the name of the state, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the governor and other executive officers, when requested by them, and perform such other duties as may be required by law.

This provision was amended in 1972, but only to change the Attorney General's term of office from two years to four years. *See* Tex. S.J.R. 1, 62nd Leg., R.S. (1971).

the separation-of-powers provision in Article II, section 1, of the Texas Constitution. That fact alone demonstrates that the opinion's reasoning is seriously flawed.

Even so, the *Brady* Court noted that the "main function" of the county and district attorneys is "to prosecute the pleas of the state in criminal cases." *Brady*, 89 S.W. at 1056. This statement makes clear that the Court's holding in *Brady* was limited to deciding the AG's authority to act on behalf of the State in bringing *civil* lawsuits where the Legislature had granted him that authority. This is because taking away the independence and duties of county and district attorneys in criminal matters and assigning them to the AG would violate the "important restriction upon that language [in article 5, section 21, describing the duties of the district and county attorneys]" that prohibits the Legislature from "tak[ing] away . . . much of their duties as practically to destroy their office." *Id.* As noted by our original *Stephens* opinion, *Brady* applies the wrong standard in analyzing a separation-of-powers issue. *See Stephens*, 2021 WL 5917198, at *7. This is probably the case because the *Brady* Court conducted no real separation-of-powers analysis; but in any event, the opinion also suggested that the Legislature could not assign the powers of criminal prosecution to the AG.

Ultimately, while the actual *Brady* holding could be correct given the fact that the statute at issue involved duties that could potentially be construed to fall within the constitutionally-enumerated duties of the AG, the *Brady* Court's reasoning was wrong. Thus, I find the opinion's precedential value highly questionable. Moreover, *Brady* solely involved the Legislature's authority to assign civil-law representation to the AG where his constitutionally-assigned duties already included representing the State in the district and inferior courts for certain specified civil law matters. Accordingly, our *Stephens* opinion correctly found *Brady* inapplicable.

C. In 1957, a court of appeals stated that the Legislature had no power to take away the district attorney's constitutional duty to prosecute election law violations and give that duty to the AG.

Several *amici* claim that the AG has had the statutory authority to criminally prosecute election law violations for over 70 years, referring to a 1951 statute that is a predecessor to the statute at issue in this case. First, the number of years a statute has been on the books matters not if that statute violates the Constitution. *Rochelle v. Lane*, 148 S.W. 558, 560–61 (Tex. 1912) (stating that "the usurpation of power on the part of officials is not sanctified by its long continuance . . ." because "the superiority of the Constitution must be sustained until the sovereign voters shall change it"). Second, this claim is inaccurate because in 1957, a court of appeals called into question the constitutionality of that statute, and the AG never appealed that decision.

In *Shepperd v. Alaniz*, the San Antonio Court of Appeals was presented with the question of whether former Section 130 of the Texas Election Code "has the effect of giving the Attorney General of Texas the exclusive power to investigate [a primary election in Webb County] . . . and to do the other things which are provided" in that statute. 303 S.W.2d at 847–48. In answering this question, the court had to consider "the respective duties of the District Attorney and County Attorney, on one hand, and the Attorney General, on the other, in the investigation of the conduct of elections and the prosecution of any election law violation that may be discovered." *Id.* at 848. The court conducted a constitutional analysis and a review of opinions from the Texas Supreme Court, including *Moore,* 57 Tex. 307, and *Brady*, 89 S.W. 1052, discussed above. Based on this analysis, the court upheld an injunction against the Attorney General's election-law case filed in Travis County when the Webb County District Attorney had already initiated a prosecution for the same matter in Webb County. The court concluded that:

> It has always been the principal duty of the district and county attorneys to investigate and prosecute the violation of all criminal law, including the election laws, and these duties cannot be taken away from them by the Legislature and given to others. If Section 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.

Id. at 850. Thus, while the court of appeals did not conclusively declare the statute unconstitutional, it stated that the statute would be unconstitutional if it were construed to confer upon the AG the "exclusive" power to initiate such prosecutions. Because the question of the AG's exclusive authority was the only one necessary to resolve the case, the court declined to address "whether or not the Attorney General may have concurrent power with the district and county attorneys to investigate and prosecute violations of the election law by reason of said Section 130[.]" *Id.*

Interestingly, just a few years after *Shepperd* was decided, in 1965, the Legislature enacted Texas Code of Criminal Procedure 2.01, titled "Duties of District Attorneys." That statute provides in part that "[e]ach district attorney *shall* represent the State in *all* criminal cases in the district courts . . ." Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722 (codified at TEX. CODE CRIM. PROC. art. 2.01) (emphasis added). Then, in 1985 the Legislature passed a statute declaring that the district attorney for the 49th Judicial District (Webb County) "represents the state in all criminal cases in Webb County" and "also represents the state in the 111th District Court in all criminal cases and in all other matters in which the state is a party." Acts 1985, 69th Leg., ch. 480, § 1 (codified at TEX. GOV'T CODE § 43.128).[98] These enactments appear to be a ratification by the Legislature of the court of appeals' *Shepperd* decision by specifying that the district attorney represents the state in *all* criminal cases. There are no exceptions in these statutes made for election law crimes.

Accordingly, the argument that the AG has had exclusive statutory authority for 70 years to initiate criminal prosecutions in election law cases is disingenuous and fails to provide a complete picture. Moreover, as previously stated, just because a statute has been "on the books" for decades does not mean that it is constitutional.

---

[98] That same year, 1985, the Legislature also passed the recodified Election Code provision at issue in this case. Given the fact that Section 273.021 of the Texas Election Code merely states that the "attorney general *may* prosecute a criminal offense prescribed by the election laws of this state," this enactment is puzzling. *See* TEX. ELEC. CODE § 273.021(a) (emphasis added). Under the rules of construction, the mandatory language used for the district attorneys would likely prevail over the permissive language used for the attorney general.

D. No Texas Supreme Court or Court of Criminal Appeals decision has ever "concluded that the Attorney General's prosecutorial authority in election law cases was consistent with the Texas Constitution;" in fact, they have consistently held the opposite.

One *amicus* claims that the Texas Supreme Court and this Court have "previously concluded that the Attorney General's prosecutorial authority in election law cases was consistent with the Texas Constitution."[99] That is unquestionably false. There are absolutely no decisions from either this Court or the Texas Supreme Court that have reached such a holding, or even suggested that to be the case. In fact, a review of the cases already discussed in detail above, as well as the following cases, reveals that both courts have consistently recognized that only the district and county attorneys have the constitutional authority to prosecute criminal cases in the trial courts to the exclusion of the AG:

- *In re Abbott*, 601 S.W.3d 802, 812 (Tex. 2020) ("[T]he State correctly observes that the Attorney General cannot bring . . . a criminal prosecution without the participation of a district attorney.")
- *Ex parte Lo*, 424 S.W.3d 10, 30 n.2 (Tex. Crim. App. 2013) (citing statutes authorizing the AG to represent the State in criminal cases in trial courts only with the consent or by the request of the local prosecutor and concluding that "the attorney general is, with a few exceptions in Texas trial courts, not authorized to represent the State in criminal cases").
- *Saldano v. State*, 70 S.W.3d 873, 883 (Tex. Crim. App. 2002) ("The language and the history of the constitutional and statutory provisions that create and regulate the attorney general, the district attorneys, and the county attorneys are clear. They expressly give district attorneys and county attorneys general authority to represent the State in appeals of criminal cases. They express no authority for the attorney general to represent the State in criminal cases without the request of a district or county attorney.").
- *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 930 (Tex. Crim. App. 1994) (citations omitted) ("Under our state law, only county and district attorneys may represent the state in criminal prosecutions. . . . The Attorney General, on the other hand, has no criminal prosecution authority. Rather, he is generally limited to representing the State in civil litigation.").
- *Meshell v. State*, 739 S.W.2d 246, 254–55 (Tex. Crim. App. 1987) ("An obvious corollary to a district or county attorney's duty to prosecute criminal cases is the utilization of his own discretion in the preparation of

[99] Br. Amici Curiae of Steven Hotze, M.D. *et al*., at 4.

> those cases for trial. Therefore, under 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.").

- *Garcia v. Laughlin*, 285 S.W.2d 191, 195 (Tex. 1955) (recognizing that the Constitution gives to county attorneys and district attorneys the duty to represent the State in trial courts, and absent a specific legislative enactment, either may represent the State).
- *Maud v. Terrell*, 200 S.W. 375, 376 (Tex. 1918) (stating that the Constitution "lodges with the county [and district] attorneys the duty of representing the State in all cases in the district and inferior courts," and gives the "duty as to suits and pleas in the Supreme Court . . . to the Attorney-General," and concluding that "the powers thus conferred by the Constitution upon these officials are exclusive").

In support of their argument that this Court has recognized the AG's statutory authority under Election Code Section 273.021 to initiate criminal prosecutions of election law violations, the AG and some *amici* point to the fact that we refused discretionary review in *Medrano v. State*, 421 S.W.3d 869 (Tex. App.—Dallas 2014, pet. ref'd). In *Medrano*, the Fifth Court of Appeals in Dallas, relying on *Brady*, held that Section 273.021 does not violate the separation-of-powers doctrine because "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." *Id.* at 879–80. Therefore, the court of appeals concluded, the statute "does not delegate a power to one branch that is more properly attached to another nor does it allow one branch to unduly interfere with another." *Id.* at 880. This Court's refusal of review, however, does not mean that we agreed with the court of appeals' opinion.

This Court is not an error-correcting court. As outlined in Rule 66.3 of the Texas Rules of Appellate Procedure, there are many reasons why the Court may choose to grant or refuse review. The Court's decision to refuse review is not a stamp of approval of the appellate court's decision. *See, e.g.*, *Gonzales v. State*, 762 S.W.2d 583, 584 (Tex. Crim. App. 1988) ("[N]either our initial grant of the state's petition nor our action today in refusing that petition should be taken as approval

of the reasoning or the decision of the Court of Appeals in this cause."). Further, even if the lower court erred in a way contemplated by Rule 66.3, we may refuse to grant review for any number of reasons, including that the briefing may be inadequate either substantively or procedurally, or the case may simply not be the right one to resolve the legal issue.[100] In short, by refusing to grant a petition for discretionary review, the Court reserves the right to consider the issues raised in another appeal on another day.

As shown by the many cases cited above, both this Court and the Texas Supreme Court have consistently held that the Texas Constitution does not authorize the Legislature to take away any part of the constitutionally-assigned duties of the county and district attorneys to criminally prosecute cases in the trial courts and give those duties to the AG, unless such duties can be construed to fall within the AG's specific duties as expressly enumerated in the Constitution.

V. Through statutes and AG Opinions, the Legislature and AG have declared for decades that the district and county attorneys have the exclusive duty to initiate criminal prosecutions.

Oddly, numerous members of the Texas Legislature have either filed or joined various *amicus* briefs that argue we should find Election Code Section 273.021 constitutional and allow the AG to unilaterally prosecute election law violations. This is perplexing not only because the Texas Constitution prohibits it and legal decisions spanning over 150 years have clarified that it is the express constitutional duty of the district and county attorneys to control criminal prosecutions in the trial courts, but it is especially odd because the Legislature itself has enacted dozens of statutes providing that DAs *shall* represent the State in *all* criminal cases in the district courts of his district. *See, e.g.*, TEX. CODE CRIM. PROC. ART. 2.01; *see also* Appendix A. Likewise, it is

[100] In fiscal year 2020, the Court granted only 8% of petitions for discretionary review. *Annual Statistical Report for the Texas Judiciary*, THE STATE OF TEXAS OFFICE OF COURT ADMINISTRATION, at 44 (2021) https://www.txcourts.gov/media/1451853/fy-20-annual-statistical-report_final_mar10_2021.pdf.

strange that the AG takes the position that Election Code Section 273.021 allows him to unilaterally prosecute election law violations when various AG opinions suggest otherwise.

A. The Legislature has enacted statutes that support DAs' exclusive duty to prosecute criminal cases in the trial courts.

For over 100 counties, the Texas Legislature has enacted statutes that make it clear that the district and county attorneys have the right to control *all* criminal prosecutions in the trial courts of their counties. For 44 counties, the statutes provide that the DA has *exclusive* criminal law jurisdiction in his or her county. *See* TEX. GOV'T CODE Chapter 44 (Titled "Criminal District Attorneys") and Appendix A. Under Chapter 43 of the Government Code, there are 35 other statutes, many covering multiple counties, that provide that the DA represents the state in *all* criminal matters in the trial courts of the specified judicial district. *See* TEX. GOV'T CODE Chapter 43 (Titled "District Attorneys") and Appendix A. Further, under Chapter 45 of the Government Code, several statutes covering various counties specify that the county attorney is to represent the State in *all* matters before the district court. *See* TEX. GOV'T. CODE Chapter 45 (Titled "County Attorneys") and Appendix A. Most of these statutes were first enacted in 1985, the same year Texas Election Code Section 273.021 was enacted.

It appears that the Legislature enacted Texas Election Code Section 273.021 in direct conflict with these other statutes. In fact, statutes in which the Legislature has expressly given *exclusive* criminal law jurisdiction to the DA may prevail over Election Code Section 273.021. That is because Section 273.021, even if construed as being the more specific statute (which courts may or may not find to be the case), uses permissive language by stating that the AG "may prosecute" election-law violations.[101] Likewise, given the word "all" in the other statutes in

[101] *See In re Dotson*, 76 S.W.3d 393, 395 (Tex. Crim. App. 2002) ("One of our general rules of statutory construction is that a more specific statute or rule will prevail over a more general one."); *see also* TEX. GOV'T CODE § 311.026(b) (stating that where conflict between general provision and special or local provision is irreconcilable, special or local provision prevails as exception to general provision, absent "manifest intent" to the contrary).

Government Code Chapters 43 and 45, there is a question to be addressed as to whether these statutes would prevail over the Election Code provision. Thus, even if Election Code Section 273.021 were found to be constitutional, there is a legitimate question as to whether by the Legislature's own actions the AG would be prohibited from prosecuting criminal election law violations in over one hundred Texas counties based on the existence of conflicting statutes. In light of these statutes enacted by the Legislature assigning the exclusive duty of criminal prosecution in the trial courts to district and county attorneys in over 100 counties, it is puzzling why various legislators have taken a position in this case that appears to run contrary to their own legislation.

B. Over several decades, various AG opinions take the position that it is the constitutional duty of the district and county attorneys to represent the State in all criminal cases in the trial courts to the exclusion of others.

Over the years, every AG's opinion on the issues involved here appears to agree that: (1) the Constitution assigns to the district and county attorneys the authority and duty of representing the State in all criminal law prosecutions in the district and inferior courts; (2) DAs have broad discretion in every case on whether or not to prosecute and no one should interfere with this discretion; and (3) the AG may assist a DA in criminal prosecutions, but only upon request by the DA.

1. AG Opinion No. MW-340 (1981)

Attorney General Mark White was tasked with the following issue: Whether Texas Parks and Wildlife Commission may contract with a private attorney to prosecute shrimp and confiscation cases. After first identifying this as a request for a private attorney to prosecute criminal law violations, the AG conducted an analysis and answered the question in the negative. The decision was based on the following reasoning and authorities:

- "Texas law places the responsibility for representing the state in prosecutions of criminal cases in the district and inferior courts in the hands of county and district attorneys." (citing TEX. CONST. ART. V, § 21).
- "Article 2.01 of the Code of Criminal Procedure provides that: Each district attorney shall represent the State in all criminal cases in the district courts of his district, except in cases where he has been, before his election, employed adversely."
- "Article 2.02 of the Code of Criminal Procedure provides that: The county attorney shall attend to the terms of court in his county below the grade of district court, and shall represent the State in all criminal cases under examination or prosecution in said county; and in the absence of a district attorney he shall represent the State alone and, when requested, shall aid the district attorney in the prosecution of any case in behalf of the State in the district court."
- *Garcia v. Laughlin*, 285 S.W.2d 191 (Tex. 1955); *Maud v. Terrell*, 200 S.W. 375 (Tex. 1918); *Brady v. Brooks*, 89 S.W. 1052 (Tex. 1905); *State v. Moore*, 57 Tex. 307 (1882); *Shepperd v. Alaniz*, 303 S.W.2d 846 (Tex. Civ. App.—San Antonio 1957, no writ); Attorney General Opinions MW-255 (1980); MW-24 (1979).
- "Because officers who are legally obligated to represent the state in the courts may not be stripped of their authority, *See, e.g.*, *Garcia v. Laughlin*, *supra*, it is clear that the Parks and Wildlife Department may not hire private counsel to prosecute criminal cases without the involvement of the district or county attorney."
- "Our courts have held that officers who are responsible for representing the state in court may, under some circumstances, be assisted in carrying out this obligation, provided such assistance is rendered in a subordinate capacity and the officer remains in control of the litigation." (citing cases)

2. AG Opinion JM-661 (1987)

This opinion issued under Attorney General Jim Mattox addressed the issue of whether a Commissioner's Court could contract with private counsel to handle bond forfeitures. The opinion cited and quoted Article V, section 21, of the Texas Constitution and relevant Code of Criminal Procedure provisions to identify district and county attorneys as the proper officers to represent the State in all criminal proceedings in the trial courts. The opinion also noted, "[I]t has been held that: '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.'" (quoting *Shepperd*, 303 S.W.2d at 850).

3. AG Opinion No. JC-0539 (2002)

This opinion, issued under Attorney General John Cornyn, involved issues pertaining to the criminal offense of selling horse meat for human consumption. One of the questions presented was whether the Texas Department of Agriculture could prosecute these crimes under a statute that requires the Department to "execute all applicable laws relating to agriculture." The AG's office concluded that the Department had no "authority, express or implicit, to prosecute a criminal action or to investigate an alleged violation" because "the Texas Constitution places the authority to prosecute with county, district, and criminal district attorneys." The AG opinion went on to state:

> A county, district, or criminal district attorney represents the state in criminal actions in the lower courts, depending on the particular attorney's statutory authority. *See* Tex. Const. art. V, § 21; Tex. Gov't Code Ann. §§ 24.901, 24.910, 24.920, 26.045 (Vernon 1988 & Supp. 2002); *Saldano v. State*, 70 S.W.3d 873, 876 (Tex. Crim. App. 2002) (en banc) (stating that the duty of criminal prosecution in trial courts of records belongs to county attorney, district attorney, or criminal district attorney) . . . A county or criminal district attorney may request the attorney general's assistance in prosecution.

4. AG Opinion Nos. GA-0765 (2010); GA-0967 (2012)[102]

Both of these opinions issued under Attorney General Greg Abbott addressed a DA's discretion on whether or not to pursue a criminal prosecution. The opinion stated that "[a] prosecuting attorney 'has great discretion in deciding whether, and which offenses, to prosecute.'" (quoting *United States v. Molina*, 530 F.3d 326, 332 (5th Cir. 2008)). Each opinion further notes, "Courts recognize that prosecutorial decisions are ill-suited to judicial review because such decisions include consideration of factors involved in initiating a criminal case such as, the strength

[102] GA-0967 was authored in part by *Amicus* Jason Boatright and current Texas Supreme Court Justice Jimmy Blacklock.

of a case, the case's deterrent value, and the government's enforcement priorities. Accordingly, courts afford prosecutorial decisions substantial deference." (internal citations omitted). Thus, the opinion concluded that "[a] district attorney's prosecutorial determination regarding the initiation of criminal proceedings is within the prosecutor's substantial discretion."

5. AG Opinion No. KP-0118 (2016)

I have included this opinion by current Attorney General Ken Paxton because it appears he may be unaware of his own policies. This AG Opinion involved an Election Code issue which was, at the time, subject to pending litigation. The opinion refused to address that particular question noting that: "Declining to answer a question that is the subject of pending litigation is a long-standing policy of this agency. This policy is based on the fact that the ultimate determination of a law's applicability, meaning or constitutionality is left to the courts. Attorney general opinions, unlike those issued by the courts of law, are advisory in nature." Given the fact that Attorney General Paxton has given his opinion on the pending *Stephens* case in dozens of public forums and media outlets and has not left the "law's applicability, meaning or constitutionality" to this Court, I hope to make him aware that he has violated his own policy.

Considering the dozens of statutes covering over 100 counties in which the Legislature has echoed the Texas Constitution's mandate that the district and county attorneys have the duty of representing the State in *all* criminal prosecutions in the trial courts and considering the several AG opinions that find the same, it is truly a mystery why the AG and various legislators argue so vigorously in this case against their own opinions and legislation.

VI. Notwithstanding the foregoing, the Court should grant the State's Motion for Rehearing.

As shown by the history and opinions above, our constitutional analysis on original submission of this case was correct in light of the arguments raised. That being said, "a statute is presumed to be constitutional, and every reasonable doubt as to the validity of an Act must be

resolved in its favor." *Friedman v. Am. Sur. Co. of New York*, 151 S.W.2d 570, 580 (Tex. 1941). If there is any doubt as to whether a law is constitutional, we should uphold it. *Brown v. City of Galveston*, 75 S.W. 488, 492 (Tex. 1903) ("If there be doubt as to the validity of the law, it is due the co-ordinate branch of the government that its action should be upheld and its decision accepted by the judicial department."). If it is possible to construe a statute in a way that is constitutional, we must do so.[103]

I believe there is a reasonable way to construe Section 273.021 of the Texas Election Code such that under certain circumstances, the AG's prosecution of election law violations may be constitutional. Because this interpretation would mean that the statute does not *always* operate unconstitutionally, it calls into question the correctness of this Court's original holding that the statute is unconstitutional on its face. No party has raised this particular construction or addressed it in any briefing or arguments, and therefore, it has not previously been considered by this Court. However, given the circumstances and the importance of the issue before us, I urge the Court to grant rehearing and order briefing on this question.

A. Texas Election Code Section 273.021 is facially constitutional; but it may be unconstitutional as applied depending on the facts of each case.

Appellant launched a facial constitutional challenge to Election Code Section 273.021, arguing that it violates the separation-of-powers provision of the Texas Constitution. "[T]o prevail on a facial challenge, a party must establish that the statute always operates unconstitutionally in all possible circumstances." *State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013). It is the "most difficult challenge to mount successfully because the challenger must establish that no set of circumstances exists under which the statute will be valid." *Santikos v. State*, 836 S.W.2d

[103] *See also Proctor v. Andrews*, 972 S.W.2d 729, 735 (Tex. 1998) (citation omitted) ("Statutes are given a construction consistent with constitutional requirements, when possible, because the legislature is presumed to have intended compliance with [the constitution]"); *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. 1979) (en banc) (statutes are "vested with a presumption of validity and this Court is duty bound to construe such statutes in such a way as to uphold their constitutionality").

631, 633 (Tex. Crim. App. 1992). Moreover, in a facial challenge, we "consider the statute only as it is written, rather than how it operates in practice." *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 908 (Tex. Crim. App. 2011). In contrast, an as-applied challenge "concedes the general constitutionality of the statute" and instead "asserts that the statute is unconstitutional as applied to [the claimant's] particular facts and circumstances." *Id.* at 910.

Section 273.021 provides in relevant part that the AG "*may* prosecute a criminal offense prescribed by the election laws of this state. . . . The authority to prosecute . . . does not affect the authority derived from other law to prosecute the same offenses." TEX. ELEC. CODE § 273.021 (emphasis added). Appellant argues that this statute impermissibly assigns prosecutorial power to the AG in the Executive Department when the Texas Constitution already expressly assigns that exclusive power to the district and county attorneys in the Judicial Department.

Appellant's challenge is raised under the separation-of-powers provision, which provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no 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.

TEX. CONST., ART. II, § 1.

"[T]he separation-of-powers provision may be violated in one of two ways." *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990). A Type I separation-of-powers violation occurs "when one branch of government assumes or is delegated, *to whatever degree*, a power that is more 'properly attached' to another branch." *Id.* (emphasis in original). A Type II violation occurs "when one branch *unduly* interferes with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers." *Id.* (emphasis in original). Here, there is no Type I separation-of-powers violation, and thus no facial constitutional violation. As I

will explain further below, however, there may be an as-applied Type II separation-of-powers violation on a case-by-case basis.

1. There is no Type I separation-of-powers violation because the "power" conferred on the AG by the Legislature is the same power conferred on both the AG and the DAs by the Constitution—the power to represent the State in the courts.

Critically important to my constitutional analysis is recognizing that there is a distinction between a "power" and a "duty." "Power" means the authority or ability to choose to act or not to act. *See* BLACK'S LAW DICTIONARY, 7th ed. By contrast, "[d]uty gives the command and the power to act." *Southern Pac. R.R. Co.*, 24 Tex. at 119. The Court recognized this distinction by noting in its opinion on original submission that the use of the word "may" in Election Code Section 273.021 assigns to the AG a "power" and not a "duty" to act. *Stephens*, 2021 WL 5917198, at *8; *see also* TEX. GOV'T. CODE § 311.016 (stating as part of the Code Construction Act that "'[m]ay' creates discretionary authority or grants permission or a power" while "'[s]hall' imposes a duty").

The Texas Constitution's separation-of-powers provision refers only to "powers." It requires that the "powers" of government be divided into three distinct governmental departments. *See* TEX. CONST. ART. II, § 1. It further provides that when a power is "properly attached" to a specific department, neither of the other two departments may exercise that power unless an expressly-enumerated exception permits it. *See id.* (prohibiting one department from exercising a "power more properly attached" to either of the others, "except in the instances herein expressly permitted"). The exception applies here because the "power" given by the Constitution to both the AG and the DAs stems from their expressly-assigned "duty" to represent the State in the courts. *See id.* ART. IV, § 22, Art. V, § 21 (providing that AG's duties are that he "shall represent the State in all suits and pleas in the [Texas] Supreme Court" and he "shall . . . take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law;" by

comparison, the DAs and county attorneys "shall represent the State in all cases in the District and inferior courts in their respective counties."). Thus, the AG and the DA possess exactly the same type of "power"—that of representing the State in the courts. Because the Constitution "properly attache[s]" the power of representing the State in the courts to both the AG in the Executive Department and the DAs in the Judicial Department, neither the AG nor the DAs would exercise a "power properly attached" to another department when engaging in such representation.[104]

Accordingly, by enacting Election Code Section 273.021, the Legislature did not create a facially invalid statute that "delegate[s] . . . a power that is more 'properly attached' to another branch" because both branches share that same power. *See Armadillo Bail Bonds*, 802 S.W.2d at 239. Therefore, there is no Type I/facial separation-of-powers constitutional violation. But the question remains as to whether there may be an as-applied Type II violation.

2. The AG's exercise of power under Election Code Section 273.021 may constitute a Type II separation-of-powers violation rendering the statute unconstitutional on an as-applied basis.

As mentioned above, a Type II separation-of-powers violation occurs when "one branch *unduly* interferes with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers." *Id.* at 239 (emphasis in original). This is a more flexible inquiry that looks to whether the core functions of one department are being invaded or interfered with by the actions of another. *See State Bd. of Ins. v. Betts*, 308 S.W.2d 846, 851–52 (Tex. 1958); *see also Vandyke v. State*, 538 S.W.3d 561, 571 (Tex. Crim. App. 2017) (noting that Type II separation-of-powers analysis "takes the middle ground between those who would seek rigid

[104] Neither Article IV, § 22, nor Article V, § 21, uses the word "power." Other sections within Article IV and Article V specify what "power" is assigned. Most of the executive "power" is vested in the Governor, and sections within Article IV refer to the Governor's "power." *See* TEX. CONST. ART. IV, §§ 7, 11. Most of the other executive "power" is assigned through specific duties and not by a general grant of "power." All of the judicial "power" is vested in the courts. TEX. CONST. ART. V, § 1. Therefore, neither the AG nor the district or county attorneys exercise judicial "power."

compartmentalization and those who would find no separation of powers violation until one branch completely disrupted another branch's ability to function") (quotations and citations omitted).

While the Type II test refers solely to "powers," the test necessarily includes constitutionally-assigned "duties" because such duties are meaningless without the "power" to carry them out. *See Southern Pacific R.R. Co.*, 24 Tex. at 119. For this reason, an analysis that includes the term "duties" more closely adheres to the will of the people expressed in the Constitution.[105] After all, the people have not only divided the powers of government, but they have assigned specific duties to certain officers.[106] These assigned duties are the people's commands to act, which are accompanied by the power to carry out the duties. *Id.* Knowing this, we are obligated to ensure that the will of the people is fulfilled in how we interpret the Constitution. Ignoring the distinction between "powers" and "duties" would betray this obligation.[107] Thus, properly understood, the Type II separation-of-powers test should focus on whether, by exercising his statutorily-granted powers under Election Code Section 273.021, the AG would unduly interfere with the DAs' execution of their constitutionally-assigned duties.

The Texas Constitution mandates that the DAs are obligated to "represent the State in *all* cases in the District and inferior courts." TEX. CONST. ART. V, § 21 (emphasis added). The AG, however, is only constitutionally-assigned to represent the State in the trial courts for a specific purpose: to "take such action . . . as may be proper and necessary to prevent any private corporation

---

[105] *See Ex parte Anderson*, 81 S.W. 973, 975 (Tex. Crim. App. 1904) (The Constitution "expresses the will of the people; that all power is in the people; that the Legislature, courts, and executive, and all the machinery put into operation by virtue of the Constitution are but the creatures of that instrument, or the people speaking through that instrument, and these must be obedient to its commands.").

[106] *See State v. Brooks*, 42 Tex. 62, 69 (Tex. 1874) (providing that the Constitution is "the paramount law of the State" which identifies "the officers who are to run the machinery of the State Government" and that "their duties [are] prescribed [therein]").

[107] *See Moore*, 57 Tex. at 310 (noting that our government is "departmental in character, and that the officers of the different departments are to a very large extent independent of and free from the control of the heads of other departments.").

from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law." *Id*. Art. IV, §22. Thus, the AG's duty, under current law,[108] does not include representing the State in the trial courts for criminal prosecution. Therefore, if the AG were to utilize the "power" under Section 273.021 to prosecute an election law violation that a DA also sought to prosecute, the AG would certainly "unduly interfere[] with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers[/duties]." *Armadillo Bail Bonds*, 802 S.W.2d at 239; *see also* discussion of *Shepperd v. Alaniz*, section IV.C. above.

But what if a DA were to refuse to prosecute an election law violation? If the AG chose to prosecute after the DA chose not to, in what sense would the AG's actions "*unduly* interfere[] with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers?" *See Armadillo Bail Bonds*, 802 S.W.2d at 239. The answer is simple: It would not. This is because, in such a case, the DA has abandoned his or her duty to represent the State, and the AG has: (1) the constitutional *power* to represent the State in the courts; and (2) the statutory authority to do so for election law violations. Therefore, in such narrow situations where the DA affirmatively or expressly chooses not to prosecute an "election law" violation, it may be constitutionally permissible for the AG to do so under the statutory power assigned to him by the Legislature in Section 273.021 of the Election Code.[109] No Type II separation-of-powers violation

[108] Currently there are no statutes criminalizing actions that fall within the AG's constitutional duty to "take action . . . to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law." TEX. CONST. ART. IV, § 22. As noted above, however, if the Legislature were to enact such statutes, I believe it would fall within the AG's core duties to prosecute such offenses directly in the trial courts.

[109] One may question how the AG might know of a DA's express abandonment of an "election law" prosecution. I am sure there will be many election law violations and a DA's abandonment of prosecutions for which the AG is unaware. But there may be violations that are brought to the AG's attention and the Election Code also provides that the AG may investigate election law violations. If an AG investigation uncovers election law violations that he brings to the local DA and the DA then refuses to prosecute, under this possible construction of Section 273.021 of the Election Code, the AG could then initiate prosecution himself.

would occur as a result. The DA's refusal to prosecute would raise a hypothetical situation similar to that posited in *Moore,* discussed above, wherein the Texas Supreme Court suggested that it may be constitutionally acceptable for the AG to rely on statutory authority to represent the State in the trial courts when "no official representation could [otherwise] be had by the state." *Moore*, 57 Tex. at 312.[110] Therefore, this Court should grant rehearing to examine whether Section 273.021 of the Election Code is facially constitutional under this interpretation, notwithstanding the likelihood that it is unconstitutional as applied in some instances.

B. The concurring opinion

While I appreciate Judge Walker's concurring opinion in which he agrees with Sections I–V of this opinion, I believe he misses the mark on three key aspects of my Section VI analysis.

First, the concurring opinion fails to recognize that under the plain language of the Constitution, the duties (and thus corresponding power needed to execute the duties) of the AG in the Executive Department and the DAs in the Judicial Department overlap. Because of this oversight, the opinion wrongly identifies the power at issue to be "the power to prosecute criminal law violations on the Attorney General's own whim and without a request for assistance from district or county attorneys." Second, while the concurring opinion properly recognizes the need for checks and balances within the government to protect against tyranny, it fails to realize that my interpretation of Election Code Section 273.021 serves as an important check on the political bias to which it refers. Third, to the extent that the concurring opinion suggests my interpretation of the

[110] In *Moore*, the Court noted that the DA had discretion on whether to bring lawsuits or not. Based on this discretion and the DA's independence, the Court suggested that if the DA chose not to file a particular lawsuit and the AG disagreed with that decision, the AG could not interfere with that discretion. 57 Tex. at 312. But there is an important distinction between *Moore* and this case. In *Moore*, the statute at issue assigned a *duty* for the AG to act in a way that violated the separation-of-powers provision. Thus, the statute was facially unconstitutional. Here, Section 273.021 assigns a power to the AG, giving him authority to act but no corresponding duty which commands him to act. As such, Section 273.021 is not facially unconstitutional. On an as-applied basis, if the AG exercises his authority under Section 273.021 when the DA chooses not to prosecute, then the AG's action does not "interfere with, frustrate, or, to some extent, defeat" the DA's exercise of the power that comes with his duty. *Smissen*, 9 S.W. at 116.

Constitution is judicial activism, it fails to recognize that I have faithfully adhered to the original intent of the 1876 ratifying voters.

1. The Texas Constitution provides for overlap of duties, and thus corresponding power, of the AG and those of the DAs.

The concurring opinion advocates for a strict interpretation of the Constitution's language but then fails to recognize that the AG's and DAs' constitutionally-assigned duties—and thus the corresponding power to execute those duties—overlap. The opinion posits that the power at issue in this case is "the power to prosecute criminal law violations on the Attorney General's own whim and without a request for assistance from district or county attorneys." It suggests that the AG has no "power" to represent the State in any type of criminal law case and asserts that "the power to prosecute criminal cases belongs to the *judicial branch*." Conc. Op. at p. 5 (emphasis in original). These assertions are unfounded.

First, nothing in the constitutional provisions for the AG or the DAs assigns a general power to these officers. In fact, neither the word "power" nor the word "may" appears in either Article IV, Section 22 (defining the duties of the AG) or in Article V, Section 21 (defining the duties of the DAs). Instead, the Constitution assigns these officers duties by using the command "shall" followed by the specific action to be undertaken. Therefore, the only "power" attached to these officers by the Constitution is that which allows these officers to fulfill their specified obligations. For both the AG and the DAs, that power is the authority to represent the State of Texas in the courts. Such overlapping power is constrained by the wording of the duties.

For example, while the AG is authorized to represent the State in the trial courts, in carrying out this duty he may exercise his power only for the purpose of "tak[ing] such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law." TEX. CONST. ART. IV, § 22. The separation-of-powers provision prevents the Legislature from

expanding the AG's "duty" of representing the State in the trial courts to include matters beyond this limited constitutional duty, because it is the district and county attorneys' constitutional duty to represent the State for all other matters.[111] But the separation-of-powers provision does not prevent the Legislature from giving the AG "power" to represent the State in the trial courts without a corresponding duty or obligation to use that power because the Constitution has already "properly attached" and thus "expressly permitted" this type of power (that of representing the State in the courts) to be exercised by the AG. TEX. CONST., ART. II, § 1.

Second, in failing to recognize that the Constitution itself overlaps the power of the AG and DAs, the concurring opinion wrongly concludes that the "power" at issue is "prosecutorial power," which it claims the AG does not have. I disagree with this understanding of the provisions in the Constitution. The Constitution makes no distinction between civil laws and criminal laws in the duties of the AG. The Constitution assigns to the AG the duty to "take such action *in the courts* as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law." *Id.* ART. IV § 22 (emphasis added). We have made it clear that the phrase "take such action in the courts" means that the AG must represent the State in the trial courts, to the exclusion of the DAs, for matters that fall within this duty.[112] Currently, there are no criminal laws that fall within this duty. But, the Legislature has full constitutional authority to enact statutes that criminalize action by private corporations (or individuals acting on their behalf) which constitute "exercising any

---

[111] It is again important to recognize the difference between a duty and a power. The Legislature may properly assign to the AG the "power" to represent the State in the courts for matters that fall outside his constitutionally-assigned duties because the Constitution itself already gives the AG that power as part of his duties. But the Legislature cannot command the AG to take action to use that power and the AG cannot use that power if doing so would interfere with another officer's (e.g., a DA's) ability to fulfill his or her constitutionally-assigned duties.

[112] *See State v. Int'l & G.N. Ry. Co.*, 35 S.W. 1067, 1068 (Tex. 1896) ("We are of the opinion that the conferring upon the attorney general of the specific authority to 'take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power . . . not authorized by law' evidences an intent to make such authority exclusive in such officer, and must be held as an exception to the general authority conferred upon the county attorney to 'represent the state in all cases in the district and inferior courts in their respective counties.'").

power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law." *See id.* If the Legislature were to enact such criminal statutes, it would be the AG's constitutional duty to prosecute those cases to the exclusion of the DAs. Thus, the AG would necessarily have the corresponding constitutional "power" of criminal prosecution to facilitate that duty. Accordingly, it is inaccurate to say that *under the Constitution* all criminal prosecution can only belong to the judicial branch.

Third, as part of its failure to recognize the distinction between powers and duties and that "prosecutorial power" is not the power at issue, the concurring opinion suggests that the Constitution itself confers "prosecutorial discretion" on the DAs. It asserts that because DAs have prosecutorial discretion, any action undertaken by the AG to prosecute a case that the DA refuses to prosecute amounts to a separation-of-powers violation. This argument also fails to strictly apply the plain language of the Constitution.

As it pertains to discretion, I again note the important distinction between a "power" and a "duty." A general grant of power allows the grantee to choose to use the power or not; it gives that discretion. For example, the Constitution grants general powers to the Governor in some provisions and assigns duties in other provisions. *Compare* ART. IV, § 24 ("The Governor may, at any time, require information in writing from [the Executive Officers] . . .") *and* § 7 ("[The Governor] shall have the power to call forth the militia . . ."), *with* § 9 ("The Governor shall, at the commencement of each session of the Legislature, and at the close of his term of office, give to the Legislature information, by message, of the condition of the State; and he shall recommend to the Legislature such measures as he may deem expedient."). But where the Constitution assigns a duty, there is no discretion—it is a command to act.

Thus, in applying the strictest interpretation of the DAs' constitutional mandate that they "shall represent the State in all cases," there is no discretion for a DA to refuse to prosecute a valid

criminal complaint. It is only the courts' longstanding interpretation that allows for DAs to have such discretion.[113] Therefore, if the DA exercises discretion and chooses not to fulfill his explicit constitutional command to prosecute an offense when presented with an election law complaint, the Legislature, under Election Code Section 273.021, may lawfully authorize the AG to use his constitutionally-assigned power to represent the State in that prosecution. And, because under these circumstances, the DA has abandoned his constitutional duty to represent the State, the AG, by choosing to represent the State for that election law violation under statutory authority, would not then "unduly interfere" with the DA's exercise of his express duty.

2. My interpretation of Election Code Section 273.021 serves as an important check on political bias.

The concurring opinion refers to the need for checks and balances within the government to protect against tyranny. I agree that checks and balances are crucial to our system of government. But what the opinion fails to realize is that my interpretation of Election Code Section 273.021 serves as an important check on the very political bias referred to in the concurring opinion.

The concurring opinion suggests that if the AG is allowed prosecute election law violations, then his political bias could influence his decision to prosecute members of the opposite political party. The concurrence fails to recognize that political bias can also be present in a partisan-elected DA. Such a DA could refuse to prosecute an election law violation because doing so benefits him or his political party. Or, what if a DA himself is involved in the election law violation? It is unlikely that he is going to prosecute himself.[114]

---

[113] *See Wallace v. State*, 170 S.W.2d 762, 764 (Tex. Crim. App. 1943) (recognizing the common law power of prosecutors to dismiss a criminal action); *see also Moore*, 57 Tex. at 312 (discussing the district and county attorneys' "freedom and independence of action as to method of managing and conducting [a] case").

[114] Code of Criminal Procedure Article 2.08(b) provides that "[a] judge of a court in which a district or county attorney represents the State shall declare the district or county attorney disqualified . . . on a showing that the attorney is the subject of a criminal investigation by a law enforcement agency if that investigation is based on credible evidence of criminal misconduct that is within the attorney's authority to prosecute." Article 2.07 then provides that where the district or county attorney has been disqualified, the judge of a court "may appoint" an attorney pro tem. Thus, DAs

Under my interpretation of Election Code Section 273.021, in such situations where the DA refuses to prosecute on the basis of political bias or self-serving interests, the AG could step in to ensure that such violations are prosecuted. And, if the AG commits an election law violation, a DA is able to prosecute him. Under the concurring opinion's reasoning, only an AG can be prosecuted for election law violations while a DA could potentially escape prosecution. And, further, a DA could decline to prosecute an election law violation based on his own political biases or motivations and the AG would be powerless to intervene. How does that ensure a check or balance?

3. To the extent that the concurring opinion suggests my interpretation of the Constitution is judicial activism, it fails to recognize that I have faithfully adhered to the original intent of the 1876 ratifying voters.

As a constitutional conservative and originalist whose judicial philosophy is founded upon an interpretation of the Texas Constitution in a way that the ratifying voters of 1876 intended, I feel compelled to respond to the concurring opinion's suggestion that my interpretation is judicial activism. When an interpretation of the words or terms as we understand them today conflicts with the meaning and purpose intended in 1876, we have an obligation to construe the Texas Constitution in a way that supports the ratifying voter's understanding of how the constitutional provisions should operate. This is why I extensively address the history underlying the provisions at issue. It is also why I make a distinction between "powers" and "duties" under the Constitution. Such distinction is not only based on the language used in the Constitution,[115] but it also gives full

---

who may be involved in election law violations can be prosecuted by an attorney pro tem, but such prosecution depends on whether a judge exercises his or her discretion in finding "credible evidence" to disqualify and then discretion as to whether to appoint an attorney pro tem to prosecute. Therefore, political bias could still come into play to protect a DA from being prosecuted for an election law violation.

[115] "Shall" gives a command or duty and comes with the power to execute the duty. "May" gives power and authority to act without an obligation to do so. The Constitution uses the word "power" when it is intended to assign power. *See e.g.*, TEX. CONST., ART. III, § 1 ("The Legislative power of this State shall be vested in a Senate and House of Representatives . . . ."); ART. IV, § 7 ("[The Governor] shall have power to call forth the militia to execute the laws of

effect to the separation-of-powers provision as intended by the ratifying voters. *See* Section VI.A.1–2 above.

Moreover, the concurring opinion uses faulty reasoning in dismissing my position and fails to recognize our duty as judges. If a statute is capable of being reasonably interpreted in a way that renders it constitutional, then we are required to do so. *See Ely*, 582 S.W.2d at 419 (stating that this Court is "duty bound to construe statutes in such a way as to uphold their constitutionality"). Here, the Court oversteps its bounds by failing to adhere to this principle, thereby denying the Legislature the ability to fully exercise its authority in this area. *See Smissen*, 9 S.W. at 116 (stating that "[a] power clearly legislative in its character, not expressly denied to the Legislature, ought not to be held to be denied by implication, unless its exercise would interfere with, frustrate, or, to some extent, defeat, the exercise of a power expressly granted"). My suggested interpretation of Election Code Section 273.021 is a reasonable one that adheres to the original intent of the Constitution while also upholding the facial constitutionality of the statute in a way that does not interfere with, frustrate, or defeat the DAs' ability to fulfill their constitutional duty. By refusing to at least seek briefing and consider this alternative interpretation, which was not previously raised or briefed by the parties, I believe we are shirking our duty to seek a reasonable construction of the statute that would uphold its constitutionality.

Conclusion

I believe that if we construe Section 273.021 of the Texas Election Code narrowly in the manner outlined above, then it is facially constitutional. I do not yet take a position on whether it is constitutional as applied in this case. That is because, even when narrowly construed, this Election Code provision may be severely limited by the various conflicting statutes identified

---

the State, to suppress insurrections, and to repel invasions."); ART. V, § 1 ("The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law. . . .").

above (and in Appendix A) such that the AG may be limited to prosecutions only in counties where there is no conflicting statutory authority.[116] Given that I am raising this possible construction of the statute for the first time and no party has addressed it, I believe the Court should grant rehearing and request briefing. Because the Court does not, I respectfully dissent.

Appendices:

Appendix A: Statutes defining duties of DAs, criminal DAs, and county attorneys.

TEX. GOV'T. CODE Chapter 43 ("District Attorneys")	Sec. 43.110 – 23rd Judicial District	(a) The voters of Matagorda County elect a district attorney for the 23rd Judicial District who represents the state in that district court only in that county. (b) The district attorney also represents the state and performs the duties of district attorney before all the district courts in Matagorda County. (d) The district attorney also handles all: (1) felony and misdemeanor criminal matters in all of the courts in Matagorda County
	Sec. 43.114 – 27th Judicial District	(a) The voters of Bell County elect a district attorney for the 27th Judicial District who represents the state in the district courts having jurisdiction in that county.
	Sec. 43.120 – 34th Judicial District	(a) The voters of Culberson, Hudspeth, and El Paso counties elect a district attorney for the 34th Judicial District. (b) The district attorney for the 34th Judicial District also acts as district attorney for the 41st, 65th, 120th, and 171st judicial districts, the 394th Judicial District in Culberson and Hudspeth counties, and represents the state in all criminal cases before every district court having jurisdiction in El Paso County. (c) The district attorney represents the state in all criminal cases pending in the inferior courts having jurisdiction in El Paso County.
	Sec. 43.122 – 36th Judicial District	The voters of San Patricio County elect a district attorney for the 36th Judicial District who represents the state in that district court only in that county. In addition to exercising the duties and authority conferred on district attorneys by general law, the

[116] It should be noted that this case arose from alleged election law violations that took place in Jefferson County. Section 44.223 of the Texas Government Code provides that: "The criminal district attorney of Jefferson County shall attend each term and session of the district courts in Jefferson County and each term and session of the inferior courts of the county, except municipal courts, held for the transaction of criminal business, and shall exclusively represent the state in all matters before those courts. He shall represent Jefferson County in any court in which the county has pending business." I believe this statute creates a possible conflict in the law that we must address in determining whether Section 273.021 of the Texas Election Code is unconstitutional or otherwise conflicts with controlling statutory authority as applied to this particular case.

		district attorney represents the state in all criminal cases in the district courts in that county.
	Sec. 43.1243 – 42nd Judicial District	(a) The voters of Coleman County elect a district attorney for the 42nd Judicial District who represents the state in that district court only in Coleman County. (b) The Coleman County district attorney shall perform all of the duties in Coleman County required by district attorneys by general law and shall represent the state in criminal cases pending in the district court of the county. The district attorney has control of any case heard on habeas corpus before any civil district or criminal court of the county. (c) The district attorney has all of the powers, duties, and privileges in Coleman County relating to criminal matters for and on behalf of the state that are conferred on district attorneys in other counties and districts.
	Sec. 43.125 – 43rd Judicial District	The voters of the 43rd Judicial District elect a district attorney who represents the state in all cases before the 43rd and 415th district courts.
	Sec. 43.127 – 47th Judicial District	(a) The voters of Armstrong and Potter counties elect a district attorney for the 47th Judicial District who represents the state in that district court only in those counties. (b) The district attorney of the 47th Judicial District also acts as the district attorney for the 108th Judicial District. (c) The district attorney also represents the state in all criminal cases before the district courts of Potter and Armstrong counties.
	Sec. 43.128 – 49th Judicial District	(a) The voters of the 49th Judicial District elect a district attorney. (b) The district attorney represents the state in all criminal cases in Webb County. (c) The district attorney also represents the state in the 111th District Court in all criminal cases and in all other matters in which the state is a party.
	Sec. 43.130 – 51st Judicial District	(a) The voters of the 51st Judicial District elect a district attorney who represents the state in all criminal and habeas corpus cases in that district court. (b) The district attorney of the 51st Judicial District may request the district attorney of the 119th Judicial District to assist in the trial of a criminal or habeas corpus case in Tom Green County. The district attorney of the 51st Judicial District has absolute control and management of those cases.
	Sec. 43.132 – 53rd Judicial District	(a) The voters of the 53rd Judicial District elect a district attorney. In addition to performing the other duties provided by law for district attorneys, the district attorney represents the state in all criminal cases before all the district courts of Travis County.

	Sec. 43.134 – 64th Judicial District	(a) The voters of Hale County elect a district attorney for the 64th Judicial District who represents the state in that district court only in Hale County. (b) The district attorney also represents the state in all criminal cases before the county court and the justice courts in Hale County.
	Sec. 43.137 – 70th Judicial District	(a) The voters of the 70th Judicial District elect a district attorney. (b) The district attorney of the 70th Judicial District shall also act as district attorney for the 161st Judicial District. (c) In addition to exercising the duties and authority conferred on district attorneys by general law, the district attorney represents the state in the district and inferior courts in Ector County in all criminal cases, juvenile matters under Title 3, Family Code, and matters involving children's protective services. (d) The district attorney has no power, duty, or privilege in any civil matter, other than civil asset forfeiture and civil bond forfeiture matters.
	Sec. 43.138 – 76th Judicial District	The voters of Titus and Camp counties elect a district attorney for the 76th Judicial District who represents the state in all matters pending before the district court in those counties.
	Sec. 43.148 – 148th Judicial District	(a) The voters of Nueces County elect a district attorney for the 105th Judicial District who has the same powers and duties as other district attorneys and serves all the district, county, and justice courts of Nueces County. (b) The district attorney shall attend each term and session of the district, county, and justice courts of Nueces County and shall represent the state in criminal cases pending in those courts. The district attorney has control of any case heard on petition of writ of habeas corpus before any district or inferior court in the district.
	Sec. 43.153 – 118th Judicial District	(a) The voters of the 118th Judicial District elect a district attorney. (b) The district attorney also represents the state in all criminal cases before the County Court of Glasscock County
	Sec. 43.154 – 119th Judicial District	(a) The voters of the 119th Judicial District elect a district attorney who represents the state in all criminal and habeas corpus cases in that district court. (b) The district attorney of the 119th Judicial District may request the district attorney of the 51st Judicial District to assist in the trial of a criminal or habeas corpus case before the 119th District Court. The district attorney of the 119th Judicial District has absolute control and management of those cases.
		(a) The voters of the 142nd Judicial District elect a district attorney.

	Sec. 43.157 – 142nd Judicial District	(b) The district attorney represents the state in criminal cases in all district and inferior courts other than municipal courts having jurisdiction in Midland County. (c) The district attorney has all of the powers, duties, and privileges conferred by law on district and prosecuting attorneys relating to: (1) the prosecution of felony and misdemeanor criminal cases; (2) matters directly relating to criminal cases, including asset and bond forfeitures; and (3) delinquent children, children in need of supervision, and protective orders under Chapter 71, Family Code.
	Sec. 43.161 – 156th Judicial District	The voters of Bee, Live Oak, and McMullen counties elect a district attorney for the 156th Judicial District who represents the state in that district court only in those counties. In addition to exercising the duties and authority conferred on district attorneys by general law, the district attorney shall also represent the state in all criminal cases in the district courts in those counties.
	Sec. 43.163 – 173rd Judicial District	(a) The voters of Henderson County elect a district attorney for the 173rd Judicial District who represents the state in all cases in the district courts having jurisdiction in that county.
	Sec. 43.165 – 198th Judicial District	(a) The voters of the 198th Judicial District elect a district attorney who represents the state in all matters before that district court. (b) The district attorney of the 198th Judicial District and the district attorneys of the other judicial districts within that district shall assist each other in the conduct of their duties.
	Sec. 43.170 – 253rd Judicial District	(a) The voters of Liberty County elect a district attorney for the 253rd Judicial District who represents the state in that district only in that county and in all cases before the 75th District Court.
	Sec. 43.172 – 259th Judicial District	The voters of the 259th Judicial District elect a district attorney. In addition to exercising the duties and authority provided by general law for district attorneys, the district attorney represents the state in all felony cases before the 259th District Court in Jones and Shackelford counties.
	Sec. 43.173 – 266th Judicial District	The voters of the 266th Judicial District elect a district attorney who represents the state in all cases before that district court.
	Sec. 43.174 – 271st Judicial District	The voters of the 271st Judicial District elect a district attorney who represents the state in all cases before that district court.

	Sec. 43.175 – 286th Judicial District	The voters of the 286th Judicial District elect a district attorney who represents the state in all cases before that district court.
	Sec. 43.176 – 287th Judicial District	The voters of the 287th Judicial District elect a district attorney who represents the state in all cases before that district court.
	Sec. 43.177 – 293rd Judicial District	(a) The voters of the 293rd Judicial District elect a district attorney who represents the state in all cases before that district court.
	Sec. 43.1775 – 329th Judicial District	(a) The voters of the 329th Judicial District elect a district attorney. (b) The district attorney represents the state and performs the duties of prosecutor in all criminal matters before the district and county courts in Wharton County. (c) At the request of the county attorney, the district attorney may assist the county attorney in the prosecution of juvenile cases under Title 3, Family Code.
	Sec. 43.1777 – 344th Judicial District	(a) The voters of the 344th Judicial District elect a district attorney who represents the state in cases before the district courts of Chambers County.
	Sec. 43.178 – 349th Judicial District	(a) The voters of Houston County elect a district attorney for the 349th Judicial District who represents the state in all cases before that district court only in that county.
	Sec. 43.179 – 355th Judicial District	The voters of the 355th Judicial District elect a district attorney who represents the state in all cases before that district court.
	Sec. 43.180 – Harris County District Attorney	(a) The voters of Harris County elect a district attorney. (b) The district attorney shall attend each term and session of the district courts of Harris County. The district attorney shall represent the state in criminal cases pending in the district and inferior courts of the county. The district attorney has control of any case heard on habeas corpus before any civil district court or criminal court of the county. (c) The district attorney has all the powers, duties, and privileges in Harris County relating to criminal matters for and in behalf of the state that are conferred on district attorneys in the various counties and districts.
	Sec. 43.1815 – 369th Judicial District	(a) The voters of Leon County elect a district attorney for the 369th Judicial District who represents the state in that district court only in Leon County. (b) The district attorney of the 369th Judicial District also represents the state in all criminal and civil actions in which the state is interested that arise in the 87th Judicial District in Leon County.

	Sec. 43.182 – District Attorney for Kleberg and Kenedy Counties	(a) The voters of Kleberg and Kenedy Counties elect a district attorney. The district attorney has the same powers and duties as other district attorneys and serves the district courts of Kleberg and Kenedy Counties. (b) The district attorney shall attend each term and session of the district courts of Kleberg and Kenedy Counties and shall represent the state in criminal cases pending in those courts. The district attorney has control of any case heard on petition of writ of habeas corpus before any district or inferior court in the district.
	Sec. 43.184 – 452nd Judicial District	The voters of the 452nd Judicial District elect a district attorney who represents the state in all matters before that district court.
TEX. GOV'T. CODE Chapter 44 ("Criminal District Attorneys")	Sec. 44.101 – Anderson County	(b) The criminal district attorney shall represent the state in all matters in the district and inferior courts in the county. The criminal district attorney shall perform the other duties that are conferred by general law on district and county attorneys.
	Sec. 44.108 – Austin County	(b) The criminal district attorney shall represent the state in all matters in the district and inferior courts in the county. The criminal district attorney shall perform the other duties that are conferred by general law on district and county attorneys. This subsection does not prevent the county from retaining other legal counsel as it considers appropriate. The criminal district attorney may represent any county official or employee of Austin County in any civil matter in a court in the county if the matter arises out of the performance of official duties by the official or employee.
	Sec. 44.111 – Bastrop County	(a) The criminal district attorney of Bastrop County shall attend each term and session of the district courts in Bastrop County and each term and session of the inferior courts of the county held for the transaction of criminal business. He shall exclusively represent the state in all criminal matters before those courts and any other court in which Bastrop County has pending business.
	Sec. 44.115 – Bexar County	(a) The criminal district attorney of Bexar County shall attend each term and session of the district, county, and justice courts in Bexar County held for the transaction of criminal business and shall exclusively represent the state in all matters before those courts. He shall represent Bexar County in any court in which the county has pending business. He serves as the district attorney for each district court in the county.
	Sec. 44.119 – Bowie County	(a) The criminal district attorney of Bowie County shall represent the state in all cases in the district and inferior courts of Bowie County and shall perform all

		other duties required of district and county attorneys under general law.
	Sec. 44.120 – Brazoria County	(a) The criminal district attorney of Brazoria County shall attend each term and session of the district courts of Brazoria County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts. He shall represent Brazoria County in any court in which the county has pending business.
	Sec. 44.128 – Caldwell County	(b) The criminal district attorney shall attend each term and session of the district courts in Caldwell County and each session and term of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts. (c) The criminal district attorney shall perform the duties conferred by law on the county and district attorneys in the various counties and districts.
	Sec. 44.129 – Calhoun County	(a) The criminal district attorney of Calhoun County shall attend each term and session of the district and inferior courts of Calhoun County, except municipal courts, held for the transaction of criminal business, and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.134 – Cass County	(a) The criminal district attorney of Cass County shall attend each term and session of the district courts in Cass County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts. He shall represent Cass County in any court in which the county has pending business.
	Sec. 44.143 – Collin County	(a) The criminal district attorney of Collin County shall attend each term and session of the district courts in Collin County held for the transaction of criminal business. He shall represent the state in all criminal and civil cases in the courts in the county unless otherwise provided by law.
	Sec. 44.157 – Dallas County	(a) The criminal district attorney of Dallas County shall attend every term of the Criminal Court of Dallas County and of the Criminal District Court No. 2 of Dallas County and shall represent the state in all matters before those courts. The criminal district attorney has exclusive control of criminal cases and all cases heard on habeas corpus in the courts of Dallas County and serves as the district attorney of all the district courts in Dallas County.
	Sec. 44.159 – Deaf Smith County	(a) The criminal district attorney of Deaf Smith County shall attend each term and session of the district courts in Deaf Smith County and shall

		represent the state in all criminal and civil cases in the courts in the county.
	Sec. 44.161 – Denton County	(b) The criminal district attorney shall attend each term and session of the district and inferior courts of Denton County, except municipal courts, held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.167 – Eastland County	(a) The criminal district attorney of Eastland County shall attend each term and session of the district courts in Eastland County and shall represent the state in all criminal and civil cases in the courts of the county.
	Sec. 44.174 – Fannin County	(a) The criminal district attorney shall attend each term and session of the district courts in Fannin County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.184 – Galveston County	(a) The criminal district attorney of Galveston County shall attend each term and session of the district courts of Galveston County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts. He shall represent Galveston County in any court in which the county has pending business.
	Sec. 44.191 – Grayson County	(a) The criminal district attorney shall attend each term and session of the district courts in Grayson County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.192 – Gregg County	(a) The criminal district attorney of Gregg County shall represent the state in all criminal cases in the district, county, and justice courts of Gregg County, and in the municipal courts of the county if the defendant is charged with violating a state law, and shall represent the state in all cases in Gregg County in which it is the duty of a county or district attorney to represent the state.
	Sec. 44.202 – Harrison County	(a) The criminal district attorney of Harrison County shall attend each term and session of the district courts of Harrison County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts. He shall represent Harrison County in any court in which the county has pending business.
	Sec. 44.205 – Hays County	(b) The criminal district attorney shall attend each term and session of the district courts in Hays County

		and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters pending before those courts.
	Sec. 44.220 – Jackson County	(a) The criminal district attorney of Jackson County shall attend each term and session of the district courts in Jackson County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.221 – Jasper County	(b) The criminal district attorney shall attend each term and session of the district courts in Jasper County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.223 – Jefferson County	(a) The criminal district attorney of Jefferson County shall attend each term and session of the district courts in Jefferson County and each term and session of the inferior courts of the county, except municipal courts, held for the transaction of criminal business, and shall exclusively represent the state in all matters before those courts. He shall represent Jefferson County in any court in which the county has pending business.
	Sec. 44.229 – Kaufman County	(b) The criminal district attorney shall attend each term and session of the district courts in Kaufman County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.230 – Kendall County	(c) The criminal district attorney shall attend each term and session of the district and inferior courts of Kendall County, except municipal courts, held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.252 – Lubbock County	(b) The criminal district attorney shall attend each term and session of the district courts in Lubbock County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.263 – Medina County	(c) The criminal district attorney shall attend each term and session of the district and inferior courts of Medina County, except municipal courts, held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.275 – Navarro County	(a) The criminal district attorney of Navarro County shall attend each term and session of the district courts

		in Navarro County and shall represent the state in all criminal and civil cases in the district and inferior courts of the county.
	Sec. 44.276 – Newton County	(b) The criminal district attorney shall attend each term and session of the district courts in Newton County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.283 – Panola County	(a) The criminal district attorney of Panola County shall represent the state in all matters in the district and inferior courts in the county. The criminal district attorney shall perform the other duties that are conferred by general law on district and county attorneys. The criminal district attorney may represent any county official or employee of Panola County in any civil matter in a court in the county if the matter arises out of the performance of official duties by the official or employee.
	Sec. 44.287 – Polk County	(a) The criminal district attorney shall attend each term and session of the 258th and 411th district courts of Polk County and each term and session of the inferior courts held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.291 – Randall County	(a) The criminal district attorney of Randall County shall attend each term and session of the district courts of Randall County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts. He shall represent Randall County in any court in which the county has pending business.
	Sec. 44.299 – Rockwall County	(b) The criminal district attorney shall attend each term and session of the district courts in Rockwall County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.304 – San Jacinto County	(a) The criminal district attorney shall attend each term and session of the 258th and 411th district courts of San Jacinto County and each term and session of the inferior courts held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.312 – Smith County	(a) The criminal district attorney of Smith County shall attend each term and session of the district courts of Smith County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts. He

		shall represent Smith County in any court in which the county has pending business.
	Sec. 44.320 – Tarrant County	(a) The criminal district attorney of Tarrant County shall attend each term and session of the criminal district courts of Tarrant County and each term and session of the County Court of Tarrant County held for the transaction of criminal business and shall represent the state in all matters before those courts. He shall represent Tarrant County in any court in which the county has pending business.
	Sec. 44.329 – Tyler County	(a) The criminal district attorney of Tyler County shall represent the state in all matters in the district and inferior courts in Tyler County.
	Sec. 44.330 – Upshur County	(a) The criminal district attorney of Upshur County shall attend each term and session of the district courts in Upshur County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts. He shall represent Upshur County in any court in which the county has pending business.
	Sec. 44.334 – Van Zandt County	(b) The criminal district attorney shall attend each term and session of the district courts in Van Zandt County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.335 – Victoria County	(a) The criminal district attorney of Victoria County shall attend each term and session of the district courts of Victoria County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts. He shall represent Victoria County in any court in which the county has pending business.
	Sec. 44.336 – Walker County	(b) The criminal district attorney shall attend each term and session of the district and inferior courts of Walker County, except municipal courts, held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.343 – Wichita County	(a) The criminal district attorney shall represent the state in all matters in the district and inferior courts in the county. The criminal district attorney shall perform the other duties that are conferred by general law on district and county attorneys.
	Sec. 44.350 – Wood County	(b) The criminal district attorney shall attend each term and session of the district courts in Wood County and each term and session of the inferior courts of the county held for the transaction of criminal business

		and shall exclusively represent the state in all criminal matters before those courts.
	Sec. 44.351 – Yoakum County	(a) The criminal district attorney represents the state in all matters in the district and inferior courts in the county. The criminal district attorney shall perform the other duties that are conferred by general law on district and county attorneys.
TEX. GOV'T. CODE Chapter 45 "County Attorneys")	Sec. 45.112 – Baylor County	The county attorney shall represent the state in all misdemeanor cases before the district court in Baylor County.
	Sec. 45.151 – Cottle County	The county attorney shall represent the state in all misdemeanor cases before the district court in Cottle County.
	Sec. 45.227 – Jones County	The county attorney shall represent the state in all misdemeanor cases before the district court in Jones County.
	Sec. 45.235 – King County	The county attorney shall represent the state in all misdemeanor cases before the district court in King County.
	Sec. 45.238 – Knox County	The county attorney shall represent the state in all misdemeanor cases before the district court in Knox County.
	Sec. 45.244 – Lee County	The county attorney of Lee County represents the state in all matters pending before the district courts in Lee County.
	Sec. 45.280 – Oldham County	(a) The county attorney in Oldham County shall represent the state in all matters pending before the district court in Oldham County.
	Sec. 45.309 – Shackelford County	The county attorney shall represent the state in all misdemeanor cases before the district court in Shackelford County.
	Sec. 45.315 – Stephens County	The county attorney of Stephens County shall represent the state in all misdemeanor cases before the district court of the county.
	Sec. 45.319 – Swisher County	The county attorney in Swisher County shall represent the state in all matters pending before the district court in Swisher County.

Appendix B: Constitutional provisions for each constitution involving the DA and AG.

Constitution	AG	DA
1836	N/A	There shall be a district attorney appointed for each district, whose duties, salaries, perquisites, and terms of service shall be fixed by

		law. Tex. Const. of 1836, art. IV, § 5.
1845	The governor shall nominate, and, by and with the advice and consent of two-thirds of the senate, appoint an attorney general, who shall hold his office for two years . . . and the duties, salaries, and perquisites of the attorney general and district attorneys shall be prescribed by law. Tex. Const. of 1845, art. IV, § 12.	. . . and there shall be elected by joint vote of both houses of the legislature a district attorney for each district, who shall hold his office for two years; and the duties, salaries, and perquisites of the attorney general and district attorneys shall be prescribed by law. Tex. Const. of 1845, art. IV, § 12.
1869	There shall be an Attorney General of the State having the same qualifications as the Governor, Lieutenant Governor, Comptroller of Public Accounts and Treasurer, who shall be appointed by the Governor, with the advice and consent of the Senate. He shall hold his office for the term of four years. He shall reside at the capital of the State during his term of office. He shall represent the interests of the State in al suits or pleas in the Supreme Court, in which the State may be a party; superintend, instruct and direct the official action of the District Attorneys so as to secure all fines and forfeitures, all escheated estates, and all public moneys to be collected by suit; and he shall, when necessary, give legal advice in writing to all officers of the government; and perform such other duties as may be required by law. Tex. Const. of 1869, art. IV, § 13.	There shall be a District Attorney elected by the qualified voters of each Judicial District, who shall hold his office for four years; and the duties, salaries and perquisites of District Attorney shall be prescribed by law. Tex. Const. of 1869, art. V, § 12.
1876	The attorney general shall hold his office for two years and until his successor is duly qualified. He shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and, from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage, not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the	A county attorney, for counties in which there is not a resident criminal district attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the governor, and hold his office for the term of two years. In case of vacancy the Commissioners' Court of the county shall have power to appoint a county attorney until the next general election. The county attorneys shall represent the State in all cases in the District and inferior courts in their respective counties, but if any county shall be included in a district in which there shall be a district attorney, the respective duties or district attorneys and county attorneys shall in such counties by regulated by the Legislature. The Legislature may

	governor and other executive officers, when requested by them, and perform such other duties as may be required by law. He shall reside at the seat of government during his continuance in office. He shall receive for his services an annual salary of two thousand dollars, and no more, besides such fees as may be prescribed by law; provided, that the fees which he may receive shall not amount to more than two thousand dollars annually. Tex. Const. of 1876, art. IV, § 22.	provide for the election of district attorneys in such districts, as may be deemed necessary, and make provision for the compensation of district attorneys, and county attorneys; provided, district attorneys shall receive an annual salary of five hundred dollars to be paid by the State, and such fees commissions and perquisites as may be prescribed by law. Tex. Const. of 1876, art. V, § 21.

FILED: September 28, 2022
PUBLISH