# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NO. PD-1032-20**

**THE STATE OF TEXAS**

**v.**

**ZENA COLLINS STEPHENS, Appellee**

**NO. PD-1033-20**

**EX PARTE ZENA COLLINS STEPHENS**

**ON STATE'S MOTION FOR REHEARING AFTER OPINION ON DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS CHAMBERS COUNTY**

**WALKER, J., filed a concurring opinion.**

## CONCURRING OPINION

Today, we consider the Attorney General's motion for rehearing in which he requests that this Court rehear Appellant Zena Collins Stephens's case, vacate our previous opinion, and affirm the judgment of the court of appeals that had ruled against Ms. Stephens. Our Court has chosen to deny the motion. I agree with that decision, and I still agree with our

original decision handed down in December, when we recognized that the specific powers given to the Attorney General by the Texas Constitution do not include the ability to initiate criminal proceedings—even in cases involving alleged violations of the Election Code.

## I. A Double-Edged Sword Cuts Both Ways

I am aware that some people feel strongly about this issue, including the current Attorney General's supporters and other individuals throughout Texas. To those concerned citizens, I want to mention one of the possible ramifications of a ruling that would have disagreed with the majority opinion in this case.

My concern is the negative impact such a ruling could have on the fairness of elections in the future. It is possible that, in the not-too-distant future, a new politician could be elected as the Attorney General of Texas. If we ruled that the legislature could give the Attorney General the unfettered power to prosecute all election cases, we would be giving every future Attorney General the power to bring possibly fabricated criminal charges against every candidate running for public office in the State of Texas who disagrees with the Attorney General's political ideals.

While some individuals are likely to favor that kind of power when wielded by one who agrees with their political views, would these same people want an individual they disagree with to be able to use this power to prosecute for purely political reasons?[1] I, for

[1] Not that long ago, many Election Code cases were run out of the Public Integrity Unit in the Travis County district attorney's office. Prosecutions by the Public Integrity Unit in Travis County were criticized as they were against prominent individuals, such as Speaker Tom DeLay and Senator Kay Bailey Hutchison, who disagreed with the Travis County district attorney's office's

one, do not think so, and I thank God for the Separation of Powers Doctrine.

## II. The Separation of Powers Provides a Needed Check on Our Political Branches

Why are the powers separated? The framers of the current Texas constitution were determined to reverse many of the changes brought about during the Reconstruction era following the Civil War, when Texas was governed by the federal government. Texas was in turmoil during the first nine years of the Reconstruction era.[2] The experience of Reconstruction "prompted provisions to decentralize the state government."[3] Among other things, the framers of the new constitution wanted to severely limit the powers of both the legislature and the governor.[4] "To assure that the government would be responsive to public will, the [constitutional] convention precisely defined the rights, powers, and prerogatives of the various governmental departments and agencies[.]"[5]

The framers of the Texas Constitution believed it best to divide the powers of

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political ideologies. *See* Morgan Smith, *Witch Hunters?*, THE TEXAS TRIBUNE (Sept. 22, 2010, https://www.texastribune.org/2010/09/22/why-a-county-da-prosecutes-state-federal-officials/).

One man—the District Attorney of Travis County—was able to do that. Do we want a single person to hold even more power over elections across the entire State?

[2] Carl H. Moneyhon, *Reconstruction*, TEX. STATE HIST. ASS'N HANDBOOK OF TEXAS (Jan. 19, 2021), https://www.tshaonline.org/handbook/entries/reconstruction.

[3] Joe E. Ericson & Ernest Wallace, *Constitution of 1876*, TEX. STATE HIST. ASS'N HANDBOOK OF TEXAS (Mar. 23, 2021), https:/www.tshaonline.org/handbook/entries/constitution-of-1876.

[4] *Id.*

[5] *Id.*

government into three distinct branches: legislative, executive, and judicial.[6] These powers cannot be passed along or shared.[7] And for good reason. As Senator John Cornyn explained when he was a justice on the Texas Supreme Court:

> The founding fathers of this nation and this state plainly understood that the best way to control governmental power is to divide it. They knew that it was only by balancing the powers of one branch of government against the powers of the other two that any degree of freedom for the people could be preserved.[8]

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[6] TEX. CONST. art. II, § 1.

[7] *Id.*

[8] *Terrazas v. Ramirez*, 829 S.W.2d 712, 731 (Tex. 1991) (Cornyn, J., concurring).

Indeed, America's founding fathers were clear:

- George Washington: "The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism." George Washington, Washington's Farewell Address 15 (Sept. 19, 1796).

- John Adams: "It is by ballancing each of these Powers against the other two, that the Effort in humane Nature towards Tyranny, can alone be checked and restrained and any degree of Freedom preserved in the Constitution." Letter from John Adams to Richard Henry Lee (Nov. 15, 1775).

- Thomas Jefferson: "The concentrating [of] these [powers] in the same hands is precisely the definition of despotic government." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 123 (Boston, Lilly and Wait, 1832) (1787).

- James Madison: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison).

- Alexander Hamilton: "For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" THE FEDERALIST NO. 78 (Alexander Hamilton).

The office of the Texas Attorney General falls under the umbrella of the executive branch. Therefore, the Attorney General's powers are limited to executive powers and duties. The legislative branch enacts the laws,[9] the judicial branch interprets and applies the laws to matters in controversy,[10] and the executive branch enforces the laws.[11] In other states and in the federal government, the executive function of enforcing the law includes both law enforcement and prosecutors.[12] But in Texas the prosecutors—the district and county attorneys—are instead part of the judicial branch,[13] meaning the power to prosecute criminal cases belongs to the *judicial branch*.[14] The Texas Attorney General is part of the *executive branch*, and his primary duties are to "render legal advice in opinions to various political

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[9] *State v. Rhine*, 297 S.W.3d 301, 305–06 (Tex. Crim. App. 2009); *Gulf Ref. Co. v. City of Dallas*, 10 S.W.2d 151, 158 (Tex. App.—Dallas 1928, writ dism'd w.o.j.).

[10] *See In re Allen*, 366 S.W.3d 696, 708 (Tex. 2012) (noting that it is the judiciary's job to interpret statutes in a manner effectuating the legislature's intent); *Gulf Ref. Co.*, 10 S.W.2d at 158.

[11] *Gulf Ref. Co.*, 10 S.W.2d at 158.

[12] *E.g.*, *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case[.]").

[13] The constitutional duties of county and district attorneys, and the requirements for electing district attorneys, are laid out in Article V of the Texas Constitution. TEX. CONST. art. V, §§ 21, 30. Article V is titled "Judicial Department" and prescribes the rules for the judicial branch. Accordingly, prosecutors are part of the judicial branch. *Cf.* TEX. CONST. art. V, § 22 (describing the duties of the Attorney General in the article of the Texas Constitution titled "Executive Department").

[14] *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987) (the primary function of district and county attorneys is to prosecute cases).

agencies and to represent the State in *civil litigation*."[15] As a part of the executive department, the Attorney General cannot exercise a power—prosecuting crimes—that belongs to the judicial branch.

And the fact that the Attorney General does not have the authority to prosecute crimes, including Election Code offenses like voter fraud or campaign finance violations, does not mean that those crimes will invariably go unchecked. The duly-elected district and county attorneys certainly can and should prosecute those cases.

## III. The Dissent's Arguments Fail

Judge Slaughter's dissenting opinion suggests that the Attorney General should, or at least may, prosecute election law cases when the district and county attorneys choose not to do so. I believe her dissent warrants a brief discussion. I generally agree with the majority of Judge Slaughter's opinion, specifically Parts I–V, and I appreciate her thorough summary and analysis of our Texas constitutions. However, I respectfully disagree with Part VI of her dissent.

In Part VI of her dissenting opinion, Judge Slaughter argues that she is raising a construction of § 273.021 of the Election Code that neither party has raised nor addressed in any briefing or arguments. She states that her construction has not been previously considered by this Court and "given the circumstances and the importance of the issues

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[15] *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001) (emphasis added); TEX. CONST. art. IV, § 22.

before us," she "urge[s] the Court to grant rehearing[.]"[16] It appears that Judge Slaughter is requesting that this Court grant the rehearing on its own motion. The Court does, on occasion, grant motions for rehearing on its own motion.[17] However, due to the facts that neither the State's brief nor any of the amicus briefs even remotely present this argument, and because I believe the argument lacks merit, I see no reason why we should grant rehearing on our own motion.[18]

Judge Slaughter seems to suggest that § 273.021 of the Texas Election Code does not violate our Separation of Powers Doctrine because the statute assigns the "power" to prosecute election law violations to the Attorney General, but it does not assign a "duty" to the Attorney General to do so. Under the dissent's reasoning, the Separation of Powers Doctrine would only be violated if the legislature assigned the "duty" to prosecute election fraud cases to the Attorney General. This argument is unavailing and fails to present a proper ground on which to grant this motion for rehearing.

As the dissent notes, the Separation of Powers Doctrine states that no individual

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[16] Dissenting op. of Slaughter, J., at 47.

[17] *E.g.*, *Dowling v. State*, 885 S.W.2d 103, 120 (Tex. Crim. App. 1992) (op. on reh'g); *Montgomery v. State*, 810 S.W.2d 372, 386 (Tex. Crim. App. 1990) (op. on reh'g); *Peterson v. State*, 645 S.W.2d 807, 807 (Tex. Crim. App. 1983) (op. on reh'g).

[18] *Cf. Petetan v. State*, 622 S.W.3d 321, 324 (Tex. Crim. App. 2021) (granting rehearing on Court's own motion to address appellant's claims in light of new United States Supreme Court case law); *Dowling v. State*, 885 S.W.2d 103, 128 (Tex. Crim. App. 1992) (op. on reh'g) (granting rehearing on Court's own motion to clarify and modify original holding in light of new legislative history); *Duncan v. State*, 639 S.W.2d 314, 315 (Tex. Crim. App. 1982) (op. on reh'g) (granting rehearing on Court's own motion to address new United States Supreme Court case law).

assigned to one department, or branch, of our government "shall exercise any power properly attached" to another department.[19] This should answer the question. Our Constitution refers to the *powers* of the different branches of government. It does not refer to the duties of the different branches. The constitution's literal text should be our guiding light by which to interpret its various provisions.[20] Judge Slaughter places import on an alleged distinction between powers and duties that is not warranted by the literal text of our Separation of Powers Doctrine.[21] The text of the Separation of Powers Doctrine itself undermines the dissent's argument.

Additionally, as Judge Slaughter correctly points out, there are two ways to violate the Separation of Powers Doctrine. First, the Doctrine is violated when one branch of government assumes or is delegated power—to whatever degree—more properly attached to another branch.[22] Second, the Doctrine is violated when one branch unduly interferes with another branch so that the other branch cannot effectively exercise the powers assigned it by

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[19] TEX. CONST. art. II, § 1.

[20] *See Johnson v. Tenth Jud. Dist. Ct. of Appeals at Waco*, 280 S.W.3d 866, 872 (Tex. Crim. App. 2008) ("As with statutory construction, when we construe a provision of the Texas Constitution, we are principally guided by the language of the provision itself . . . ."); *Stringer v. Cendant Mortg. Corp.*, 23 S.W.3d 353, 355 (Tex. 2000) ("When we interpret our state constitution, we rely heavily on its literal text and must give effect to its plain language.").

[21] TEX. CONST. art. II, § 1.

[22] *Jones v. State*, 803 S.W.2d 712, 715 (Tex. Crim. App. 1991) (quoting *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990)).

the Constitution.[23]

The dissent contends that because the Attorney General is authorized to represent the State before the Texas Supreme Court and in other specified civil matters, the power to represent the State is properly assigned to both the judicial and executive branches. In so concluding, however, the dissent largely fails to discuss the specific power at issue in this case—the power to prosecute criminal law violations on the Attorney General's own whim and without a request for assistance from the district or county attorney. As stated in the Court's original majority opinion, "[a]lthough the duties of the county and district attorney are not enumerated in article V, section 21, our courts have long recognized that . . . their primary function is 'to prosecute the pleas of the state in criminal cases.'"[24] Accordingly, the power to represent the State in criminal law matters is more properly attached to the district and county attorneys located within the judicial branch—rather than the Attorney General located in the executive branch.[25] This has already been litigated and presents no new argument warranting a grant of the State's motion for rehearing.

Regarding undue interference, the dissent contends that "where the [district attorney] affirmatively or expressly chooses not to prosecute an 'election law' violation, it may be constitutionally permissible for the [Attorney General] to do so under the statutory power

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[23] *Id*. (quoting *Armadillo Bail Bonds*, 802 S.W.2d at 239).

[24] *Ex parte Stephens*, — S.W.3d —, No. PD-1032-20, 2021 WL 5917198, at *4 (Tex. Crim. App. Dec. 15, 2021) (quoting *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987)).

[25] *See* TEX. CONST. art. II, § 1.

assigned to him by the Legislature in Section 273.021 of the Election Code."[26] In concluding that this would not be an undue interference with the judicial branch, Judge Slaughter ignores the scope of prosecutorial power. Her dissent implies that a prosecutor's power begins and ends with charging and prosecuting a defendant for a crime. I respectfully disagree.

The power given to district and county attorneys includes the power not only to prosecute cases but also to decide which cases should not be prosecuted.[27] When the district or county attorney chooses not to prosecute a case, they are permissibly exercising their prosecutorial discretion; it is their prerogative to file or not file charges. If the Attorney General files criminal charges when the prosecutor has specifically chosen not to, the Attorney General unduly interferes with—he usurps—the district or county attorneys' exercise of their prosecutorial power. "[T]he Attorney General has no authority to independently prosecute criminal cases in trial courts."[28]

Accordingly, the dissent's arguments for rehearing are unavailing. Because the dissent and the State have failed to provide new issues that would be proper for us to review, the motion for rehearing should be denied.

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[26] Dissenting op. of Slaughter, J., at 52.

[27] *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004) ("Both Texas and federal courts recognize that prosecutors have broad discretion in deciding which cases to prosecute. Thus, '[i]f the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision *whether to prosecute* and what charge to file generally rests entirely within his or her discretion.'") (quoting *State v. Malone Serv. Co.*, 829 S.W.2d 763, 769 (Tex. 1992)) (emphasis added).

[28] *Stephens*, 2021 WL 5917198, at *10.

## IV. Conclusion

I share the concerns that citizens have about election law violations. Frankly, I am deeply concerned as well. However, if citizens do not like that the Texas Constitution gave specific powers to the Attorney General and that these powers do not include the power to unilaterally prosecute crimes, the remedy is a constitutional amendment—something the legislature could propose and the citizens could vote to ratify.[29] The remedy is not for the courts to water down the Texas Constitution from the bench. To do so would be a violation of our judicial oath.

The Constitutions of the United States and Texas do not give appellate judges the power to create new law. The Separation of Powers Doctrine has reserved that power for the legislature. The duty of appellate judges is to interpret the law by determining the original intent of the legislature and constitutional framers. We deduce this intent by following our firmly grounded rules of statutory construction and constitutional interpretation. Consequently, a judge's role is to examine the literal text of the law and interpret it accordingly. Principled judges do not legislate from the bench and rewrite the Texas Constitution. Six years ago, when I campaigned for my position on this Court, I promised voters that I would not legislate from the bench and that I would uphold our Constitution. I certainly intend to keep that promise.

I concur with the decision to deny the motion for rehearing.

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[29] TEX. CONST. art. XVII, § 1(a).

Filed: September 28, 2022
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