

Special Prosecutors

The Issue

A new law [enacted in 2019](#) eliminated language in the Texas Code of Criminal Procedure ([Art. 2.07](#)) pertaining to the appointment of attorneys *pro tem* who are not already “attorneys for the state,” and instead required that any person appointed by a judge as an attorney *pro tem* must be a county or district attorney with criminal jurisdiction. Previously, “any competent” attorney could be appointed upon filing an oath with the clerk of the court.

However, no such requirement currently exists for the appointment of a special prosecutor, a position that has many similar roles as an attorney *pro tem*, but also important differences. While an attorney *pro tem* assumes all the duties of a district attorney and, for purposes of the law, *becomes* the district attorney upon taking their oath, special prosecutors need not take any oath of office—nor is court approval required for their appointment—[because](#) the “ultimate responsibility for the special prosecutor’s actions remains with the elected district attorney.” The ambit of a special prosecutor’s role is defined and supervised entirely by a district attorney, who remains in office.

Furthermore, a special prosecutor selected to investigate alleged criminal activities on behalf of the district attorney need not even be a prosecutor, elected or otherwise.

These last two aspects of a special prosecutor’s role—their potentially broad investigatory authority (all without court approval) and the fact that they need not be an attorney for the state—create an avenue for possible mischief. District attorneys are human like any other public official and susceptible to the same abuses of authority. Those with an axe to grind are constrained by the simple burden of being under the discipline of a public election. Therefore, engaging in questionable criminal investigations on their own, for political purposes or otherwise, is discouraged by their very visibility. The activities of a special prosecutor, on the other hand, are opaquer. A district attorney wishing to avoid scrutiny can hire a special prosecutor, without court approval, and direct potentially unethical inquiries without arousing a second look. The lack of any requirement that special prosecutors be an attorney for the state also increases the likelihood of such inquiries being undertaken by those with little or no expertise in conducting successful investigations, which risks wasting resources or presenting only weak evidence of criminal wrongdoing.

Individuals can be financially ruined defending themselves in court against such investigations that may not be legally virtuous.

In this way, the 2019 law requiring that an attorney *pro tem* must be a prosecutor—an *elected* one at that—was sensible: requiring the assent of a putatively neutral third party, especially one directly accountable to the public, subjects an attorney *pro tem* to public oversight and diminishes the likelihood of an individual being able to wield the state’s coercive power under partisan or other pretenses. Requiring attorneys *pro tem* to be prosecutors also helps to ensure that any resulting investigations are being undertaken by those experienced in doing so, which protects public resources and makes it more likely that resulting investigations yield bona fide evidence of wrongdoing that can be proven at trial.

Judicial process itself is justice. To the extent that the appointment of a special prosecutor flies under the radar of this process for ensuring public oversight over its judicial institutions and their powers, some basic correction is warranted.

The Facts

- In 2019, the Texas Legislature passed a law requiring that attorneys *pro tem* appointed by a judge must be county or district attorneys with criminal jurisdiction. Previously, they needed only be “competent” attorneys.
- Special prosecutors, while possessing many similarities with an attorney *pro tem*, are nonetheless not subject to these requirements. They do not require court approval; they need not take an oath of office; they do not need to be “attorneys for the state”; and they operate under the supervision of the elected district attorney.

Recommendation

Ban the appointment of special prosecutors who are not elected county or district attorneys with criminal jurisdiction, in the same manner in which attorneys *pro tem* now must be.

Resources

[SB 341](#). 86th Texas Legislature. Regular (2019).

Texas Code of Criminal Procedures, Title 1, Chapter 2, Section 07.

[Coleman v. State of Texas](#), 246 S.W.3rd 76, Texas Court of Criminal Appeals (2008) (footnote 19).