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Unconstitutional Delegation of Prosecutorial Discretion in Texas: The Pollution of Environmental Violation Deterrents.

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COMMENTS

UNCONSTITUTIONAL DELEGATION OF PROSECUTORIAL DISCRETION IN TEXAS: THE POLLUTION OF ENVIRONMENTAL VIOLATION DETERRENTS

SUZANNE M. JOST

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I. INTRODUCTION

"I'll enforce any law the [l]egislature passes. I won't enforce a law that's unconstitutional."¹ This quote by Harris County District Attorney Chuck Rosenthal shows the split among Texas officials on how to address the growing problem of enforcing environmental laws.² In response to the growing need to address environmental crimes, legislation has been debated, reformed, and enacted as part of the Texas Water Code.³ The most notable aspect of the 2003 amendment to the code is that it requires permission from the Texas Commission on Environmental Quality, an executive agency commonly called the TCEQ, before prosecutors may bring criminal charges against a permit holder for criminal violations.⁴

1. *Harris DA Rosenthal Says Proposal Is Unconstitutional*, ASSOC. PRESS NEWSWIREs, Apr. 2, 2003 (quoting Chuck Rosenthal).

2. *See Harris DA Rosenthal Says Proposal Is Unconstitutional*, ASSOC. PRESS NEWSWIREs, Apr. 2, 2003 (explaining how "Rosenthal contends Senate Bill 1265 violates separation of powers by allowing the executive branch to direct activities of the judicial branch"). The other side of the debate avers that "the measure is needed to rein in overly aggressive prosecutors from going after private residents for minor violations." *Id.* Rosenthal believes that "there are big-time interests behind this [legislation]." *Id.*; *see also* Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, *available at* 2003 WL 56777478 (asserting the opinion of Harris County District Attorney (DA) Roger Haseman that the legislature never asked the DA's side before drafting legislation that would hinder investigations); Interview with Ross Fischer, County Attorney, Kendall County, in Boerne, Tex. (Nov. 18, 2003) (asserting that prosecutorial discretion is best left in the hands of district and county attorneys who are subject to review by their constituencies).

3. *See* TEX. WATER CODE ANN. § 7.203(b) (Vernon Supp. 2004-2005) (stating that "[b]efore a peace officer . . . may refer any alleged criminal environmental violation . . . the peace officer shall notify the commission in writing of the alleged criminal environmental violation and include within the notification a report describing the facts and circumstances of the alleged criminal violation"). The statute then states that the Texas Commission on Environmental Quality (TCEQ) will determine which remedies are most appropriate—criminal or administrative. *Id.* § 7.203(c). The structure is set in place where the peace officers must make a report for an investigation in which they possibly may not take part, and then that fact report is passed to the appropriate office of the agency. *Id.* § 7.203(d). While this may seem efficient for any violations made near a TCEQ office, how will investigations be made in the many rural counties in Texas? Adding officials to the chain of authorities who will investigate will not make the process any more predictable, but it will definitely take longer.

4. *See* TEX. WATER CODE ANN. § 7.203(c) (Vernon Supp. 2004-2005) (stating that "[a]s soon as practicable and in no event later than the 45th day after receiving a notice and report . . . the commission shall evaluate the report and determine whether an alleged environmental violation exists and whether administrative or civil remedies would adequately and appropriately address the alleged environmental violation"). To put the penal system and a prosecutor's authority at the mercy of an agency with different methods and goals will not serve either's purpose. *See* Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, *available at* 2003 WL 56777478 (stat-

Statewide response to the amendment has not been positive.⁵ Prosecutors now expect difficulty cutting through bureaucratic red tape as they pursue environmental violators, resulting in lower environmental standards.⁶ In fact, prosecutors “see the new law as a political effort to alter the legal process because it has become effective in punishing polluters.”⁷

There has been an outcry from many parts of the state for government officials to take ever stronger measures against polluters, whether these polluters are large companies or smaller “mom and pop” operations that dump their waste in illegal areas.⁸ For instance, groups in El Paso, where

ing that “Haseman suspects the commission may, as a bureaucratic reflex, be inclined to favor its own administrative process”). This Harris County District Attorney, which is well versed in cooperating with the TCEQ, does not believe the TCEQ will be quick to refer cases for prosecution. *Id.* Mr. Haseman further states, “In essence, they would be saying the powers they have, the civil or administrative options, are inadequate.” *Id.*

5. See Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (quoting an officer for the Lower Colorado River Authority, who helps investigate environmental crimes, as saying that “[t]his law just doesn’t make sense. . . . It’s an insult to the local governments, which do most of the enforcement of environmental violations in Texas.”); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (announcing that “[a] big treat for polluters fell out of the legislative piñata this year: a new law that hobbles pursuit of environmental crime by local prosecutors”); Texas District & County Attorneys Association (TDCAA) Staff Counsel Shannon Edmonds, Address at the Texas District & County Attorneys Association 2003 Elected Prosecutor Conference (Dec. 10, 2003) (uttering, in reference to Section 7.203 of the Texas Water Code, such quotable phrases as “money talks” and “we got burned”); Guadalupe District Attorney Bud Kirkendall, Environmental Protection in-and-for Your Community, Address at the Texas District & County Attorneys Association 2003 Elected Prosecutor Conference (Dec. 11, 2003) (stating this new avenue of protection is necessary in part because “SB 1265 steamrolled us”).

6. See Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (quoting Tarrant County District Attorney Tim Curry as saying that “[l]egislation that would require prosecutors to get approval from the state environmental commission before going after big polluters would ‘seriously curtail’ the ability of law enforcement officials to prosecute environmental crimes”); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (calling Section 7.203 of the Texas Water Code a law that “hobbles pursuit of environmental crime by local prosecutors”).

7. Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478; see also *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (commenting that even the relatively low number of criminal environmental cases filed each year “were way too many” for the Texas Association of Business and Texas Chemical Council, who lobbied for this legislation’s passage).

8. See Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (informing the Austin community that a couple who owned a hazardous disposal business was prosecuted for felony

concerned citizens are repulsed by “shredded tires, rotting planks[,] and shattered beer bottles,” have organized clean up initiatives aimed at the everyday littering that affects most people.⁹ The new amendment to the Water Code brings even the type of pollution addressed in El Paso within the primary jurisdiction of the TCEQ.¹⁰ Local law enforcement officials are deterred from making the normal judgment calls they are elected to make, and instead must await the “go-ahead” to protect their communities from polluters.¹¹

The Environmental Division of the Harris County District Attorney's Office, because of its aggressive enforcement of environmental law, has been called the “poster child” for this legislation, implying that amendments were necessary to rein in overzealous prosecution.¹² But the Har-

violations); *Harris DA Rosenthal Says Proposal Is Unconstitutional*, ASSOC. PRESS NEWSPAPERS, Apr. 2, 2003 (paraphrasing District Attorney Rosenthal that the focus of his office is enforcement of the law, not the size of the entity being charged); Randy Lee Loftis, *Dallas Crackdown on Dumping Yields Charges Against Ellis County-Based Recycler*, DALLAS MORNING NEWS, Dec. 21, 2002, available at 2002 WL 104727188 (warning illegal dumpers that city officials are sending illegal waste dumpers to jail); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (commenting that “[n]o one would ever accuse Texas prosecutors of being environmental zealots or being overly aggressive with companies that endanger the environment”); *Protect Environment*, EL PASO TIMES, Aug. 18, 2003, available at 2003 WL 57602644 (urging more enforcement power for environmental crimes); *Smoke Stacks / Anti-pollution Laws Should Be Stronger, Not Weaker*, HOUS. CHRON., Apr. 18, 2003, available at 2003 WL 3253222 (urging legislators to refrain from passing legislation that would weaken clean air standards); Neil Strassman, *North Texas Cement Company Faces \$223,000 Fine*, FORT WORTH STAR-TELEGRAM, Aug. 21, 2002, available at 2002 WL 26059955 (showing Fort Worth officials' willingness to levy heavy penalties).

9. Laura Cruz, *El Pasoans to Target Dump Sites in Cleanup*, EL PASO TIMES, Apr. 5, 2002, at A1, available at 2002 WL 20106048.

10. See TEX. WATER CODE ANN. § 7.203(a) (Vernon Supp. 2004-2005) (establishing that “[t]his section is applicable to criminal prosecution of alleged environmental violations of this code, of the Health and Safety Code, or of any other statute, rule, order, permit, or other decision that is within the commission's jurisdiction”).

11. See Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (proposing that the opponents to Section 7.203 of the Texas Water Code believe the bill “protects polluters by forcing prosecutors to cut through red tape, while taking control away from local communities to enforce laws against everything from illegal dumping to dangerous emissions”); Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (explaining how “[t]he commission has 45 days to complete a review after an officer submits the required information, but the draft rules don't set a deadline for the commission to determine when the case information is complete enough to start a review”).

12. Dina Cappiello, *Making Case for Clean Air / Aggressive Prosecutor Cracks Down on Polluters*, HOUS. CHRON., July 31, 2003, available at 2003 WL 57432159 (citing that the Harris County District Attorney's Office, headed by Roger Haseman, worked more than 600 cases against polluters). “Haseman has been accused of delaying cases for years, wait-

ris County District Attorney's Office "reject[s] the suggestion that they have been bringing unwarranted cases"¹³ and argues that the aggressive tactics are exactly what environmental law enforcement needs to make those polluters squirm.¹⁴ In fact, the chief of the environmental division asserts that "[i]f people violating the environmental laws understand that criminal and civil enforcement are a possibility, that is a huge deterrent."¹⁵

Proponents of this legislation, which provides the TCEQ discretion over which cases to prosecute and which cases to leave to merely administrative remedies, claim that there is a need for these particular laws to be enforced equally throughout the state.¹⁶ These lobbyists claim that

ing until just before the statute of limitations runs out. He has been called overzealous and anti-business, characterizations that he denies." *Id.* In fact, the Harris County District Attorney argues that "in many cases rather than go to trial, [he] will negotiate for a cleanup and seek penalties that he funnels to environmental projects." *Id.* If the judgment used in the office of the district attorney is used to enforce when necessary and to deter when possible, then splitting that authority to properly employ judgment between an agency such as the TCEQ and district attorneys across Texas merely weakens it. Further, if the people in Texas are unhappy with the actions of the District Attorney, they may simply vote him out. How does a Texas constituent change the policy or approach of the TCEQ?

13. Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478; see also *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (hinting that Texas prosecutors are not generally overly aggressive in the pursuit of environmental crime violations).

14. Dina Cappiello, *Making Case for Clean Air / Aggressive Prosecutor Cracks Down on Polluters*, HOUS. CHRON., July 31, 2003, available at 2003 WL 57432159; see also Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (asserting that criminal penalties are extra deterrents against pollution).

15. Dina Cappiello, *Making Case for Clean Air / Aggressive Prosecutor Cracks Down on Polluters*, HOUS. CHRON., July 31, 2003, available at 2003 WL 57432159; Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478; see also Janet Elliott & Dina Cappiello, *Audit Critical of How Agency Collects Polluter Fines / Report Says Violators Aren't Consistently Held Accountable*, HOUS. CHRON., Dec. 18, 2003, available at 2003 WL 68829540 (reporting that an audit made on the TCEQ showed "that fines weren't large enough to deter polluters and such 'discounts' were a loss to the state of millions of dollars").

16. See Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (quoting Texas Representative Jaime Capelo, the state representative who sponsored Senate Bill 1265 through the house). Representative Capelo feels that "[h]ow business interacts with the environment is very important" and he further states that this bill is important "to make sure that TCEQ rules and environmental laws . . . are fairly implemented [throughout] the state." *Id.* However, the weakness with this justification is that the fact that the TCEQ has the discretion of whom to prosecute does not guarantee either consistency or better judgment than that judgment that is used by Texas prosecutors. See Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003

there is abuse in the system, and that taking the decision-making power away from the zealous prosecutors will ensure statewide consistency.¹⁷ The lobbyists, not surprisingly, work for the companies who are now less likely to be prosecuted criminally.¹⁸ The purpose of the TCEQ's administrative penalties is to focus more heavily on moving companies into compliance.¹⁹ Prosecution in the criminal system is a heftier tool of deterrence that will be weakened by Section 7.203 of the Texas Water Code.²⁰

WL 5677478 (quoting other suspected motives, Travis County District Attorney Ronnie Earle said that “[t]his new law is an attack on the Texas tradition of local prosecution [because i]t is an effort to centralize prosecution of environmental crimes in order to make prosecution easier for large corporate polluters to control”).

17. See Dina Cappiello, *Making Case for Clean Air / Aggressive Prosecutor Cracks Down on Polluters*, HOUS. CHRON., July 31, 2003, available at 2003 WL 57432159 (comparing the views of the Harris County District Attorney's Office with those views shared by the critics of that office's tactics); Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 5677478 (showing that “[a] broad coalition of business groups, including the Texas Association of Business and the Texas Chemical Council, backed the legislation to remedy what they say is overzealous prosecution of environmental cases by the Harris County [D]istrict [A]ttorney's [O]ffice”). The purpose of elected prosecutors is to maintain the relationship between the citizens of Texas and the state attorneys that represent them against people charged with crimes. See TEX. CONST. art. XVI, § 1 (constitutionalizing the duties of prosecutors to “preserve, protect, and defend” the constitution). Because the populace is fully capable of addressing concerns against an allegedly overzealous prosecutor by electing his opponent, when a prosecutor is reelected it is a safe assumption that the general populations of Texas counties appreciate the efforts of prosecutors to protect the air, water, and use of land.

18. *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 5677636 (referring to the identities of the business associations affiliated with the lobbyists as the Texas Association of Business and the Texas Chemical Council); see also TDCAA Staff Counsel Shannon Edmonds, Address at the Texas District & County Attorneys Association 2003 Elected Prosecutor Conference (Dec. 10, 2003) (referring to Section 7.203 of the Texas Water Code by inferring that money in the backing was the strength of this legislation).

19. See Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 5677478 (noting that a business group proponent of Water Code Section 7.203 asserts that certain violations were prosecuted, but “if those cases had gone through the TCEQ, they would not have come anywhere close to criminal prosecution”); Janet Elliott & Dina Cappiello, *Audit Critical of How Agency Collects Polluter Fines / Report Says Violators Aren't Consistently Held Accountable*, HOUS. CHRON., Dec. 18, 2003, available at 2003 WL 68829540 (quoting a TCEQ spokesman who stated that the TCEQ's goal is compliance, not collections).

20. See TEX. WATER CODE ANN. § 7.203(b) (Vernon Supp. 2004-2005) (requiring officials to notify the TCEQ of any alleged criminal environmental violation before referring it to a prosecuting attorney); Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (highlighting an example in Nueces County, which has several oil refineries, and explaining how law enforcement officials report violations to the TCEQ and then wait for a response);

Unfortunately for progressive environmental protection methods, there may be some consistency within the TCEQ, but if the enforcement by the TCEQ follows past patterns, that consistency will not include widespread criminal punishment of polluters.²¹ Although the TCEQ was unable to provide an exact number of criminal prosecution referrals because some are conducted “informally,” whatever that may mean, “the Texas Environmental Crime Task Force, in which the commission participates, brought 18 criminal cases last year.”²² By comparison, in Harris County alone, 660 criminal cases battled pollution in the district attorney’s office in 2002, while the Attorney General of Texas, who addresses the TCEQ’s current recommended criminal cases, handled only thirteen cases statewide.²³ Outside Harris County, Texas has not previously been commended for pursuing polluters.²⁴

Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (stressing that through the criminal process, restitution may be extracted, and the added threat of criminal prosecution exists if the clean-up measures are not properly completed); Janet Elliott & Dina Cappiello, *Audit Critical of How Agency Collects Polluter Fines / Report Says Violators Aren’t Consistently Held Accountable*, HOUS. CHRON., Dec. 18, 2003, available at 2003 WL 68829540 (asserting that a “report by the State Auditor’s Office . . . concluded [that] the enforcement process does not consistently ensure violators of the state’s pollution laws are held accountable”); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (arguing that “[l]ocally elected [officials] should not have to seek permission from an Austin agency to investigate and prosecute crime”); Interview with Ross Fischer, County Attorney, Kendall County, in Boerne, Tex. (Nov. 18, 2003) (discussing the necessity of elected officials retaining prosecutorial discretion to ensure consistent enforcement).

21. See Dina Cappiello, *Four Bills Could Help Polluters / Issues Would Change Way Crimes Prosecuted*, HOUS. CHRON., Apr. 15, 2003, available at 2003 WL 3252332 (contrasting the approaches to criminal enforcement of environmental violations between the attorney general and the Harris County District Attorney’s Office). See generally Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (showing how the commission is unable to inform the public how many of their cases have been recommended for criminal penalties).

22. Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478.

23. See Dina Cappiello, *Four Bills Could Help Polluters / Issues Would Change Way Crimes Prosecuted*, HOUS. CHRON., Apr. 15, 2003, available at 2003 WL 3252332 (citing statewide statistics of prosecutions for environmental crimes); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (adding that the highest pending number of cases was in Harris County, with “325 criminal environmental cases . . . filed last year”).

24. *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (stating “[n]o one would ever accuse Texas prosecutors of being environmental zealots or being overly aggressive with companies that endanger the environment”).

The legislature has spoken, passing Senate Bill 1265, and now Section 7.203 of the Texas Water Code is the law in Texas.²⁵ Unfortunately, this legislation falls short of the goals for which it was enacted.²⁶ Furthermore, in attempting to curtail prosecution of polluters, the legislators have violated the Texas Constitution.²⁷

Part II of this Comment discusses the inception of Section 7.203 of the Water Code, and then explains the unique aspects of the Texas Constitution that place Texas prosecutors within the judicial branch. Part III discusses the Texas Constitution and Texas case law, demonstrating how this newly enacted law violates the Texas Constitution. Part IV explains that the result of this legislation will be confusion in enforcement, followed by a string of cases that must work their way up through the Texas court system in order to declare this provision unconstitutional and reassert the freedom of Texas prosecutors to seek justice. Therefore, the proposed solution is for the legislature to repeal Section 7.203 of the Texas Water Code. Alternatively, a Texas prosecutor could request that the Attorney General of Texas issue an opinion declaring this amendment unconstitu-

25. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005); Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (acknowledging that even against opposition from environmental groups and other legislators, Senate Bill 1265 finally passed the Texas House of Representatives with an 85 to 56 vote of approval); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (stating that the Texas Senate unanimously passed Senate Bill 1265); see also TEX. COMM'N ON ENVTL. QUALITY, CRIMINAL ENFORCEMENT REVIEW DRAFT RULES, at <http://www.tceq.state.tx.us/legal/rules.html> (Oct. 14, 2003) (announcing a meeting where persons interested in asserting input to the TCEQ's rules on criminal enforcement were invited to attend).

26. See generally Dina Cappiello, *Four Bills Could Help Polluters / Issues Would Change Way Crimes Prosecuted*, HOUS. CHRON., Apr. 15, 2003, available at 2003 WL 3252332 (discussing the proposed bills); Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (showing cracks in the wall of this statute including red tape that is time consuming and as a result possibly compromising some cases, additional paperwork may discourage police officers from filing the cases, and the fact that the TCEQ will not be quick to refer cases and thereby admit that their sole powers are inadequate enforcement); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (quoting Kinnan Golemon, an Austin lawyer, who advised the business groups that lobbied for the legislation as necessary for a "system where people who make honest mistakes get told not to do it again and, if necessary, pay some penalty").

27. TEX. CONST. art. II, § 1; see also Harris DA Rosenthal Says Proposal Is Unconstitutional, ASSOC. PRESS NEWSWIREs, Apr. 2, 2003 (referencing the Harris County District Attorney's opinion that the provisions added to the Texas Water Code are unconstitutional).

tional. A final remedy, but the least timely, would be to bring the issue within the Texas court system, where it could be ruled unconstitutional.

II. BACKGROUND

A. *Senate Bill 1265 Was Enacted As Section 7.203 of the Texas Water Code*

1. Section 7.203 and Its Requirements

Senate Bill 1265 added Section 7.203 to the Texas Water Code.²⁸ Effective September 1, 2003, the amended code requires that prosecutors wait to prosecute a polluter in violation of the law until the TCEQ determines that criminal penalties are appropriate.²⁹ The code allows the prosecutor to move forward if the TCEQ has failed to respond within forty-five days.³⁰ There is also an exception to the statutory hold if there is a threat of death present.³¹

2. Purpose of Section 7.203

The TCEQ dispenses permits related to environmental regulation.³² These permits restrict use, location, and waste of environmentally dangerous substances as well as issues such as water use.³³ The environmental issues handled by the TCEQ are expansive, and depending upon the interpretation of the term “related to,” the issues covered could grow even larger.³⁴ The TCEQ collects fines as penalties for violations of these permit allowances.³⁵ In fact, the TCEQ collected “total penalties of about \$8 million, said commission spokeswoman Adria Dawidczik.”³⁶ On the

28. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005).

29. *Id.*; Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068; Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478.

30. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005); Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068.

31. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005); Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068.

32. TEX. COMM’N ON ENVTL. QUALITY, PERMITS, REGISTRATIONS AND LICENSES, available at <http://www.tceq.state.tx.us/nav/permits/> (last modified Mar. 25, 2004).

33. *Id.*

34. See Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (indicating that “the commission will have to define what ‘related to’ means. A broad definition, as sought by businesses, would mean more cases must be reviewed.”).

35. See *id.* (explaining the administrative penalties collected in a fiscal year).

36. *Id.*

other hand, the number of cases referred by the Commission for criminal prosecution is more difficult to define.³⁷

Before the enactment of Section 7.203, prosecutors would receive information from law enforcement officials that described the incident involved.³⁸ Then, after reviewing the facts the law enforcement officers gathered, the prosecutor would file appropriate charges, according to the elements of the crime alleged, against the polluter.³⁹ This method is the same process followed for any criminal prosecution.⁴⁰ Policemen, deputies, and investigators work closely with the prosecutor to decide exactly which law was broken, and to determine the extent of the criminal act by referencing the Penal Code or other applicable statute.⁴¹ This process will become more drawn out as the investigators send information to the TCEQ and await approval for further action.⁴² Not all permit violations constitute breaking the law, so the only overlap in cases between the prosecutor and the TCEQ are those which involve both a permit related to the violation, and a law that has been broken.⁴³

In areas such as Harris County, there is cooperation and communication between the TCEQ investigators and the prosecuting attorney's of-

37. *See id.* (stating that the "commission did not have a record of the exact number of criminal cases it referred to the attorney general's office and other prosecutors because some referrals are done informally").

38. Interview with Ross Fischer, County Attorney, Kendall County, in Boerne, Tex. (Nov. 18, 2003).

39. *Id.*

40. *Id.*

41. *Id.*

42. *See* Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (commenting how "[c]ommission staff are now preparing rules to implement the law, including a questionnaire on cases that law officers would submit along with supporting documents"); *see also* TEX. COMM'N ON ENVTL. QUALITY, CRIMINAL ENFORCEMENT REVIEW DRAFT RULES, available at <http://www.tceq.state.tx.us/legal/rules.html> (Oct. 14, 2003) (announcing the opportunity for citizens to be heard if they are interested in the rules drafted by the TCEQ for creation of procedures for the new Water Code amendment).

43. *See* TEX. WATER CODE ANN. § 7.203(a) (Vernon Supp. 2004-2005) (outlining the amendment and showing how it is applicable to "a defendant holding a permit issued by the commission or a defendant employed by a person holding such a permit and that is related to the activity for which the permit was issued"); Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (clarifying the law by stating how it only applies to companies holding permits from the TCEQ); Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (forewarning of the push by businesses to have this "related to" wording read expansively); Telephone Interview with Roger Haseman, District Attorney, Harris County (Aug. 19, 2003) (stating that only a "handful" of their office prosecutions involve permit violations).

face.⁴⁴ While the information is gathered, the TCEQ determines its administrative remedies and the prosecutor determines its prosecutorial avenue.⁴⁵ The two separate entities are accustomed to this arrangement.⁴⁶ As a result, Harris County prosecutes a large number of violators.⁴⁷

In response to Harris County and other jurisdictions' successful efforts to curb pollution, lobbyists attacked the methods used by the prosecutors.⁴⁸ Perhaps these prosecutorial methods have worked too well, as was

44. See Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (negating the idea that prosecutors have implied that the TCEQ will not investigate environmental infractions); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (showing that the majority of Texas environmental cases occur in highly populated and industrially focused areas such as Houston, and the prosecutors' offices in those areas are therefore accustomed to working closely with the TCEQ); Telephone Interview with Roger Haseman, District Attorney, Harris County (Aug. 19, 2003) (responding that the Harris County District Attorney's Office already works closely with the TCEQ, and therefore cooperation between the two entities will not be difficult). In other areas, though, where there is not a local TCEQ representative, this communication will be more difficult. Interview with Ross Fischer, County Attorney, Kendall County, in Boerne, Tex. (Nov. 18, 2003).

45. See Telephone Interview with Roger Haseman, District Attorney, Harris County (Aug. 19, 2003) (discussing the relationship between the TCEQ and Harris County prosecutors).

46. *Id.*

47. See *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (reporting that Harris County environmental prosecutors currently have a caseload of 600 cases).

48. See Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (paraphrasing House Representative Jaime Capelo as saying that "the bill would reduce abuses of the system while assuring that environmental laws are enforced equally across the state"); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (quoting Kinnan Goleman, an Austin lawyer and advisor to business groups who lobbied for Section 7.203, as wanting the laws to focus on "real criminals" and allow violators who make "honest mistakes" to be safe from criminal prosecution). It is counter-intuitive that for some reason, environmental criminals receive protections not afforded to others. Undoubtedly, many non-environmental law violators in the Texas court system would prefer both a civil fine, with no threat of jail or a criminal record, and the opportunity to proclaim that the crime that brought them to the courtroom was merely an "honest mistake." Under the law, however, honest mistakes are just as illegal as dishonest mistakes if the statute so defines the elements of the crime. Being "really sorry" doesn't make actions any less illegal. See Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (stating that "Haseman and some other prosecutors see the new law as a political effort to alter the legal process because it has become effective in punishing [violators]").

evidenced by the lobbyists' fight to restrict prosecutorial discretion.⁴⁹ The Texas Legislature felt inclined to attempt to ensure consistency statewide.⁵⁰ An attempt at consistency was made in the form of an amendment to the Water Code that encompasses all permit related activities under the TCEQ.⁵¹

3. Section 7.203 Does Not Support a Clean Texas Environment

In response to the Texas Legislature's attention to environmental prosecutions and deterrence, Senate Bill 1265 unanimously passed in the Texas Senate.⁵² This Bill also easily made it through the Texas House.⁵³ The smooth road through the voting process was due in part to the lobbying efforts of the Texas Association of Business and the Texas Chemical Council.⁵⁴ Besides the fact that the Texas Association of Business has "officers and employees under investigation for possible campaign law

49. See Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (introducing the article by stating this law will "seriously curtail" prosecutorial efforts against environmental violations); Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (implying that this legislation was not in response to overly zealous prosecution, but instead responded to effective enforcement of environmental crimes); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (asserting that this amendment was in direct response to an overly effective prosecutorial effort that business groups want to quash).

50. See SEN. COMM. ON ENVTL. REGULATION, BILL ANALYSIS, Tex. S.B. 1265, 78th Leg., R.S. (2003) (stating that "[t]he purpose of this Act is to ensure statewide consistency in the interpretation and enforcement of environmental laws"); see also TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005) (reiterating the underlying goal of statewide consistency); Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (showing the Texas Legislature's agreement with the need for consistency by passing the law).

51. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005).

52. *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636.

53. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005); see also Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (establishing that the bill passed in the Texas House by an approval of 84 of 140 votes); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636.

54. See Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (noting that a "broad coalition of business groups . . . backed the legislation"); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (identifying that a coalition of business groups "lobbied successfully for the change in the law").

violations in Travis County,”⁵⁵ it is presumable from the names of these associations whom this law will benefit—the companies that would otherwise be criminally prosecuted if found to be in violation of environmental laws.⁵⁶

The fact that there are so few referrals for criminal prosecution, and so many of these are done “informally,”⁵⁷ illuminates the argument that this prosecutorial discretion is being placed in the hands of a bureaucracy that is not directly accountable to the people of Texas.⁵⁸

55. *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636.

56. See Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (quoting Travis County District Attorney Ronnie Earle). Mr. Earle stated:

This new law is an attack on the Texas tradition of local prosecution. . . . It is an effort to centralize prosecution of environmental crimes in order to make prosecution easier for large corporate polluters to control. One state agency is easier to control than 327 Texas prosecutors, whose first allegiance is to their local constituents who live in the communities being polluted).

Prosecution of Environmental Crime a Job for Local Officials, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (naming the business groups and Chemical Council as members of the group who lobbied for the legislation). If prosecutors were truly targeting citizens to such an extent that there existed rampant misuse of discretion, the groups who were most adamantly pushing the legislation would not be business groups. The business groups must be the ones who are taking the brunt of the prosecutions in Texas, and therefore these are the groups that want to avoid prosecution by the TCEQ's use of purely civil and administrative remedies. The vigorous lobbying shows the huge deterrent created by the threat of criminal charges as opposed to facing the civil and administrative remedies of the TCEQ.

57. Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478.

58. See *id.* (quoting Sgt. John Babb, an investigating officer with the Lower Colorado River Authority, as saying that this legislation is an “insult to the local governments, which do most of the enforcement of environmental violations in Texas”); see also *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (claiming that the amendment is a “big treat for polluters” that “fell out of the legislative piñata.” The editors further conclude that “[i]nstead of having the freedom they once enjoyed in investigating environmental transgressions, independently elected county and district attorneys must now ask an Austin bureaucracy if they may do so.”). See generally Janet Elliott & Dina Cappiello, *Audit Critical of How Agency Collects Polluter Fines / Report Says Violators Aren't Consistently Held Accountable*, HOUS. CHRON., Dec. 18, 2003, available at 2003 WL 68829540 (showing how the TCEQ acknowledged “constructive criticism” and attempted to “monitor deadlines more closely” after an audit of the TCEQ described unfavorable results). This is a far cry from a prosecutor's responsibilities, considering how a prosecutor could be voted out of a job if his or her office was found to be sluggishly enforcing laws.

B. *Texas Prosecutors Are Under the Judicial Branch of Government*

The constitutional designation of Texas prosecutors as members of the judicial branch has been affirmed by both case law and the Attorney General of Texas.⁵⁹ Although not part of the “judiciary” exception for the Open Records Act, prosecutors are within the judicial branch.⁶⁰ District and county attorneys are established under Article V of the Texas Constitution, and are therefore within the judicial umbrella.⁶¹

59. See *Ex parte Barnes*, 959 S.W.2d 313, 319 (Tex. App.—Fort Worth 1997, pet. dismissed) (finding that “[b]ecause district and county attorneys are part of the judicial branch, they are entitled to protection under the separation of powers doctrine”). This may be one reason why the bill itself was modified. The original bill sanctioned oversight by the Office of Attorney General before any state prosecutors could proceed. Tex. S.B. 1265, 78th Leg., R.S. (2003) (Introduced Version). That procedure was amended to oversight by the TCEQ, assumedly in an attempt to protect the constitutionality between the branches. Compare Tex. S.B. 1265, 78th Leg., R.S. (2003) (Introduced Version) (allowing the attorney general to evaluate alleged environmental violations, and offer “investigative, technical, and litigation assistance” after the TCEQ and attorney general decide “whether available administrative or civil remedies would adequately address the alleged violation”), with Tex. S.B. 1265, 78th Leg., R.S. (2003) (House Committee Report) (omitting any reference to input by the attorney general’s office), and Tex. S.B. 1265, 78th Leg., R.S. (2003) (Engrossed Version) (creating the final version with discretion given solely to the TCEQ).

60. See TEX. CONST. art. V, § 21 (creating the offices of District and County Attorneys and describing the election or appointment process); Gov’t Servs. Ins. Underwriters v. Jones, 368 S.W.2d 560, 562 (Tex. 1963) (stating that governmental powers do not always fit logically and clearly into particular departments); *Holmes v. Morales*, 906 S.W.2d 570, 573 (Tex. App.—Austin 1995, writ granted), *rev’d on other grounds*, 924 S.W.2d 920 (Tex. 1996) (holding that the court cannot conclude that “the legislature intended to include the office of district attorney in the word ‘judiciary’ when that body composed” the Open Records Act); Tex. Att’y Gen. ORD-657 (1997) (distinguishing the judiciary exception from the judicial branch by saying “[t]he judiciary exception applies only to those records which relate to the exercise of judicial powers”). See generally Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337 (1990) (outlining the applicability of the separation-of-powers doctrine in Texas).

61. See *El Paso Elec. Co. v. Tex. Dep’t of Ins.*, 937 S.W.2d 432, 439 (Tex. 1996) (reiterating that district and county attorney authority is constitutional and therefore may not be delegated by the legislature); *Hill County v. Sheppard*, 142 Tex. 358, 178 S.W.2d 261, 262 (Tex. 1944) (defining criminal district attorneys as those included within the constitutional creation of the office of district attorney); *Meshell v. State*, 739 S.W.2d 246, 257 (Tex. Crim. App. 1987) (holding the “Speedy Trial Act” unconstitutional and void); *Ex parte Barnes*, 959 S.W.2d 313, 319 (Tex. App.—Fort Worth 1997, pet. dismissed) (holding that the separation-of-powers doctrine protects district and county attorneys); *Reed v. Triplett*, 232 S.W.2d 169, 171 (Tex. Civ. App.—Waco 1950, writ. ref’d) (affirming the offices of county and district attorneys are constitutionally created); *Am. Liberty Pipe Line Co. v. Agey*, 167 S.W.2d 580, 582-83 (Tex. Civ. App.—Austin 1942), *aff’d*, 141 Tex. 379, 172 S.W.2d 972 (Tex. 1943) (affirming “that the legislature could not devolve upon others the powers vested in the Attorney General and district and county attorneys, nor interfere with their rights to exercise them”); 31 TEX. JUR. 3D *District & Municipal Attorneys* § 1 (2003) (explaining

Prosecutors' duties are constitutionally mandated, though not completely and expressly delineated. The power to represent the state is a constitutional power, and "is not, then, a mere statutory power."⁶² Because the prosecuting attorneys are given exclusive authority under the Texas Constitution to represent the state in all cases, they also have exclusive control over the lawsuits.⁶³ Thus, exclusive control of a criminal lawsuit is constitutionally mandated to be employed solely by the prosecutor. Therefore, the Texas Legislature may not properly delegate that exclusive power to any executive agency, including the TCEQ.⁶⁴

III. ANALYSIS

A. *Section 7.203 Oversteps Rulemaking Authority*

Effective September 1, 2003, the amended provision of the Water Code unconstitutionally usurped discretionary powers previously held by prosecutors. The law replaces the constitutionally mandated standards that existed for public officials to arrest, investigate, and prosecute offenders of environmental law with purely administrative control by an agency that is not directly accountable to the citizens of Texas.⁶⁵

how "[t]he office of district attorney, including that of criminal district attorney, is a constitutional office").

62. *Holmes*, 906 S.W.2d at 574.

63. *State v. Moore*, 57 Tex. 307, 315 (Tex. 1882); *Meshell*, 739 S.W.2d at 253; *State Bd. of Dental Exam'rs v. Bickham*, 203 S.W.2d 563, 566 (Tex. Civ. App.—Dallas 1947, no writ).

64. *See Bickham*, 203 S.W.2d at 566 (safeguarding prosecutorial decisions from the oversight of the State Board of Dental Examiners).

65. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005); *see also* Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (disputing the efficiency of requiring state agency permission to prosecute local violations in Texas communities); Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (explaining that prosecutors are accountable to the constituents in the communities that are being polluted); Harvey Kronberg, *Duggan Flanakin: Open Government at TCEQ Needs an Open Mike*, QUORUM REP., Apr. 22, 2003, at <http://www.quorumreport.com/Subscribers/Article.cfm?IID=4102> (reporting the changes in the TCEQ's decision-making process that removes individual input in an open forum); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (announcing that "[i]nstead of having the freedom they once enjoyed in investigating environmental transgressions, independently elected county and district attorneys must now ask an Austin bureaucracy if they may do so"). *But see* Harvey Kronberg, *Duggan Flanakin: TCEQ Takes Our Advice—Again!*, QUORUM REP., Nov. 9, 2003, at <http://www.quorumreport.com/Subscribers/Article.cfm?IID=5314> (proclaiming that the TCEQ did allow an "open mike" session and that the TCEQ states their officials "want to hear what the public thinks about those environmental issues that directly affect them").

The Texas Water Code sets forth criminal penalties for violations in Chapter 7.⁶⁶ The presence of these penalties, along with provisions in each violation that define the level of criminal penalty, clearly establishes legislative intent that the citizens of Texas receive protection from pollution and a demand that the polluters face repercussions.⁶⁷

Prosecutors are endowed with constitutional authority to enforce these codes.⁶⁸ But with the addition of Section 7.203, prosecutors will effectively be blocked from pursuing violators that hold permits with the TCEQ.⁶⁹ By the plain language of the amendment, prosecutions will be hampered not only for Water Code violations, but also for violations of the "Health and Safety Code, or of any other statute, rule, order, permit, or other decision of the commission that is within the commission's jurisdiction committed by a defendant holding a permit issued by the commis-

66. TEX. WATER CODE ANN. § 7.187 (Vernon 2000).

67. See TEX. WATER CODE ANN. § 7.161 (Vernon 2000) (mandating that violation of the statute is a Class B Misdemeanor); Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (explaining how in one recent incident, a felony violation earned penalties of 90 to 120 days in jail, 400 hours of community service, and \$40,000 in restitution for illegally dumping hazardous waste).

68. See *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987) (stating that the duties of county and district attorneys have long been recognized as the duty "to prosecute the pleas of the state in criminal cases" (quoting *Brady v. Brooks*, 89 S.W. 1052, 1056 (Tex. 1909))); *Driscoll v. Harris County Comm'rs Court*, 688 S.W.2d 569, 578 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); cf. *Holmes v. Morales*, 906 S.W.2d 570, 573 (Tex. App.—Austin 1995, writ granted), *rev'd on other grounds*, 924 S.W.2d 920 (Tex. 1996) (acknowledging that "the office of district attorney derives directly from Article V, Section 21 its power to represent the state, a constitutional power that the legislature may divide between the county and district attorneys in cases of overlap. It is not, then, a mere statutory power."). In considering *Holmes*, the court reversed solely on the court of appeals' misconstruction of the Public Information Act, and not on the Third Court of Appeals' rationale regarding separation-of-powers. *Holmes*, 924 S.W.2d at 925.

69. See TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005) (requiring permission from an executive agency before investigating, prosecuting, or charging a TCEQ permit holder); Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (stating that Texas prosecutors, including Tarrant County District Attorney Tim Curry, feel that this amendment will "seriously curtail" enforcement of environmental crimes); Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (warning that according to Sarretta McCaslin, coordinator of the Regional Environmental Task Force, "the additional paperwork and steps involved in the reviews may discourage police officers from smaller agencies from pursuing possible cases"); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (stating that this legislation is a "direct attack on local discretion by locally elected prosecutors to protect their communities from environmental harm").

sion.”⁷⁰ This broad language could be read as a sweeping statement of criminal immunity for a TCEQ permit holder in any area of the commission’s extensive jurisdiction.⁷¹

The amended guidelines require an officer to file a report with the Texas Commission on Environmental Quality before making an arrest or issuing a citation to a permit holder.⁷² Further, peace officers must refrain from investigating or prosecuting until and unless notified to do so by the agency.⁷³ The TCEQ then attempts to resolve the violation in a purely civil or administrative manner.⁷⁴ The unconstitutionally fatal provision is the final sentence, which expresses that “[a] prosecuting attorney may not prosecute an alleged violation if the commission determines that administrative or civil remedies are adequate and appropriate.”⁷⁵

The purported justification, according to the Legislative Committee Report, is to “ensure statewide consistency in the interpretation and en-

70. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005) (emphasis added).

71. See TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005) (using broad language to encompass all permit holders in any violation that relates to the purpose for which their permit was issued). But the amendment does make an exception for “an alleged environmental violation that clearly involves imminent danger of death or bodily injury under an endangerment offense specified in [S]ection 7.252.” *Id.*; see also Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (acknowledging that an exception is made in cases where imminent threat of death is present); Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (forewarning of the danger of interpreting the “related to” permit language so broadly that the numbers of perpetrators freed from criminal prosecution increases).

72. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005) (outlining the process by which law enforcement officials are to proceed); see also Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (explaining the procedure required by the prosecutor in order to postpone prosecution); Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (indicating that “[c]ommission staff are now preparing rules to implement the law, including a questionnaire on cases that law officers would submit along with supporting documents”).

73. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005); see also Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (warning that paperwork overload may deter officers from filing and pursuing environmental violations).

74. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005); see also Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (showing the lobbyist’s expectation that only administrative penalties should apply, as opposed to criminal prosecutions).

75. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005); see also *Shepperd v. Alaniz*, 303 S.W.2d 846, 848-49 (Tex. Civ. App.—San Antonio 1957, no writ) (mandating that when powers are constitutionally granted, the prosecution has discretion to accept or decline services of other persons).

forcement of environmental laws.”⁷⁶ The result, in actuality, undermines the historical and constitutional power of prosecutors to seek justice in the manner most appropriate.⁷⁷ This new law limits prosecutors’ ability to charge the TCEQ permit holders.⁷⁸

This untenable encroachment upon the judicial process should not be permitted. Illustratively, this practice of agencies superseding prosecutorial discretion has been rightly disallowed in other areas.⁷⁹ For instance, would a reasonable legislature deter prosecutors from bringing to justice an employee in a nursing home who assaults an elderly patient? Should the Department of Human Services be able to prevent prosecution for injury to the elderly, leaving a criminal unaccountable to the citizens of Texas? Surely not.

Even more dangerous is the inference made by proponents of Section 7.203 that environmental law violators should receive a slap on the wrist because of their ignorance of the law or a genuine intention to improve.⁸⁰ Proponents of Section 7.203 asserted the following:

76. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005); *see also* Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (identifying the purpose behind the passage of the amendment in the Texas House of Representatives).

77. TEX. CRIM. PROC. CODE ANN. art 2.01 (Vernon 1977); *see also* Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (explaining that historically, local prosecutors have done the majority of the enforcement of crimes, and local prosecutors should remain the protectors of their local communities); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (arguing that this amendment is a “direct attack on local discretion by locally elected prosecutors to protect their communities from environmental harm”).

78. *See* TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005) (announcing that prosecutors “may not prosecute an alleged violation if the commission determines that administrative or civil remedies are adequate and appropriate”); Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (citing opposition to Section 7.203 because it will “‘seriously curtail’ the ability of law enforcement to prosecute environmental crimes”); Dina Cappiello, *Four Bills Could Help Polluters / Issues Would Change Way Crimes Prosecuted*, HOUS. CHRON., Apr. 15, 2003, available at 2003 WL 3252332 (leading with the statement that “[f]our bills . . . hamper the ability of local law enforcement and citizens to force companies to clean up pollution”).

79. *See* State Bd. of Dental Exam’rs v. Bickham, 203 S.W.2d 563, 566 (Tex. Civ. App.—Dallas 1947, no writ) (protecting prosecutorial discretion from oversight by the State Board of Dental Examiners); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (analogizing criminal polluters to armed robbers who would attempt to ask for mandatory conflict resolution for their “misbehavior”).

80. *See* Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (negating the idea that polluters can be sufficiently deterred by curtailing statewide prosecutions).

[P]eople who make honest mistakes [and] get told not to do it again and, if necessary, [are required to] pay some penalty. We've seen too many cases of people who made honest mistakes being prosecuted criminally, whereas if those cases had gone through the TCEQ, they would not have come anywhere close to criminal prosecution.⁸¹

This justification for the law was best discredited by the Editorial Board of the Austin American-Statesman in the following quote: "If armed robbers had a lobby that made a pitch for mandatory conflict resolution or counseling for their clients who misbehave, they would have been laughed out of the Capitol."⁸² An accused's penitence has been accounted for in prosecutions across the state on a daily basis prior to the amended Water Code. There is no reason to infer that because citizens or companies are unaware of environmental laws that they are breaking, they should be shielded from prosecution. If Texas truly intends to address environmental concerns, the awareness of the general citizen should be raised and people should be educated about the dangers of actions that may not be widely known as an environmental infraction. This point cannot be stressed more strongly—the threat of criminal prosecution is a deterrent, and that is not "the case with the administrative process."⁸³ It should also be noted that there are many tiers to the justice system, and the threat of criminal prosecution, though fearsome sounding, does not always mean a jail term.⁸⁴ Often, prosecutors lessen penalties for first-time offenders, or otherwise use their judgment and discretion to avoid unfairly burdening a first-time offender.⁸⁵

81. *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636.

82. *Id.*

83. Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478. Environmental crimes are not crimes of passion, nor are they usually crimes with intent. Many are generally strict liability crimes where the mere occurrence is enough to show a violation. See TEX. WATER CODE ANN. § 7.147(a) (Vernon 2004) (stating that "[a] person commits an offense if the person discharges or allows the discharge of any waste or pollutant into any water in the state that causes or threatens to cause water pollution"). The same way speeding is dangerous in a work zone whether or not the speeder knows there are men working nearby, certain activities involving wastes, air, and water have been determined to be so detrimental to our environment that they are now illegal. *Id.* These actions do not require any criminal intent, or intent to cause damage. See *id.* § 7.147(b) (adding that "[a]n offense under this section may be prosecuted without alleging or proving any culpable mental state").

84. See Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (explaining that even through criminal prosecutions, restitution may be sought after remedy, and actual jail time only applied when proper clean-up measures are not taken).

85. See Telephone Interview with Roger Haseman, District Attorney, Harris County (Aug. 19, 2003) (stating that in Harris County, the majority of cases are plead out). This

The inference that a stronger need exists for maintaining consistency in environmental areas, in comparison to any other area of potentially criminal behavior, undermines the democratic system of justice.⁸⁶ Even with other environmental protection statutes, such as the Agriculture Code, the Department of Agriculture collects a penalty from pesticide permit violators, but is not empowered to bar concurrent criminal punishment if the act committed satisfies the elements of a criminal offense.⁸⁷

Because prosecutors are elected officials, they are inherently accountable to the public.⁸⁸ Prosecutors swear to “faithfully execute the duties of the office . . . and . . . to the best of [their] ability, preserve, protect, and defend the Constitution and laws of the United States and of this State.”⁸⁹ On the other hand, TCEQ officials are neither elected nor are they accountable in a public forum. Placing discretion in the hands of an executive agency’s bureaucratic hierarchy does not ensure the same level of candid, fair, and consistent evaluation that prosecutors apply every day to criminal situations.⁹⁰

The Texas Constitution divides the government into three branches—judicial, legislative, and executive.⁹¹ The powers of these branches are also divided, so that “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.”⁹²

implies that these prosecutors, though accused of overzealousness, work with the accused violators and their attorneys, contrary to the law’s proponents. *Id.*

86. See Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (accusing this law of insulting local governments where most of the enforcement of environmental crimes in Texas are pursued).

87. TEX. AGRIC. CODE ANN. §§ 76.156, 76.201, 76.202 (Vernon 2004).

88. See Interview with Ross Fischer, County Attorney, Kendall County, in Boerne, Tex. (Nov. 18, 2003) (asserting the necessity of elected officials retaining prosecutorial discretion to ensure widespread enforcement).

89. TEX. CONST. art. XVI, § 1.

90. *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (arguing that “[l]ocally elected prosecutors should not have to seek permission from an Austin agency to investigate and prosecute crime”); Interview with Ross Fischer, County Attorney, Kendall County, in Boerne, Tex. (Nov. 18, 2003) (stating that “[t]he changes in SB 1265 undermine the notions of local control and prosecutorial discretion. Locally elected prosecutors are accountable to the voters, and, therefore, are in the best position to take action against those who pollute our state’s natural treasures.”).

91. TEX. CONST. art. II, § 1.

92. *Id.*

Clearly, a constitutional stipulation is required before any powers of one branch can be given to another.⁹³

The Texas Constitution states that county and district attorneys are to “represent the State in all cases.”⁹⁴ Therefore, when the state must decide whom to prosecute, the county and district attorneys are constitutionally endowed with discretionary power.⁹⁵ While official duties of the judicial branch may be regulated by the legislature, the power granted to the officials cannot be portioned out to executive agencies.⁹⁶

93. See *Ex parte Barnes*, 959 S.W.2d 313, 319 (Tex. App.—Fort Worth 1997, pet. dismissed) (explaining that the effect of the separation-of-powers doctrine is that the “provision was designed to prohibit one branch of government from interfering with another branch’s exclusive power unless an express provision of the constitution authorizes the action”); cf. *Rodriguez v. State*, 953 S.W.2d 342, 353 (Tex. App.—Austin 1997, writ refused) (discussing powers devolved upon the legislature, but still upholding the idea that “power which has been granted to one department of government by the state constitution may be exercised only by that branch to the exclusion of others”); 60 TEX. JUR. 3D *Public Officers & Employees* § 211 (2003) (proclaiming that “where certain duties are imposed or specific powers are conferred on a designated officer, the Legislature cannot withdraw them from the officer, confer them on others, abridge them, or interfere with the officer’s right to exercise them, unless the constitution expressly so provides”).

94. TEX. CONST. art. V, § 21.

95. See *Brady v. Brooks*, 89 S.W. 1052, 1056 (Tex. 1905) (explaining that the right to prosecute for the state is constitutionally bestowed upon county and district attorneys, and as needed upon the attorney general); *Ex parte Austin Indep. Sch. Dist.*, 23 S.W.3d 596, 600 (Tex. App.—Austin 2000, pet. refused) (proclaiming that the main purpose of the constitutional provision creating the offices of district and county attorneys was “to make it the duty of the county attorney or district attorney, as the case might be, to prosecute the pleas of the state”); *Lone Starr Multi Theatres, Inc. v. State*, 922 S.W.2d 295, 298 (Tex. App.—Austin 1996, no writ) (citing the constitutional provision that creates the county and district attorney offices); *Holmes v. Morales*, 906 S.W.2d 570, 573 (Tex. App.—Austin 1995, writ granted), *rev’d on other grounds*, 924 S.W.2d 920 (Tex. 1996) (holding that “the Constitution provides for either the district attorney or the county attorney, jointly or singly, in the event either fails to act, to be the proper officer to represent the State in the district court”). Agencies may not interfere in the representation of the state by a county or district attorney, although they could have been present in their own capacity as an interested civil party. See *Tex. Dep’t of Pub. Safety v. Butler*, 941 S.W.2d 318, 319 (Tex. App.—Corpus Christi 1997, no writ) (holding the state agency unable to interfere with the prosecuting attorney’s authority to contest the expunction of an accused’s records).

96. See *Ex parte Barnes*, 959 S.W.2d at 319 (explaining that the effect of the separation-of-powers doctrine is that the “provision was designed to prohibit one branch of government from interfering with another branch’s exclusive power unless an express provision of the constitution authorizes the action”); *State v. Walker-Tex. Inv. Co.*, 325 S.W.2d 209, 212 (Tex. Civ. App.—San Antonio 1959, writ refused n.r.e.) (concluding that although the legislature may regulate powers, “the powers thus conferred by the Constitution upon these officials are exclusive. The Legislature cannot devolve them upon others. Nor can it interfere with the right to exercise them.”); cf. *Ex parte Davis*, 947 S.W. 2d 216, 219 (Tex. Crim. App. 1996) (en banc) (explaining the difference between asserting a partial power and interfering with the other branches’ delegation of their power); *Rodriguez*, 953

Two types of behaviors violate the separation-of-powers clause.⁹⁷ These violations occur when one branch either attempts to exercise the power of another or interferes with the proper exercise of power by another.⁹⁸ By enacting this new provision of the Water Code, the Texas Legislature has effectively violated the separation-of-powers doctrine in both separate and distinct manners.⁹⁹

The newly enacted Section 7.203 violates the separation-of-powers clause, first, by improperly delegating the power of prosecutorial discretion.¹⁰⁰ “When one branch of government assumes, or is delegated, to whatever degree, a power that is more properly attached to another branch,”¹⁰¹ a violation has occurred.¹⁰² The executive branch, specifically

S.W.2d at 353 (discussing powers devolved upon the legislature, but still upholding the idea that “power which has been granted to one department of government by the state constitution may be exercised only by that branch to the exclusion of others”). An agency may disagree with a prosecutor over a particular case and whether it should be prosecuted criminally. This would undoubtedly be an interference with the constitutional prosecutorial power.

97. *Hixson v. State*, 1 S.W.3d 160, 162 (Tex. App.—Corpus Christi 1999, no pet.); *see also* *Gen. Serv. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001) (explaining that the “separation-of-powers doctrine prohibits one branch of government from exercising a power inherently belonging to another branch”).

98. *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 240 (Tex. Crim. App. 1990); *Ex parte Hayward*, 711 S.W.2d 652, 655 (Tex. Crim. App. 1986); *Rushing v. State*, 50 S.W.3d 715, 724 (Tex. App.—Waco 2001, pet. granted), *aff’d*, 85 S.W.3d 283 (Tex. Crim. App. 2002); *Enlow v. State*, 46 S.W.3d 340, 346 (Tex. App.—Texarkana 2001, pet. ref’d); *Edwards v. State*, 10 S.W.3d 699, 704 (Tex. App.—Houston [14th Dist.] 1999, pet. dism’d); *Hixson*, 1 S.W.3d at 162; *State v. Montgomery*, 957 S.W.2d 581, 583 (Tex. App.—Houston [14th Dist.] 1997, writ ref’d); *Jackson v. State*, 861 S.W.2d 259, 260 (Tex. App.—Dallas 1993, no writ); *see also* *Gen. Serv. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001) (explaining the separation-of-powers doctrine); *Ex parte Giles*, 502 S.W.2d 774, 780 (Tex. Crim. App. 1973) (providing that “any attempt by one department of government to interfere with the powers of another is null and void”); *State ex rel. Smith v. Blackwell*, 500 S.W.2d 97, 101 (Tex. Crim. App. 1973) (declaring in the same language as in *Giles* that interference with constitutionally granted powers violates the separation-of-powers clause).

99. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005).

100. *See id.* (granting the final authority for the TCEQ to determine when and if prosecutors may proceed); 31 TEX. JUR. 3D *District & Municipal Attorneys* § 22 (2003) (declaring that “a statute giving to other officers the exclusive right to bring suits that the district or county attorney has a right to institute is unconstitutional”); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (lamenting that prosecutors must now ask permission from an Austin agency to prosecute environmental crimes).

101. *Hixson*, 1 S.W.3d at 162.

102. *Hayward*, 711 S.W.2d at 655; *Rushing*, 50 S.W.3d at 723-24; *Edwards*, 10 S.W.3d at 704; *Hixson*, 1 S.W.3d at 162; *Montgomery*, 957 S.W.2d at 583; *Jackson*, 861 S.W.2d at 261; *State v. Hardy*, 769 S.W.2d 353, 354 (Tex. App.—Houston [1st Dist.] 1989, no pet.); *see also* *Little-Tex Insulation Co.*, 39 S.W.3d at 600 (explaining how one branch of government

the TCEQ, is delegated the power of choosing the appropriateness of prosecuting criminal violations,¹⁰³ which is the proper authority of elected prosecutors.¹⁰⁴ This improperly delegated authority encroaches upon judicial power and therefore violates the Texas Constitution.¹⁰⁵

The new law also violates the separation-of-powers provision by unduly interfering with the judicial branch's ability to exercise its constitutional duties. "When one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers,"¹⁰⁶ the separation-of-powers clause is violated.¹⁰⁷ Interference with the judicial branch under this new law comes from both the executive and legislative branches.¹⁰⁸

cannot exercise any power that is granted to another); *Giles*, 502 S.W.2d at 780 (preventing one department of government from interfering with another); *Enlow*, 46 S.W.3d at 346 (recognizing the two ways in which the separation-of-powers clause may be violated); *Univ. of Tex. Health Sci. Ctr. v. Mata & Bordini, Inc.*, 2 S.W.3d 312, 317 (Tex. App.—San Antonio 1999, pet. denied) (acknowledging that "separation of powers doctrine means that a 'public officer or body may not exercise or otherwise interfere with a power constitutionally assigned to another public officer or body'" (quoting *Holmes v. Morales*, 906 S.W.2d 570, 573 (Tex. App.—Austin 1995, writ granted), *rev'd on other grounds*, 924 S.W.2d 920 (Tex. 1996))); *Ex parte Barnes*, 959 S.W.2d 313, 319 (Tex. App.—Fort Worth 1997, pet. dism'd) (explaining that the effect of the separation-of-powers doctrine is that the "provision was designed to prohibit one branch of government from interfering with another branch's exclusive power unless an express provision of the constitution authorizes the action"); *cf. Rodriguez v. State*, 953 S.W.2d 342, 353 (Tex. App.—Austin 1997, writ ref'd) (addressing powers bestowed upon the legislature, but still stating that "power which has been granted to one department of government by the state constitution may be exercised only by that branch to the exclusion of others").

103. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005).

104. See *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (explaining the benefit to the prosecutors retaining the authority and freedom to "protect their communities from environmental harm").

105. See TEX. CONST. art. II, § 1 (mandating the separation-of-powers).

106. *Hixson*, 1 S.W.3d at 162.

107. *Hayward*, 711 S.W.2d at 655; *Rushing*, 50 S.W.3d at 723-24; *Edwards*, 10 S.W.3d at 704; *Hixson*, 1 S.W.3d at 162; *Montgomery*, 957 S.W.2d at 583; *Jackson*, 861 S.W.2d at 261; see also *Little-Tex Insulation Co.*, 39 S.W.3d at 600 (explaining that the "separation-of-powers doctrine prohibits one branch of government from exercising a power inherently belonging to another branch"); *Giles*, 502 S.W.2d at 780 (providing "any attempt by one department of government to interfere with the powers of another is null and void"); *Enlow*, 46 S.W.3d at 346 (recognizing the two ways in which the separation-of-powers clause may be violated); *Mata & Bordini, Inc.*, 2 S.W.3d at 317 (stating that a public body cannot use those powers that belong to another body).

108. In an earlier, modified version of Senate Bill 1265, it was the Attorney General's Office that would receive this delegation of prosecutorial discretion. See Tex. S.B. 1265, 78th Leg., R.S. (2003) (Introduced Version) (establishing a proposed system of permission required from the office of attorney general, in conjunction with the TCEQ).

Section 7.203 of the Texas Water Code ensures this second type of unconstitutional encroachment in two ways. First, the legislature interferes with judicial branch power by apportioning constitutionally delegated discretionary power to executive agencies.¹⁰⁹ Additionally, the executive branch unduly interferes with the prosecutor's assigned power to represent the state in all cases by attempting to determine which permit violators should be prosecuted and which should not.¹¹⁰

The manner in which cases shall be decided is not properly placed in the hands of the TCEQ.¹¹¹ “[B]ased on the separation of powers clause of our state constitution, the question of when cases shall be decided and the manner in which they shall be decided, is a matter solely for the judicial branch of government.”¹¹²

B. *Section 7.203 Subjects Prosecutors to the Legislative Branch*

By enacting Section 7.203, the legislature has taken the discretion out of the hands of the prosecutor.¹¹³ Although the legislature is empowered

109. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005); *Holmes*, 906 S.W.2d at 574; see also Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (quoting Tarrant County District Attorney Tim Curry as saying “[c]riminalizing environmental destruction yet raising administrative barriers to timely and effective prosecution of those laws does not serve the public”); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (describing the process that now requires TCEQ approval for criminal prosecution of environmental crimes).

110. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005); see also Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (summarizing the process by stating that “[t]he state would then tell the prosecutor whether a violation occurred and whether it would be a civil or criminal case before the prosecutor could proceed with it”).

111. See Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (explaining that prosecutors feel that this bill is not in the best interest of Texas because the process actually creates a barrier to prosecution of environmental crimes “by forcing prosecutors to cut through red tape, while taking control away from local communities to enforce laws”); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (arguing that prosecutorial discretion is best left in the hands of the prosecutors); Interview with Ross Fischer, County Attorney, Kendall County, in Boerne, Tex. (Nov. 18, 2003) (asserting that this discretion should be left in the hands of locally elected officials).

112. Cf. *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 240 (Tex. Crim. App. 1990) (declaring unconstitutional a statute that interfered with a court's final judgment powers).

113. TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005); see also Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (clarifying the lack of efficiency in the process created by the Water Code amendment); Kevin Carmody, *State Has Veto in Charg-*

to regulate duties of prosecutors, the distinction must be drawn between regulating a particular area and interfering with the disposition of that power.¹¹⁴ This statute surpasses merely imposing guidelines upon discretion.¹¹⁵

The legislature has further been allowed to apply time limits upon speedy trials, but these regulations have only been permissible to the extent that they do not infringe upon the prosecutor's plenary duty to bring law violators to trial.¹¹⁶ Even when regulations are enacted to aid the prosecutors in the discharge of their duties, the legislature cannot compel the prosecutors to accept these services.¹¹⁷ The prosecutors may at their discretion decline assistance, and if the services are accepted, these services "are to be rendered in subordination to their authority."¹¹⁸

ing Polluters, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (bemoaning the process now in place which must be followed by prosecutors and their local investigators); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (arguing against requiring prosecutors to seek administrative approval before protecting the citizens of Texas).

114. See *Ex parte Davis*, 947 S.W.2d 216, 218-19 (Tex. Crim. App. 1996) (en banc) (distinguishing between regulation of a power and an actual interference of a constitutional power); *Ex parte Barnes*, 959 S.W.2d 313, 319 (Tex. App.—Fort Worth 1997, pet. dism'd) (explaining that the effect of the separation-of-powers doctrine is that the "provision was designed to prohibit one branch of government from interfering with another branch's exclusive power unless an express provision of the constitution authorizes the action"); *Coates v. Windham*, 613 S.W.2d 572, 576 (Tex. Civ. App.—Austin 1981, no writ) (interpreting the constitution to mean that the "proper interpretation is that this provision prohibits a transfer of a whole mass of powers from one department to another and it prohibits a person of one branch from exercising a power historically or inherently belonging to another department").

115. See TEX. WATER CODE ANN. § 7.203 (Vernon Supp. 2004-2005) (explaining that after receiving notice of the alleged violation, the TCEQ then notifies the peace officer who made the fact report whether or not to prosecute and, furthermore, "[a] prosecuting attorney may not prosecute an alleged violation if the commission determines that administrative or civil remedies are adequate and appropriate"); Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (stating that the TCEQ alone decides "whether it would be a civil or criminal case before the prosecutor could proceed with it").

116. See *Jones v. State*, 803 S.W.2d 712, 716 (Tex. Crim. App. 1991) (en banc) (finding that time requirements placed upon prosecutors do not reach the point of interference with their power to prosecute).

117. *State ex rel. Hancock v. Ennis*, 195 S.W.2d 151, 153 (Tex. Civ. App.—San Antonio 1946, writ ref'd n.r.e.).

118. *Id.*

C. *Section 7.203 Subjects Prosecutors to the Executive Branch*

“Under our state law, only county and district attorneys may represent the state in criminal prosecutions.”¹¹⁹ Therefore, if the executive branch, in the form of the TCEQ, attempts to curtail the prosecution or to employ their own prosecutorial discretion, the executive branch tramples the constitutional boundaries between branches.¹²⁰

Once the legislature attempts to devolve these exclusive powers upon the executive branch, the right to exercise powers conferred by the Constitution has been curtailed.¹²¹ Logically, the legislature may grant and take away powers.¹²² That authority does not apply, though, when the legislature did not grant the power in the first place. The prosecutorial representation in place in the State of Texas is a constitutional delegation.¹²³ Even a trial court is not given authority, either in its inherent powers or expressly by constitutional decree, to interfere with the prosecutor's authority to decide whom to prosecute.¹²⁴ The prosecutor's consent is required to dismiss a case, and if a trial court attempts to dismiss without the district or county attorney's authority, the trial court's actions are voided.¹²⁵

119. *State ex. rel. Hill v. Pirtle*, 887 S.W.2d 921, 930 (Tex. Crim. App. 1994); *see also* TEX. GOV'T CODE ANN. § 44.115 (Vernon 2004) (enacting the statutory creation of Criminal District Attorneys in Bexar County and further stating that these district attorneys “shall exclusively represent the state in all matters before those courts”). Note that this section of the Texas Government Code is under the Judicial Branch delineation of powers and duties. *Id.*

120. *See* Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (explaining that requiring prosecutors to receive permission before proceeding to prosecute will “seriously curtail” the prosecutions of environmental crimes).

121. *See* *Maud v. Terrell*, 109 Tex. 97, 100, 200 S.W. 375, 377 (Tex. 1918) (pointing out that under some situations, the court must decide whether the extent of the interference is merely regulatory or interference).

122. *Cf.* Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 318 (1989) (opining that “[i]f Congress wants the President to act and so instructs him, where is the conflict? After all, what Congress gives it can take away, again by the act of legislating.”).

123. TEX. CONST. art. V, § 21; *see also* *Pirtle*, 887 S.W.2d at 930 (indicating that district attorneys generally represent the State of Texas in all criminal proceedings).

124. *See* *State v. Johnson*, 821 S.W.2d 609, 613 (Tex. Crim. App. 1991) (en banc) (stating that “there is no general authority, written or unwritten, inherent or implied, which would permit a trial court to dismiss a case without the prosecutor's consent”).

125. *See id.* (recognizing the prosecutor's inherent power to dismiss a case).

D. *Even If Prosecutors Were Members of the Executive Branch, the Legislature Still Infringes upon the Powers of Another Branch*

Even if one assumed by the nature of a prosecutor's duties that district or county attorneys belong in the executive branch—an untenable position given the plain language of the Texas Constitution¹²⁶—Section 7.203 still violates the separation-of-powers clause.¹²⁷ Under this assumption, the power to represent the state is still a constitutional delegation of authority, rather than a statutory regulation created by the legislature.¹²⁸ Absent a similar constitutional provision, any attempt by the legislature to take that discretion out of the hands of prosecutors is still an infringement upon that power.¹²⁹ The strength of prosecutorial discretion will no doubt be diminished by spreading this power among enforcement departments within the executive branch.¹³⁰ As a result, the legislature could

126. See generally TEX. CONST. art. II (detailing the separation-of-powers between the executive, legislative, and judicial branches); TEX. GOV'T CODE ANN. § 402 (Vernon 1998) (defining the office of attorney general). The attorney general is the only state attorney provided for within the executive branch of Texas government. TEX. GOV'T CODE ANN. § 402 (Vernon 1998).

127. See generally TEX. CONST. art. II (describing the separation-of-powers between the three branches of the state government). Because of the changes made in the initial stages of this bill, it could be interpreted that the creators were aware of this problem and changed the bill from requiring oversight by the attorney general's office to oversight by the TCEQ. Compare Tex. S.B. 1265, 78th Leg., R.S. (2003) (Introduced Version) (authorizing the attorney general to evaluate alleged environmental violations followed by the attorney general's office offering "investigative, technical, and litigation assistance" and further stipulating that the TCEQ and attorney general together will decide "whether [available] administrative or civil remedies would adequately . . . address the alleged environmental violation"), with Tex. S.B. 1265, 78th Leg., R.S. (2003) (House Committee Report) (omitting any reference to input by the attorney general's office), and Tex. S.B. 1265, 78th Leg., R.S. (2003) (Engrossed Version) (creating the final version with discretion given solely to the TCEQ). Even so, the legislature has merely accomplished creating a separation-of-powers issue between the TCEQ and the judicial branch rather than between the attorney general's office and the judicial branch.

128. See *Holmes v. Morales*, 906 S.W.2d 570, 574 (Tex. App.—Austin 1995, writ granted), *rev'd on other grounds*, 924 S.W.2d 920 (Tex. 1996) (recognizing that the powers of state prosecutors are derived from Article V of the state constitution).

129. See *Ex parte Barnes*, 959 S.W.2d 313, 319 (Tex. App.—Fort Worth 1997, pet. dismissed) (noting that the separation-of-powers doctrine is a "provision [that] was designed to prohibit one branch of government from interfering with another branch's exclusive power unless an express provision of the constitution authorizes the action"); cf. *Rodriguez v. State*, 953 S.W.2d 342, 353 (Tex. App.—Austin 1997, writ refused) (discussing powers devolved upon the legislature, but still upholding the idea that "power which has been granted to one department of government by the state constitution may be exercised only by that branch to the exclusion of others").

130. See Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (reiterating the peril in requiring approval from the TCEQ before prosecuting environmental law viola-

effectively divide and conquer this constitutionally mandated authority.¹³¹

IV. SOLUTION

A. *Repeal Section 7.203 of the Texas Water Code*

As the Editorial Board of the Austin American-Statesman asserted, “Locally elected prosecutors should not have to seek permission from an Austin agency to investigate and prosecute crime, but absent intervention from the courts, that’s now the law. Laws can be repealed, and this is a prime candidate.”¹³² In a time when there has been much outcry for environmental cleanup, the best option would be to repeal this bill and allow the prosecutors to do their jobs. This Comment does not imply that the TCEQ will not address environmental law violations.¹³³ Nevertheless, the purpose of the TCEQ and the district and county attorney’s offices are simply not the same.¹³⁴ Further, it is clear that the discretion placed in the hands of prosecutors rarely appears in any other area of government. This power should remain solely with the locally elected, publicly accountable prosecutors.¹³⁵ Any misuse of that power can effectively be addressed by the citizens of Texas.

One of the underlying rationales of the separation-of-powers doctrine involves the idea that using the doctrine to control government is impor-

tors); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (arguing against making the enforcement of environmental crimes dependant upon decisions from an Austin bureaucracy).

131. Cf. *Brady v. Brooks*, 99 Tex. 366, 89 S.W. 1052, 1056 (Tex. 1905) (opining that “the Legislature could not take away from the county attorneys so much of their duties as practically to destroy their office”).

132. *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636.

133. Cf. Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (suggesting that prosecutors do not argue with the TCEQ’s motives, but do not feel that there will be an appropriate number of criminal case referrals to curtail the pollution in industrial areas of the state).

134. See Janet Elliott & Dina Cappiello, *Audit Critical of How Agency Collects Polluter Fines / Report Says Violators Aren’t Consistently Held Accountable*, HOUS. CHRON., Dec. 18, 2003, available at 2003 WL 68829540 (describing the goals of the TCEQ compliance with laws, rather than punitive consequences for pollution in Texas).

135. See Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (reiterating that control should remain in “local communities to enforce laws against everything from illegal dumping to dangerous emissions”); Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (opining that prosecutors are the better entity to properly address local concerns).

tant in order to thwart the exercise of arbitrary power.¹³⁶ Another applicable theory for the usefulness of separation-of-powers is to “neutralize conflicts of interest inherent in the governmental process.”¹³⁷ An independent judiciary, which in Texas includes prosecutors, is the “hallmark of the constitutional state.”¹³⁸ This same independence does not exist in the system of state agencies, such as the TCEQ.¹³⁹

Even the federal separation-of-powers doctrine, which is admittedly rarely applied, is violated when “those powers, which, because of their nature, are assigned by the Constitution to one department exclusively”¹⁴⁰ but are usurped by another branch.¹⁴¹ That is precisely the situation caused by the new law. While it may be true that the “headless fourth branch” of government, meaning administrative agencies, have

136. See *Coates v. Windham*, 613 S.W.2d 572, 576 (Tex. Civ. App.—Austin 1981, no writ) (stating that the separation-of-powers clause “was designed, as were other checks and balances, to prevent excesses”); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303 (1989) (explaining the reasons for the separation-of-powers).

137. Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 304 (1989) (explaining the “rule of law version” of the separation-of-powers doctrine).

138. See *id.* at 308 (stating that “[t]he great cases of our system, from *Marbury v. Madison* to *United States v. Nixon*, testify to the bolstering value of independence to the judicial process”) (citations omitted).

139. See Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (quoting Travis County District Attorney Ronnie Earle as saying that “[o]ne state agency is easier to control than 327 Texas prosecutors, whose first allegiance is to their local constituents who live in the communities being polluted”).

140. 16A AM. JUR. 2D Constitutional Law § 251 (1998); see also *Enlow v. State*, 46 S.W.3d 340, 346 (Tex. App.—Texarkana 2001, pet. ref’d) (recognizing the two ways in which the separation-of-powers clause may be violated); *Ex parte Barnes*, 959 S.W.2d 313, 319 (Tex. App.—Fort Worth 1997, pet. dism’d) (explaining that the effect of the separation-of-powers doctrine is that “[t]he provision was designed to prohibit one branch of government from interfering with another branch’s exclusive power unless an express provision of the constitution authorizes the action”).

141. See *Gen. Serv. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001) (explaining that the “separation-of-powers doctrine prohibits one branch of government from exercising a power inherently belonging to another branch”); *Univ. of Tex. Health Sci. Ctr. v. Mata & Bordini, Inc.*, 2 S.W.3d 312, 317 (Tex. App.—San Antonio 1999, pet. denied) (acknowledging that “separation-of-powers doctrine means that a ‘public officer or body may not exercise or otherwise interfere with a power constitutionally assigned to another public officer or body’”); cf. *Rodriguez v. State*, 953 S.W.2d 342, 353 (Tex. App.—Austin 1997, writ ref’d) (discussing powers devolved upon the legislature, but still upholding the idea that “power which has been granted to one department of government by the state constitution may be exercised only by that branch to the exclusion of others”).

often been assigned legislative and executive duties,¹⁴² there is no justification for divvying up powers placed in the hands of accountable Texas prosecutors, who are members of the judicial branch.¹⁴³

B. *Courts Rule Section 7.203 Unconstitutional*

The doctrine of separation-of-powers has historically been used to create checks and balances to protect efficient government from powerful, self-interested coalitions.¹⁴⁴ According to one commentator:

[It is the] duty of the courts to attempt to enforce the true meaning, intent, and purpose of the constitutional provision declaring distribution of governmental powers, notwithstanding that there is necessarily some mingling and overlapping of powers between the three departments of government which cannot be avoided. And it remains true, as a general rule, that the powers confided by the constitution to one of these departments cannot be exercised by any other.¹⁴⁵

An attempt to employ the court system to determine the unconstitutionality of Section 7.203 would effectively defeat the law, but using the court system in this instance is not a timely or efficient method. It could

142. 16A AM. JUR. 2D *Constitutional Law* § 251 (1998) (implying that the administrative agencies are purposefully not placed in a branch of government in order to avoid the specific determination of exactly whose powers these agencies should share).

143. The federal treatment of prosecutors is different from Texas, as is the federal treatment of the nondelegation clause. See Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1338 (1990) (explaining the history of the federal constitution and the freedom with which the United States Congress has been allowed to delegate its rulemaking authority).

144. See Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303 (1989) (discussing the historical interpretations of the federal separation-of-powers clause).

145. 16A AM. JUR. 2D *Constitutional Law* § 251 (1998) (arguing against bills of attainder by Congress because they are considered a judicial function that is constitutionally prohibited); see also *Little-Tex Insulation Co.*, 39 S.W.3d at 600 (explaining that “[t]he separation-of-powers doctrine prohibits one branch of government from exercising a power inherently belonging to another branch”); *Enlow*, 46 S.W.3d at 346 (recognizing the two ways in which the separation-of-powers clause may be violated); *Edwards v. State*, 10 S.W.3d 699, 704 (Tex. App.—Houston [14th Dist.] 1999, pet. dismissed) (per curiam) (defining a violation of the separation-of-powers doctrine); *Ex parte Barnes*, 959 S.W.2d at 319 (explaining that the effect of the separation-of-powers doctrine is that “[t]he provision was designed to prohibit one branch of government from interfering with another branch’s exclusive power unless an express provision of the constitution authorizes the action”); cf. *Rodriguez*, 953 S.W.2d at 353 (discussing powers devolved upon the legislature, but still upholding the idea that “power which has been granted to one department of government by the state constitution may be exercised only by that branch to the exclusion of others”).

take years for such a case to work its way through the court systems.¹⁴⁶ Therefore, while this is a possible solution, it is not the optimal one.

C. *Any Texas Prosecutor Can Request an Opinion from the Attorney General*

The attorney general at times provides guidance for the legal profession in Texas; at the request of an official, the attorney general is required to respond to the legal question presented.¹⁴⁷ While the attorney general's opinion is not dispositive, meaning it would not repeal the law or create precedent, it is highly persuasive to Texas officials.¹⁴⁸ An attorney general's opinion acts as law in Texas until an appellate court rules otherwise.¹⁴⁹ Because of the unique aspects of the Texas Constitution, the attorney general's response could likely support the view that this law is unconstitutional.¹⁵⁰

V. CONCLUSION

This Comment does not imply that the TCEQ will not continue to administratively address polluters who violate their permits. It does assert,

146. See Telephone Interview with Roger Haseman, District Attorney, Harris County (Aug. 19, 2003) (paraphrasing Mr. Haseman's belief that though there is a separation-of-powers issue with the new law, it will take years to get any case law on the subject).

147. See TEX. GOV'T CODE ANN. § 402.042 (Vernon 1998) (promulgating that "the attorney general shall issue a written opinion on a question affecting the public interest or concerning the official duties of the requesting person," and then listing those officials who may request an opinion); TEX. GOV'T CODE ANN. § 402.043 (Vernon 1998) (stating that, "The attorney general shall advise a district or county attorney . . . in the prosecution or defense of an action in which the state is interested").

148. See Website of the Texas Attorney General, available at <http://www.oag.state.tx.us/opinopen/opinhome.shtml> (last visited Oct. 18, 2004) (determining that without subsequent modification, "an Attorney General Opinion is presumed to correctly state the law," and it therefore "carries the weight and force of law unless or until it is modified or overruled").

149. *Id.*

150. This may be one reason why the bill itself was changed. The originally introduced version included discretion imposed by the attorney general rather than the TCEQ. Tex. S.B. 1265, 78th Leg., R.S. (2003) (Introduced Version). The bill was modified, and the Senate Committee Report version modified the middle man in prosecutions from the attorney general to the TCEQ. Compare Tex. S.B. 1265, 78th Leg., R.S. (2003) (Introduced Version) (authorizing the attorney general to evaluate alleged environmental violations followed by the attorney general's office offering "investigative, technical, and litigation assistance" and further stipulating that the TCEQ and the attorney general together will decide "whether available administrative or civil remedies would adequately address the alleged violation"), with Tex. S.B. 1265, 78th Leg., R.S. (2003) (House Committee Report) (omitting any reference to input by the attorney general's office), and Tex. S.B. 1265, 78th Leg., R.S. (2003) (Engrossed Version) (creating the final version with discretion given solely to the TCEQ).

though, that the added penalty of criminal prosecution is a heavy deterrent that can and should be used separately from, and in addition to, the TCEQ's efforts.¹⁵¹ The enactment of this law is not in the best interests of prosecutors, citizens who have a say in what their elected officials do, or strict policies against pollution of Texas.¹⁵² The fact that these criminal prosecutorial referrals will not be made on a regular basis was confirmed by a lawyer who advised the business groups and lobbied for the legislation.¹⁵³ It seems that the only people in Texas who do not want polluters to be punished are the polluters themselves and their paid political representatives.¹⁵⁴

The TCEQ levies its fines, but it is more of an incentive to follow the law to add the possibility of criminal prosecution. Companies compute fines and permit payments into the cost of doing business. A highly prof-

151. See Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (stating that this amendment will "seriously curtail" prosecutions by usurping control from local communities); Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (paraphrasing Travis County Assistant District Attorney Kevin Morse as saying that "[w]hile financial penalties can be similar under the criminal and administrative processes, the threat of jail time and a criminal conviction offer an added deterrent"); Janet Elliott & Dina Cappiello, *Audit Critical of How Agency Collects Polluter Fines / Report Says Violators Aren't Consistently Held Accountable*, HOUS. CHRON., Dec. 18, 2003, available at 2003 WL 68829540 (asserting that "[d]elays in enforcing pollution laws could be harming the environment and costing the state money").

152. Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (citing Tarrant County District Attorney Tim Curry's letter to Texas lawmakers that says "[c]riminalizing environmental destruction yet raising administrative barriers to timely and effective prosecution of those laws does not serve the public").

153. See Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (assuring the readers that "if [these] cases had gone through the TCEQ, they would not have come anywhere close to criminal prosecution"); Janet Elliott & Dina Cappiello, *Audit Critical of How Agency Collects Polluter Fines / Report Says Violators Aren't Consistently Held Accountable*, HOUS. CHRON., Dec. 18, 2003, available at 2003 WL 68829540 (citing a spokesperson for the TCEQ as stating that bringing companies into compliance with the laws is the foremost goal of the TCEQ); *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636 (lamenting that a "big treat for polluters fell out of the legislative piñata this year" and that Texas prosecutors were not known for being overly aggressive with possible polluters before this legislation).

154. *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636; see also Texas District & County Attorneys Association Staff Counsel Shannon Edmonds, Address at the Texas District & County Attorneys Association 2003 Elected Prosecutor Conference (Dec. 10, 2003) (referring to SB 1265 by uttering such quotable phrases as "money talks" and "we got burned").

itable company may feel that paying these fines is a justifiable expense compared to the high expense of cleaning up facilities.¹⁵⁵ In this scenario, administrative penalties fall short of true deterrents. On the other hand, there is no cost-benefit analysis to compute employing the price of a jail sentence or a criminal record for violating environmental protection laws.

“This is no cosmetic change to protect hapless citizens from overzealous prosecutors. It is a direct attack on local discretion by locally elected prosecutors to protect their communities from environmental harm.”¹⁵⁶ This law merely adds to the steps necessary to bring charges against a polluter.¹⁵⁷ Therefore, law enforcement officers will be less likely to make environmental prosecutions a priority.¹⁵⁸ The consistency that will be created by this layering of bureaucracy will be a consistent lack of prosecution.¹⁵⁹

Aside from the fact that allowing this amendment to affect prosecutorial discretion is unconstitutional, this law is not beneficial.¹⁶⁰ “The changes in SB 1265 undermine the notions of local control and prosecutorial discretion. Locally elected prosecutors are accountable to

155. See Janet Elliott & Dina Cappiello, *Audit Critical of How Agency Collects Polluter Fines / Report Says Violators Aren't Consistently Held Accountable*, HOUS. CHRON., Dec. 18, 2003, available at 2003 WL 68829540 (quoting Mary Kelly, an Environmental Defense Attorney, as saying that the audit of the TCEQ shows that “under the state’s current policy, it can pay to pollute”).

156. *Prosecution of Environmental Crime a Job for Local Officials*, AUSTIN AM.-STATESMAN, Oct. 22, 2003, at A14, available at 2003 WL 56777636.

157. See Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (emphasizing the added “red tape” in requiring TCEQ approval before prosecution); Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (stressing that “[p]rosecutors and law officers say they are concerned that the commission reviews will mean delays that could compromise some cases” and further stating that “steps involved in the reviews may discourage police officers from smaller agencies from pursuing possible cases”).

158. See Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (forewarning of the danger that “officers from agencies with limited manpower may not bother to file cases”).

159. A recent audit of the TCEQ’s penalty recovery process has already shown the agency to be, at times, 72 days late in enforcing violations. Janet Elliott & Dina Cappiello, *Audit Critical of How Agency Collects Polluter Fines / Report Says Violators Aren't Consistently Held Accountable*, HOUS. CHRON., Dec. 18, 2003, available at 2003 WL 68829540.

160. Karen Brooks, *DA Says Bill Hinders Environmental Prosecution*, FORT WORTH STAR-TELEGRAM, May 6, 2003, available at 2003 WL 19945068 (quoting Tarrant County District Attorney Tim Curry as saying that Section 7.203 “does not serve the public”); Kevin Carmody, *State Has Veto in Charging Polluters*, AUSTIN AM.-STATESMAN, Oct. 19, 2003, at A1, available at 2003 WL 56777478 (claiming that prosecutors believe this law to be an effort to “alter the legal process because it has become effective in punishing polluters”).

the voters, and, therefore, are in the best position to take action against those who pollute our state's natural treasures."¹⁶¹

161. Interview with Ross Fischer, County Attorney, Kendall County, in Boerne, Tex. (Nov. 18, 2003).