

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

July 19, 2019

Nickita S. Banks, Esq.
Attorney, Jefferson County Board of Supervisors
Post Office Box 124
Port Gibson, Mississippi 39150-0124

Re: Separation of Powers Doctrine

Dear Ms. Banks:

Attorney General Jim Hood is in receipt of your opinion request and has assigned it to me for research and reply.

OFFICIAL OPINION

Background and Issues Presented

Your request states, in pertinent part:

I currently serve as the Board Attorney for the Jefferson County Board of Supervisors. I also serve as the current Claiborne County Justice Court Judge for the Western District of Claiborne County. In Jefferson County, the position of County Prosecutor is an appointed position, not an elected one. The Jefferson County Prosecutor position is currently vacant after the resignation of the former County Prosecutor. . . . Before acting in the capacity as County Prosecutor for Jefferson County and receiving any additional compensation, I would like to know if this would create a separation of powers issue. And if it creates a separation of powers issue, does it rise to the point of being a violation with which this office would have issue.

Brief Response

Yes. Serving as judge and prosecutor would violate the separation of powers doctrine. Judges exercise core powers of the judicial branch. Prosecutors exercise core powers of the executive branch. The effect of violating the separation of powers doctrine is

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found in Article 1, Section 2 of the Mississippi Constitution of 1890, which states: "the acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments."

Response

The separation of powers doctrine places limitations on an individual's ability to serve simultaneously in different branches of government. See Article 1, Sections 1 and 2, Miss. Const. (1890). You have asked us if it is a violation for you to serve as justice court judge, board attorney, and prosecutor. In order to make this determination, a determination must be made as to what branch of government each job falls in and if the position exercises core powers. A person who exercises "core powers" in one branch of government cannot simultaneously hold a position in another branch of government if that position also exercises "core powers." "Core power" has been defined by the Court to include those circumstances "where the acts are 'ongoing and are in the upper level of governmental affairs' and have a substantial policy-making character." *Dye v. State*, 507 So.2d 332 (Miss. 1987)(quoting Alexander, 441 So.2d at 1337).

This office has consistently opined that judges exercise powers at the core of the judicial branch. See MS AG Op., Perkins (July 31, 2015); MS AG Op., Glover (July 8, 2005); MS AG Op., Alford (September 17, 1999). Additionally, this office has opined that a prosecutor exercises core powers of the executive branch. See MS AG Op., Littleton (March 14, 2003); MS AG Op., Moore (July 8, 1993); MS AG Op., Haley (December 28, 2009). Conversely, this office has opined that a board attorney does not exercise core powers. See MS AG Op., Fondren (December 16, 2005); MS AG Op., Sanford (February 10, 2017); MS AG Op., Russell (March 12, 2012). Therefore, serving as justice court judge and prosecutor would result in a violation of the separation of powers doctrine.

With regard to violating the separation of powers doctrine, Article 1 Section 2 states:

No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.

(Emphasis added). In the event that a justice court judge has accepted the position of county prosecutor, he would have automatically vacated his position as justice court judge under the separation of powers doctrine. Any compensation paid to any individual who has vacated his position would be impermissible. We refer you to the Office of the State Auditor for further guidance on this matter.

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If we may be of further assistance, please advise.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By: 
Emiko Hemleben
Special Assistant Attorney General

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