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## A Pandemic of Separation of Powers Violations in Texas: The Interrelationship of the Texas Disaster Act and Texas Gov't Code Section 22.0035

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## ARTICLE

# A PANDEMIC OF SEPARATION OF POWERS VIOLATIONS IN TEXAS: THE INTERRELATIONSHIP OF THE TEXAS DISASTER ACT AND TEXAS GOV'T CODE SECTION 22.0035

RON BEAL\*

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#### ABSTRACT

This Article is on the interrelationship of the Texas Disaster Act and Texas Government Code Section 22.0035. The author demonstrates that the Governor of Texas and the Texas Supreme Court have grossly violated the separation of powers on a continuing basis since March 29, 2020 by Governor Abbott issuing Executive Order 13, which prohibits the granting of bail to anyone awaiting trial, and the Texas Supreme Court's unwillingness to invalidate that order administratively or judicially. Finally, the Article addresses the nearly one thousand district and county court judges who are constantly violating the separations of powers by failing to invalidate the order, choosing instead to follow it and thereby subject thousands of Texas citizens to unlawful incarceration. The violation of the Texas Constitution by two branches of government who are wholly ignoring clear and unambiguous statutes passed by the Texas legislature is simply alarming.

#### I. INTRODUCTION

On Thanksgiving Day in 2017, Damon Allen, a 41-year-old highway patrol trooper, was gunned down during a traffic stop near Fairfield, which is a Texas town approximately sixty miles east of Waco, Texas.<sup>1</sup> The suspect was 33-year old Dabrett Black, who was out of jail on bond.<sup>2</sup> Prior to the killing, he had been arrested for allegedly assaulting a Smith County deputy.<sup>3</sup> What heightened the outcry of the trooper's death was a bail reform bill,

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1. Jolie McCullough, *Texas Gov. Greg Abbott Proposes Bail Reform after Death of DPS Trooper*, THE TEX. TRIB. (Aug. 7, 2018, 9:00 PM), <https://www.texastribune.org/2018/08/07/greg-abbott-bail-reform-proposal/> [https://perma.cc/8Y6Z-BRME].

2. *Id.*

3. *Id.*

which failed to pass in the 2017 Legislative Session.<sup>4</sup> The author of the bill was Senator John Whitmire, a Democrat from Houston.<sup>5</sup> He responded to the tragic news by stating: “If we’re going to do bail bond reform, we ought to do real bail bond reform and look at the bill that passed the Senate last session . . . . The first part of my proposal would have prevented that guy from having a bond at all.”<sup>6</sup>

In the 2019 Legislative Session, Senator Whitmire and State Representative Andrew Murr, a Republican from Junction, filed identical bills in the two houses for consideration of Senator Whitmire’s bill that failed in the 2017 Session.<sup>7</sup> However, the governor worked with State Representative Kyle Kacal of College Station to achieve his goal of bail reform.<sup>8</sup> The major difference between Representative Kacal’s bill and the other two bills filed was that it would vest with the governor’s office the power to “develop the tool and recommend best practices for pretrial release decisions.”<sup>9</sup> Even though Representative Kacal’s H.B. 2020 did in fact pass in the house of representatives, it died in the senate.<sup>10</sup>

Thereby, through two legislative sessions, Governor Abbott’s goal had been wholly frustrated: “Our goal at the same time is to make sure that if there are criminals who are dangerous who pose a threat to a law enforcement officer or the community, we’re going to get them off the street and keep them off the street.”<sup>11</sup>

Not long after the governor’s legislative defeat, it goes without need of citation that a very different, much more catastrophic, ongoing event

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4. *See id.* (notating the bill passed in the senate chamber but did not pass in the house chamber); *see also* Tex. S.B. 1338, 85th Leg., R.S. (2017) (indicating twenty-six senators voted “yea” to pass the bill).

5. *See* Tex. S.B. 1338, 85th Leg., R.S. (2017) (indicating bill by Senator Whitmire).

6. McCullough, *supra* note 1.

7. *See* Tex. S.B. 628, 86th Leg., R.S. (2019); Tex. H.B. 1323, 86th Leg., R.S. (2019).

8. *See* Jolie McCullough, *Gov. Greg Abbott’s Influence has Shifted Texas Bail Reform Efforts Toward a Bill that Would Give Him More Control*, THE TEX. TRIB. (Mar. 18, 2019, 12:00 PM), <https://www.texas-tribune.org/2019/03/18/bail-reform-texas-legislature-damon-allen-act-bills/> [<https://perma.cc/6KLR-2G53>] (noting Representative Kacal’s comments that he worked with Governor Abbott to craft the bill).

9. *Id.*

10. *See* Mary Mergler, *What Went Right with Criminal Justice Reform in the 86th Session*, TEX. APPLESEED (June 27, 2019), <https://www.texasappleseed.org/blog/what-went-right-criminal-justice-reform-86th-session> [<https://perma.cc/L4TP-4THL>] (noting bail reform failed to pass during the 86th Legislative Session).

11. *See* McCullough, *supra* note 1 (quoting Governor Abbott’s comments on criminal justice reform).

commenced with the invasion of the United States from China, by the coronavirus, which soon turned into a nationwide pandemic. This ongoing event would seem to have absolutely no relationship to decisions made for pre-trial bail. However, on March 13, 2020, the governor declared that the pandemic had created an imminent disaster within the State of Texas, and pursuant to the powers vested in his office by Texas Government Code Section 418.014, he would exercise such powers as necessary to ensure the public safety.<sup>12</sup>

Barely more than two weeks after issuing twelve other executive orders applying to the general public and Texas businesses, and with no warning at all, Governor Abbott issued Executive Order 13.<sup>13</sup> This order held, without factual justification, that many counties were “considering broad-scale releases of arrested or jailed individuals,” potentially including those who have committed felonies, due to the pandemic causing the need to reduce jail populations.<sup>14</sup> The governor concluded that this was a grave threat to public safety and it would hinder efforts to combat the pandemic.<sup>15</sup> The governor then ordered the suspension of four criminal statutes, three of which allowed for pre-trial bail and one that allowed for the reduction of one’s sentence for good conduct.<sup>16</sup>

These were the exact statutes related to pre-trial release and good time sentence-reduction that the legislature had considered and failed to amend and/or repeal in 2019 by H.B. 2020 to establish a more sensible system.<sup>17</sup> So too, they are also the same statutes targeted for amendment or repeal by the governor in which he had suffered rare defeats within the legislature.<sup>18</sup> Yet, there were immediate concerns from health experts that “[j]ails and prisons are overcrowded, inmates share everything from cells to showers to

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12. The Governor of the State of Tex., Proclamation of March 13, 2020, 45 Tex. Reg. 2087, 2094 (2020).

13. The Governor of the State of Tex., Executive Order GA-13, 45 Tex. Reg. 2361, 2368–69 (2020).

14. *Id.* at 2369.

15. *Id.*

16. *Id.* (mentioning specifically the following sections from the Texas Code of Criminal Procedure: Section 17.03 Personal Bond; 17.151 Release on Personal Bond if Delay of Trial; 15.21 Release on Personal Bond if Not Timely Demanded; 42.032 Good Conduct-Reduction of Sentence; and 42.035 Release with Electronic Monitoring).

17. Tex. H.B. 2020, 86th Leg., R.S. (2019).

18. *See* Mergler, *supra* note 10 (“Comprehensive bail reform was derailed by the introduction of a weaker bill with the [g]overnor’s backing.”).

dining spaces, and inmates have few resources for proper hygiene.<sup>19</sup> Without room to social distance, proper hygiene becomes even more important. [However,] most correctional facilities do not provide soap, and hand sanitizer has been banned in most prisons because it can be used to brew toxic alcoholic drinks.”<sup>20</sup>

Despite these obvious concerns, one might be willing to defer to the governor when dealing with such a catastrophic pandemic. However, soon after the issuance of Executive Order 13, Attorney General Paxton issued a press release stating, “The unlawful release of 5,000 potentially violent criminals would directly endanger Texans. A health crisis cannot be used as an excuse to override the rule of law.”<sup>21</sup>

Yet, the governor’s and attorney general’s official statements of wholly illegal activities by county and state officers were made with absolutely no facts or witness testimony to verify it, and the attorney general came up with a figure, with absolutely no proof, of 5000 felons fleeing through the streets of Texas!<sup>22</sup> Finally, the attorney general cites the “rule of law,”<sup>23</sup> but would that not be fulfilled by only allowing the release of those inmates that the four current laws allow rather than suspending them as the governor did in his executive order?

The intent and good faith of the governor and attorney general may be debatable, but the conversation radically changes if it can be established that he knew or clearly should have known, as a licensed attorney himself, that he simply had no statutory power under Chapter 418 to suspend these criminal laws. The governor relied solely on this statutory provision in Executive Order 13.<sup>24</sup>

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19. Jerusalem Demsas, *80 Percent of Those Who Died of Covid-19 in Texas County Jails were Never Convicted of a Crime*, VOX (Nov. 12, 2020, 2:50 PM) (citation omitted) (internal quotation marks omitted), <https://www.vox.com/2020/11/12/21562278/jails-prisons-texas-covid-19-coronavirus-crime-prisoners-death> [<https://perma.cc/SED4-MCKJ>].

20. *Id.*

21. Press Release, Ken Paxton, Attorney General of Texas, AG Paxton Defends Governor Abbott’s Executive Order Prohibiting the Release of Dangerous Individuals from Dallas Jails (Apr. 15, 2020), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-defends-governor-abbotts-executive-order-prohibiting-release-dangerous-individuals-dallas> [<https://perma.cc/V3FA-QQCC>].

22. *See id.*

23. *Id.*

24. The Governor of the State of Tex., Executive Order GA-13, 45 Tex. Reg. 2361, 2369 (2020).

## II. TEX. GOV'T CODE, CHAPTER 418: THE POWER OF THE TEXAS GOVERNOR DURING A STATE DISASTER

### A. *Reading the Statute as a Whole*

It is true that, Governor Abbott, in issuing Executive Order 13, was acting pursuant to his constitutional authority. Article IV, Section 10 of the Texas Constitution grants him the power to faithfully execute the laws.<sup>25</sup> Yet, that power only extends as far as the constitutional words make clear, that is, the power is governed and limited by the words in the statute. Therefore, the existence and/or extent of the governor's power is based solely on statutory interpretation and the final determination of what that law means is for the judiciary to decide.<sup>26</sup>

A cardinal rule of statutory construction is that any particular word or phrase must be consistent with the statute's reading as a whole.<sup>27</sup> In construing Chapter 418 in its entirety, there is absolutely no express mention of the power of the governor to affect the workings of the judiciary or suspend criminal laws. The Supreme Court of Texas has often held that "every word of a statute must be presumed to have been used for a purpose. Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose."<sup>28</sup> The legislature clearly knows how to write "judiciary" and "criminal laws" or even "penal laws" and it simply did not do so. There can be no question that these omissions were deliberate.

### B. *The Governor May Suspend Regulatory Laws and Agency Rules*

In Executive Order 13, the governor first, specifically relies upon Section 418.016(a),<sup>29</sup> which provides that "[t]he governor may suspend the provisions of any regulatory statute prescribing the procedure for conduct

25. TEX. CONST. art. IV, § 10.

26. See *Havlen v. McDougall*, 22 S.W.3d 343, 345 (Tex. 2000) (noting statutory interpretation is a question of law, not fact); see also, Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 351–53 (2012) (referring to the judiciary as a "caregiver" of a statute).

27. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011); *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 352 (Tex. 2009) (explaining the steps of statutory construction); see Beal, *supra* note 26 at 374–75 (discussing the analysis of a statute as a whole).

28. *In re Bell*, 91 S.W.3d 784, 790 (Tex. 2002) (citations omitted) (quoting *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981)); see also Beal, *supra* note 26 at 397–98 ("When the legislature includes a provision in one part of a statute, but omits it in another, that may be precisely what the legislature intended.").

29. The Governor of the State of Tex., Executive Order GA-13, 45 Tex. Reg. 2361, 2369 (2020).

of state business . . . or rules of a state agency . . . .”<sup>30</sup> When the legislature uses a term with an accepted legal meaning without a statutory definition, the Supreme Court of Texas has held it was intended by the legislature for it to be given its legal meaning.<sup>31</sup> The use of the phrase “regulatory statutes” has no ordinary meaning, but it is one used by lawyers and courts.<sup>32</sup> It is asserted this phrase is so commonly understood within the law, that it is undisputed the phrase includes only civil laws where most, but not all, are to be administered by executive agencies with rulemaking authority to fulfill the purposes of the statute.<sup>33</sup>

However, since at least 1972, the United States Supreme Court has made a distinction between regulatory statutes which regulate businesses that are civil in nature, and criminal statutes which are penal in nature.<sup>34</sup> That is the exact language of Chapter 418 quoted above that allows the suspension of regulatory statutes “for [the] conduct of state business.”<sup>35</sup> The Texas Supreme Court, the Texas Court of Criminal Appeals, and many other courts of appeals have cited to the same definition as the United States Supreme Court in making the distinction between regulatory and criminal laws.<sup>36</sup> Statutes related to the conduct of business have no relationship to the criminal justice system or its laws. In all of the cited cases, the courts all refer to the fact that, in contrast to civil laws regulating business, the legislature adopts penal or criminal laws.<sup>37</sup>

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30. TEX. GOV'T CODE ANN. § 418.016(a).

31. See *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942) (indicating existing statutes and court decision determine the meaning and effect of other statutes' language); *Shook v. Walden*, 304 S.W.3d 910, 917 (Tex. App.—Austin 2010, pet. denied) (“We should also read every word, phrase, and expression in a statute as if it were deliberately chosen, and likewise presume that words excluded from the statute are done so purposefully.”); see also Beal, *supra* note 26 at 386–88 (explaining how a term is defined within a statute).

32. See *infra* notes 34, 36–37 and accompanying discussion.

33. See generally RON BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE ch. 1 (23rd ed. 2020).

34. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162–63 (1972).

35. TEX. GOV'T CODE ANN. § 418.016(a) (emphasis added).

36. *Pennington v. Singleton*, 606 S.W.2d 682, 689 (Tex. 1980) (citing *Papachristou*, 405 U.S. at 162); *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. 1979) (same); *Anding v. City of Austin*, No. 03-18-00307-CV, 2020 WL 2048255, at \*5 (Tex. App.—Austin Apr. 29, 2020, no pet.) (mem. op.) (same); *City of Houston v. Harris Cnty Outdoor Adv. Ass'n*, 732 S.W.2d 42, 51 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (same); *Huett v. Texas*, 672 S.W.2d 533, 537 (Tex. App.—Dallas 1984, no writ).

37. *Pennington*, 606 S.W.2d at 689; *Ely*, 582 S.W.2d at 419; *Anding*, 2020 WL 2048255, at \*5; *Harris Cnty Outdoor Adv. Ass'n*, 732 S.W.2d at 51; *Huett*, 672 S.W.2d at 537.



It also goes without citation that the phrases “criminal law” or “penal law” are the only phrases used by the legislature for laws that set forth prohibitions that will result in a criminal fine, incarceration, or other punishment. It is simply absurd and nonsensical to read the phrase “regulatory statutes” to include criminal or penal laws when not so stated or defined.<sup>38</sup> The glaring omission of these phrases from the statute, by itself, is compelling evidence that the legislature had absolutely no intention of empowering the governor to suspend such laws.<sup>39</sup>

In addition, the title of this section of the statute is “Suspension of Certain Laws and Rules.”<sup>40</sup> The plain meaning of these words makes clear, the legislature was focusing on “certain” civil, regulatory statutes and the rules of state agencies. The legislature did not state “any and all” laws or “the laws of the State of Texas.” The legislature deliberately stated the governor may suspend regulatory laws and rules.<sup>41</sup> That was it and it was deliberate.

Also, another canon of statutory construction mandates that the courts read a term within its phrase and sentence, and not in isolation.<sup>42</sup> For a court should not give one provision a meaning that is out of harmony or inconsistent with the other provisions, although it might be susceptible to such a construction standing alone.<sup>43</sup> The statute speaks in terms of regulatory laws and the rules of a “state agency.”<sup>44</sup> By the legislature adopting the phrase “state agency,” not defining the phrase and not merely stating “agency” or “governmental body,” the legislature was clearly referring, once again, to state agencies who enforce civil and not criminal law. This is so, for the courts will always presume the legislature adopts a law with full knowledge of existing laws and with reference to them.<sup>45</sup> The phrase “state agency” has a definite legal meaning set forth in the Administrative Procedure Act, applying to agencies that enforce civil laws,

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38. A statute must be interpreted to reach a fair and reasonable, not an absurd, result. *See* TGS-NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432, 439 (Tex. 2011); *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010).

39. *See supra* notes 27–28 and accompanying text.

40. TEX. GOV'T CODE ANN. § 418.016.

41. *Id.* § 418.016(a).

42. *See City of Waco v. Kelley*, 309 S.W.3d 536, 542 (Tex. 2010) (stating the Court does not read terms in statutes in isolation).

43. *Id.*

44. TEX. GOV'T CODE ANN. § 418.016(a).

45. *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex.1942); *see also In re Pirelli Tire, LLC*, 247 S.W.3d 670, 677 (Tex. 2007).

of “a state officer, board, commission or department of statewide jurisdiction that makes rules or determines contested cases.”<sup>46</sup>

C. *The Governor’s Power as to the Movement of People*

The governor also relied on another specific provision in Chapter 418 that allows him to “control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area.”<sup>47</sup> The first part of this provision is inapplicable because the governor declared a state of disaster for all counties in the State of Texas. Thus, there is no need to control the ingress and egress to and from a disaster area.<sup>48</sup> However, by suspending the right of parole or early release from prison, the governor was clearly relying upon his power to suspend laws prohibiting the release of citizens from jail or prison when the criminal law otherwise provides that they should be released. The governor was clearly restricting the inmates’ movement within the disaster area and mandating occupancy within a jail or prison.

However, this entire statutory provision is simply a nullity, for the governor has no power to suspend criminal laws. Criminal laws, without need of citation, have dictated the current residence of these inmates. Clearly, a condition precedent for the ability to control persons’ actions is the ability of the governor to suspend any law that would be inconsistent with his order. Since he cannot suspend criminal laws, the legislature is evidencing a clear intent that he cannot take control of the entire state criminal justice system and county jails by executive order.

Reaffirming what was set forth at the beginning of this analysis,<sup>49</sup> for the governor to assert that he has the power to assume control of the entire criminal justice system and county jails without the statute mentioning either set of entities is simply absurd.<sup>50</sup> It goes without citation that the entire focus of these systems is clearly to control the physical whereabouts and conditions of the confinement of inmates. Under the governor’s interpretation, the legislature gave him that power despite never once mentioning this massive criminal justice system by name.

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46. TEX. GOV’T CODE ANN. § 2001.003(7).

47. TEX. GOV’T CODE ANN. § 418.018(c).

48. The Governor of the State of Tex., Proclamation of March 13, 2020, 45 Tex. Reg. 2087, 2095 (2020).

49. See *supra* notes 27–28 and accompanying text.

50. See *supra* note 38 and accompanying text.

Furthermore, a common sense reading of these words is that the governor is able to order citizens where they must go or not go when he otherwise has no such authority to do so under existing laws. It removes the power and discretion of a citizen to be or not be in any legal place he or she chooses. Again, someone who is involuntarily, physically detained by the judiciary has no freedom that can or needs to be restricted by the governor. The only way the prison population must comply with a governor's order is for other state officers, namely the judiciary, to violate existing criminal statutes that dictate whether an inmate remains in jail or prison or not. It has been established that the legislature granted no such powers to the governor. The Texas Supreme Court held long ago that a "legislature legislates by legislating, not by doing nothing, not by keeping silent."<sup>51</sup> When it comes to the validity of criminal laws and the power of the judiciary to enforce those provisions during a disaster, the legislature clearly did not grant the governor the power to do so pursuant to Chapter 418.

#### D. *Enforcement of Executive Order 13*

Executive Order 13 stated that "no authority" could release a person pursuant to the suspended criminal statutes during the pendency of the order.<sup>52</sup> Of course, it was unquestioned that such "authority" would be a district or county court judge. Violation of an executive order under Chapter 418 could result in criminal prosecution, a fine of up to \$1000.00 and a sentence of up to 180 days in jail.<sup>53</sup> This simply means that the governor believed Chapter 418 gave him the authority to criminally prosecute constitutional judges when they are exercising their constitutional duties to determine the constitutionality, statutory validity, and application of an executive order.

Once again, this conclusion was made despite the fact that Chapter 418 makes absolutely no mention of the Judicial Branch generally or district and county court judges specifically.<sup>54</sup> It is simply beyond reasonable contemplation that the governor could in any way reasonably believe that an Executive Branch order could subject a constitutional officer to criminal

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51. *Sanchez v. Schindler*, 651 S.W.2d 249, 252 (Tex. 1983) (citation omitted).

52. The Governor of the State of Tex., Executive Order GA-13, 45 Tex. Reg. 2361, 2369 (2020).

53. TEX. GOV'T CODE ANN. § 418.173 (c).

54. TEX. GOV'T CODE ANN. § 418.001 et seq.

prosecution for exercising his or her constitutional duties. Particularly, due to the fact that the United States Supreme Court has long recognized the principle that the judiciary must be free of domination by other branches of government.<sup>55</sup> For our licensed attorney-governor to even consider, and then finally require in the executive order, that all district and county court judges must comply or be prosecuted, is once again, absurd (a tired phrase, but nonetheless true).

In fact, the more reasonable and constitutional approach is to do what the legislature actually accomplished, that is, to expressly give regulatory power to the Texas Supreme Court which clearly and unambiguously established that the governor does not have such power. That statutory provision was wholly absent from Executive Order 13.

E. *Texas Gov't Code Section 22.0035(b)*

The Texas Supreme Court set the standard for this statutory canon in 1942 and its use in this context: “[a]ll statutes are presumed to be enacted by the legislature with full knowledge of the existing condition[s] of the law and with reference to it.”<sup>56</sup> Chapter 418, also known as the Texas Disaster Act of 1975, was created under the auspices of the Executive Branch and finally codified in 1987.<sup>57</sup> In 2009, the Legislature amended the Texas Government Code, Title 2, Courts, and specifically added Section 22.0035.<sup>58</sup> Therefore, the legislature was well aware of the powers it had granted the governor when Section 22.0035 was adopted. Further, actual knowledge is clear, for Section 22.0035(a) adopts the exact definition of a “disaster” as set forth in Chapter 418.<sup>59</sup>

Section 22.0035(b) expressly provides that the Supreme Court of Texas “*may modify or suspend procedures of any court proceeding affected by a disaster during the pendency of a disaster declared by the governor.*”<sup>60</sup> Thereby, the judiciary will charge the legislature with knowledge of the powers conferred upon the governor in Section 418, that such power did not include the ability to modify criminal laws or order judges on how to conduct their proceedings, if at all, and imply that they knowingly granted such powers to the Texas

55. *United States v. Will*, 449 U.S. 200, 217–18 (1980).

56. *McBride v. Clayton*, 166 S.W.2d 125, 128 (1942); *see also In re Pirelli Tire, LLC*, 247 S.W.3d 670, 677 (Tex. 2007) (same).

57. Acts May 21, 1987, 70th Leg., R.S., ch. 147, § 1, 1987 Tex. Gen. Laws 316, 317.

58. Acts June 19, 2009, 81st Leg., R.S., ch. 1280, § 5.01, 2009 Tex. Gen. Laws 4032, 4046.

59. TEX. GOV'T CODE ANN. § 418.004(1).

60. TEX. GOV'T CODE ANN. § 22.0035(b) (emphasis added).

Supreme Court since such power had not been granted to the governor. There would be no reasonable basis to conclude otherwise, for it would be absurd to read the two statutes to grant the same power simultaneously to both branches of government. Once again, the judiciary will interpret statutes to reach a fair and reasonable result and not an absurd one.<sup>61</sup> In addition, the judiciary will interpret a statute to be feasible in execution<sup>62</sup> and not a useless act.<sup>63</sup> Thus, it is not even debatable that there would not be any sane reason or reasonable basis to construe the two statutory provisions in such a manner.

This grant of power is clearly very broad. “Any” is defined as “used to indicate one selected without restriction.”<sup>64</sup> “Proceeding” is defined as “[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.”<sup>65</sup> Finally, “procedural law” is defined as “[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.”<sup>66</sup> Thus, there is no question that the legislature delegated by statute to the Texas Supreme Court any and all powers to control any proceeding of any kind regarding the rights, duties, and privileges of parties who are part of a criminal or civil proceeding.

There is no debate that in a criminal proceeding where a defendant has been arrested, charged, and is awaiting her or his criminal trial, an integral part of that process is determining when or if the defendant is entitled to be released on bail. Thereby, it is unquestioned that the legislature delegated to the Texas Supreme Court the power to decide if and when such hearings should be held, and if not, where the defendant will remain incarcerated in the meantime pending the reduction of the pandemic’s negative effects on this process.

Therefore, the adoption of Section 22.035 clearly and unambiguously sets forth that if any criminal law is to be suspended during a governor-declared disaster, it is exclusively the power of the Supreme Court of Texas to do so, which clearly implies that absolutely no such power is vested in the governor.

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61. TGS-NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432, 439 (Tex. 2011).

62. Lovell v. State., 525 S.W.2d 511, 515 (Tex. Crim. App. 1975).

63. *In re Mo Pac. R. R. Co.*, 998 S.W.2d 212, 216 (Tex. 1999).

64. *Any*, CAMBRIDGE DICTIONARY 154 (2021).

65. *Proceeding*, BLACK’S LAW DICTIONARY (11th ed. 2019).

66. *Procedural law*, BLACK’S LAW DICTIONARY (11th ed. 2019).

It also appears that not only did the legislature delegate to the Supreme Court of Texas the power to regulate the proceedings of any and all courts regarding any and all types of hearings during the pandemic, the legislature was constitutionally required to do so. The Texas Supreme Court has held that, not only does the Texas Constitution give express grants of power to the judiciary, there are inherent powers woven into the fabric of the Texas Constitution by virtue of their origin in the separation of powers provision of our state's Constitution.<sup>67</sup> The inherent judicial power of a court is not derived from legislative grant or a specific constitutional provision, but from the very fact that the court has been created and charged by the Texas Constitution with certain duties and responsibilities. The inherent powers of a court are those which it may call upon to aid in the exercise of its jurisdiction in the administration of justice, and in the preservation of its independence and integrity.<sup>68</sup> This power exists to enable our courts to effectively perform their judicial functions and to protect their dignity, independence, and integrity.<sup>69</sup> Thus, the Supreme Court of Texas has held, without hesitation, that in our adversary system, a court has not only the power, but the duty to do so.<sup>70</sup>

It is simply indisputable that if a court is unable to control the physical appearance of its criminally-charged defendants for any type of hearing required, it has lost its ability to function. That power could be impacted by releasing such persons due to a pandemic or by their illegal and involuntary detention in a prison environment that could lead to a severe illness and/or death. Without debate, the timely appearance of a defendant in the criminal justice system is the fundamental prerequisite for a rule-of-law judiciary to maintain its dignity, independence, and integrity to ensure our citizenry that those who violated the law will answer for it in a court of law.

Finally, the absolute proof of legislative intent is apparently the clear and unambiguous language of the statute.<sup>71</sup> As the Supreme Court of Texas has long held, if the disputed statute is clear and unambiguous, the statute should be given its common, everyday meaning.<sup>72</sup> Section 22.0035(b)

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67. TEX. CONST. art. II, § 1.

68. *See Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398–99 (Tex. 1979) (describing the powers of Texas courts).

69. *Id.*

70. *P.U.C. of Tex. v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988).

71. *See In re Smith*, 333 S.W.3d 582, 586–87 (Tex. 2011) (noting the legislature says what it means when it is stated in clear and unambiguous language).

72. *Id.* at 586.

begins with: “Notwithstanding any other statute . . . .”<sup>73</sup> “Notwithstanding” means “despite; in spite of.”<sup>74</sup> This is in effect an express statement to the governor that, even if he reasonably believed Chapter 418 vested him with power to control the judiciary, he in fact has absolutely no power over the entire justice system, or specifically, the criminal justice system and bail hearings. Nothing could be clearer, and it is simply impossible with this language to find that Chapter 418 in any way grants the governor power to suspend criminal procedural laws related to bail or to confine citizens in jail or prison when the statutes so provide for their physical release. Even if a court could be persuaded that it does, this opening phrase is clear legislative intent that such interpretation is a nullity.

### III. GOVERNOR ABBOTT INDISPUTABLY VIOLATED SEPARATION OF POWERS IN ISSUING EXECUTIVE ORDER 13

The Framers of the Texas Constitution clearly believed that separation of powers between our three branches of government was so important that they dedicated an entire article solely to that requirement:

*Section 1: SEPARATION OF POWERS AMONG THREE DEPARTMENTS. The powers of the government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons being of one of these departments, shall exercise any power attached to either of the others, except in the instances herein expressly permitted.*<sup>75</sup>

As was discussed *supra*,<sup>76</sup> the governor exercises his constitutional power to faithfully execute the laws, but the question of the extent of power granted is simply an issue of statutory construction, which is ultimately determined by the judiciary. It goes without citation that an officer can misinterpret a statute, which is the very reason for the existence of the judiciary—to set him or her straight as to the legislative intent. Therefore, there is a strong argument that Governor Abbott’s illegal Executive Order 13 was clearly not a violation of separation of powers, but merely a good faith mistake.

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73. TEX. GOV'T CODE ANN. § 22.0035(b).

74. *Notwithstanding*, BLACK'S LAW DICTIONARY (11th ed. 2019).

75. TEX. CONST. art. II, § 1.

76. See *supra* notes 25–26 and accompanying text.

However, first, it has been demonstrated that interpreting Chapter 418 as granting him control over 447 district courts and 500 county courts, having the ability to suspend criminal procedure statutes, and subjecting them to possible criminal prosecution if they fail to follow an executive order has absolutely no basis in the language of the statute.<sup>77</sup> Second, a different statutory provision adopted eleven years ago delegated the very same power exclusively to the Texas Supreme Court.<sup>78</sup> Third, the Texas Supreme Court has held for over forty years that the judiciary, as a constitutional creature, has the inherent constitutional power to maintain control of the district courts and county courts in the administration of justice and to protect the dignity, independence, and integrity of the judicial system.<sup>79</sup>

With absolutely no statutory or constitutional power, Governor Abbott seized the control of the judiciary, suspended laws he has no authority to suspend, and threatened almost one thousand judges with criminal prosecution if they do not obey his orders instead of those of the Texas Supreme Court. That act simply is a gross usurpation of judicial powers, and there is absolutely no reasonable legal defense to negate that legal conclusion.

Even more troubling is the concern cited by the governor in Executive Order 13 that the existing bail laws were a threat to the public welfare was not new.<sup>80</sup> It was the exact basis for attempting to repeal and/or amend the existing statutes that Governor Abbott has suspended for two legislative sessions during the pandemic, but the bills died in the houses.<sup>81</sup> Therefore, in the minds of the governor and his staff, the factual basis to wholly suspend the criminal statutes had absolutely nothing uniquely to do with the pandemic per se, but constituted a long term, ongoing problem. In fact, Governor Abbott stated at the beginning of the 2021 Legislative Session that reforming the existing bail laws was a priority for the governor's office because "Texas has a broken bail system that allows dangerous criminals to go free."<sup>82</sup> That is clearly not a disaster/pandemic problem, but an ongoing institutional problem.

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77. *See supra* notes 25–51 and accompanying text.

78. *See supra* notes 56–74 and accompanying text.

79. *See supra* notes 70–71 and accompanying text.

80. *See supra* notes 12–16 and accompanying text.

81. *See supra* notes 12–20 and accompanying text.

82. Jeremy Wallace, *Gov. Greg Abbott Calls for Another Fix to 'Broken Bail System'*, HOUSTON CHRONICLE (Jan. 21, 2021), <https://www.houstonchronicle.com/politics/texas/article/Gov-Greg-Abbott-calls-for-another-fix-to-15888901.php> [<https://perma.cc/SEE8-SVWU>].



This appears to be overwhelming evidence that Governor Abbott has had major frustration with the legislature's inability to fix the bail system for years, and he merely used the pandemic as a cover to nullify the bail laws he deplored. There is simply no evidence how the pandemic itself created a higher danger or risk to the general public by the bail system operating as usual. In fact, clearly the Supreme Court of Texas did not believe so, for the court took no action to curb releases from jail under its statutory or constitutional authority.

This appeared to be validated by a press release of Attorney General Paxton. He indicated the health and safety of Texans was paramount during the pandemic. He then made the most remarkable statement that "a health crisis cannot be used as an excuse to override the rule of law."<sup>83</sup> This statement is the actual reverse of what happened. The governor utilized his disaster power to override the criminal procedure bail laws that had been in place and applicable for years.

Governor Abbott simply utilized Chapter 418 to literally take over the Judicial system as to whether or not a citizen would be released on bail.

#### IV. THE TEXAS SUPREME COURT VIOLATED THE SEPARATION OF POWERS PROVISION BY ALLOWING GOVERNOR ABBOTT TO SEIZE ITS CONSTITUTIONAL AND STATUTORY POWER

##### A. *Supreme Court's Failure to Exercise Its Inherent and Statutory Power to Nullify Executive Order 13 Violates Separation of Powers*

It has been established that Section 22.0035(b) grants the Supreme Court of Texas the exclusive, express power to suspend bail statutes and to order district and county court judges on how to proceed with such requests during the pandemic.<sup>84</sup> It has also been established that the Supreme Court of Texas would clearly be aware that Chapter 418 did not confer power on the governor to suspend bail statutes, to order judges on how to conduct or not conduct bail hearings, and to suspend bail statutes by executive order.<sup>85</sup> Nothing could be clearer than the beginning phrase of this section that states

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83. Press Release, Ken Paxton, Attorney General of Texas, AG Paxton Defends Governor Abbott's Executive Order Prohibiting the Release of Dangerous Individuals from Dallas Jails; (April 15, 2020), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-defends-governor-abbotts-executive-order-prohibiting-release-dangerous-individuals-dallas> [<https://perma.cc/V3FA-QQCC>].

84. *See supra* notes 56–74 and accompanying text.

85. *See supra* notes 25–55 and accompanying text.

“Notwithstanding any other statute . . . .”<sup>86</sup> Finally, it has been established that the Supreme Court of Texas has held they have the constitutional, inherent power and *duty* to aid in the administration of justice and to preserve the independence and integrity of the Court.<sup>87</sup> This is further buttressed by the fact that the Texas Code of Judicial Conduct requires the Court to diligently and promptly discharge its administrative responsibilities.<sup>88</sup>

Therefore, the Supreme Court of Texas knew from the day that Governor Abbott’s Executive Order 13 was issued that it was a nullity and did not have the force and effect of law. The Texas Supreme Court knew it had the unqualified power, statutorily and constitutionally, to issue an order relating to the criminal bail statutes and to direct all district and county court judges on how they were to proceed in determining bail requests during the pandemic. This did not necessitate a lawsuit to be filed, but merely the issuance of an administrative order. The Supreme Court of Texas clearly understands how to exercise this power since it has issued, up until the time of this writing, 34 Emergency Orders pursuant to Section 22.0035 on the basis of Governor Abbott’s Proclamation that a disaster was occurring throughout the State of Texas due to the coronavirus pandemic.<sup>89</sup> By failing to act, the Court violated its constitutional duty to protect the integrity of the Court and violated separation of powers to allow the governor’s unlawful order to control the constitutional duties of the Court and the district and county court judges.

Yet, the Supreme Court of Texas has done nothing, allowing Governor Abbott’s invalid order to remain in effect that on its face applies to nearly a thousand judges holding bail hearings and thousands of incarcerated citizens seeking release. The Court need not in any way formally declare the governor’s order invalid or place in their order a statement that the judges are to disregard the governor, for there is no question that all of the judges would know that it was invalid and that the valid authority was vested in the Supreme Court. The Supreme Court of Texas could even conclude the governor was correct about the bail situation and issue an emergency order nearly identical to that of the governor’s order. However, it would then be lawful so that all the judges could lawfully deny

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86. TEX. GOV’T CODE ANN. § 22.0035(b).

87. See *supra* notes 67–70 and accompanying text.

88. Tex. Code of Jud. Conduct, Canon 3(C)(1), as reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G., app. B. (As Amended by the Supreme Court of Texas through July 10, 2019).

89. See *supra* note 12 and accompanying text.

bail and not be subject to the unconstitutional, yet real threat, of being prosecuted by the local district or county attorney for violating Executive Order 13.

Why would the Supreme Court of Texas initially not act and continue to not act? Why would the Court not easily conclude the independence of the judiciary is severely compromised by the governor usurping its own power and threatening judges with criminal prosecution for doing their constitutionally mandated job? Why would the Court not view the governor's order as a threat to its integrity when nearly a thousand judges are unlawfully denying citizens release from confinement which these citizens are currently entitled to under the law? There is simply no known or obvious reason for their non-action. Yet it is clear that it blatantly violates the Code of Judicial Conduct that mandates an independent and honorable judiciary that is indispensable to justice in our society.<sup>90</sup>

However, there can be no debate that this real scenario is a blatant violation of separation of powers that stands equally beside the unconstitutional acts of Governor Abbott.

B. *The Supreme Court's Willingness to Hear and Decide a Legal Challenge by Houston District Court Judges Violates Separation of Powers and the Code of Judicial Conduct*

Sixteen Houston County Criminal County Courts of Law Judges sued the governor and the attorney general, alleging constitutional violations and that the governor had acted outside of his statutory power.<sup>91</sup> A Travis County district judge held in favor of the Houston judges and issued a temporary restraining order against Executive Order 13.<sup>92</sup> The governor and attorney general then filed an emergency petition for writ of mandamus and a motion to stay in the Texas Supreme Court.<sup>93</sup>

What is truly remarkable is that the Court sat and decided to determine the writ at all. As it has been established, the only reason that Executive Order 13 was subject to challenge is due to the failure of the Texas Supreme Court to issue its own emergency order to replace it. The writ dispute could have been resolved at any time before or during the activation of the Court's

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90. Tex. Code of Jud. Conduct, Canon 1, as reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G., app. B. (As Amended by the Supreme Court of Texas through July 10, 2019).

91. *In re Abbott*, 601 S.W.3d 802, 806 (Tex. 2020).

92. *Id.* at 807.

93. *Id.*

jurisdiction by the mere issuance of an emergency administrative order by the Supreme Court. In essence, all nine members of the Supreme Court of Texas were unnamed parties to the controversy and most obviously, they could not be impartial because they would have to defend themselves for their failure to act and their violations of the Code of Judicial Conduct.

The Code clearly prohibits the Court from deciding matters in which they are disqualified or where recusal is appropriate.<sup>94</sup> There is no question the full Court was prohibited on both counts by being, in essence, unnamed parties to the dispute, and that on the basis of a separate and distinct power, the Constitution and the disaster statute, the Court could fully resolve the controversy at any time. Why did the Court proceed to hear and decide the emergency writ? It is simply unknown.

Was there a bona fide legal basis to make this controversy go away on a non-merit basis, and thereby to dismiss it? The Houston judges strongly asserted that they had standing to bring this lawsuit, for the governor and attorney general were clear, based on certain statements they had publicly made, that the judges would be prosecuted.<sup>95</sup> However, in briefing, the governor and attorney general both stated they had no legal authority to do so, for that was vested in the independent, local district attorneys. Further, they both stated that they had no intention to affirmatively enforce Executive Order 13<sup>96</sup> However, the governor and attorney general in no specific words assured the court they would even attempt to dissuade an independent, local district attorney from doing so. Based solely on the statements of the governor and attorney general, the Texas Supreme Court held that it was simply unsubstantiated speculation that prosecutions would materialize, which was insufficient to establish a credible threat of prosecution of the sitting district and county judges. In sum, the sixteen judges lacked constitutional standing to sue.<sup>97</sup>

It is truly difficult to conclude the Court's holding is reasonable when a judge knows the very act that he or she might take (granting bail) is clearly a violation of the law. Further making the Court's holding difficult to find reasonable is that an independent district attorney, who has no direct dependence on or subject to any order of how to perform his or her job by the governor or attorney general, will simply comply with the requests of

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94. Tex. Code of Jud. Conduct, Canon 3(B)(1), *as reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G., app. B. (As Amended by the Supreme Court of Texas through July 10, 2019).

95. *In re Abbott*, 601 S.W.3d at 808–09.

96. *Id.* at 812.

97. *Id.* at 809.

the same to not prosecute the judge when he or she has an airtight case of conviction. The truly unusual and novel act of these sixteen judges suing the governor and attorney general might be considered very persuasive evidence that the court clearly weighed the evidence of potential prosecution incorrectly. In hindsight even more so, since at the time of the writing of this Article, none of the nearly one thousand judges have ruled in a bail determination that Executive Order 13 is invalid, suggesting a chilling effect on judges following the decision. Further, the governor has never amended Executive Order 13 to expressly exclude the judges from prosecution.

However, by eliminating, in the Court's mind, any direct, personal threat or injury to the judges, it was a foregone conclusion that the writ of mandamus would be granted to dissolve the injunction and to dismiss the lawsuit.<sup>98</sup> Generally, when a judge is confronted with a law that he or she believes is invalid for whatever reason, the Court stated the absolute obvious conclusion that all lawyers and judges understand regarding how the judicial system works: "Nor can one judge file a lawsuit against the executive branch that asks another judge to clarify the rule of decision the plaintiff judge should apply in his or her courtroom, as the judicial plaintiffs have done here."<sup>99</sup> Therefore, the emergency writ was granted and the lawsuit was dismissed.<sup>100</sup>

Conveniently, this ruling eliminated the need for the Court to alter the status quo. If a decision on the merits of the legality of Executive Order 13 was forced upon the Court, this Article has established that the clear and unambiguous language of the applicable laws would have forced the Court to strike it down as illegal. However, that did not happen due to the Court's own interpretation of constitutional standing and determining the motives of district attorneys exercising prosecutorial powers. Therefore, up until the writing of this Article, the Texas Supreme Court continues to violate separation of powers by failing to exercise both its constitutional duty and statutory powers to administratively nullify Executive Order 13, and thus, continues allowing a severe impact on the honesty and integrity of the judiciary by forcing district and county judges to unlawfully hold citizens in jail due to an executive order that violates the law and the Constitution.

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98. *Id.* at 813.

99. *Id.*

100. *Id.* at 813.

Yet, these conclusions are disputed by Attorney General Paxton who, following the dismissal of the lawsuit avoiding a ruling on the merits of Executive Order 13, stated: “The court’s ruling rightly upholds the rule of law and maintains the integrity of our criminal justice system.”<sup>101</sup> The decision obviously did nothing of the sort, but instead allowed an illegal order to remain in effect despite the Texas Supreme Court’s power to nullify it.

C. *The District and County Court Judges Are Violating Separation of Powers and the Code of Judicial Conduct*

In analyzing these acts by governmental officers, it could appear to some that the district and county court judges are victims in this scenario by being subject to an unlawful executive order and a Supreme Court who is unwilling to exercise its constitutional and statutory power to remove it. Even in the outrageous context that the Supreme Court was considering a challenge to the executive order by judges, it could not help but chastise the judges by stating: “the executive branch cannot criminally prosecute judges for deciding cases based on what they understand the law to be. We appeal judicial decisions we don’t like; we don’t jail the judges.”<sup>102</sup> The Court continued:

Moreover, even if criminal prosecution of judges were genuinely threatened, the plaintiffs [judges] offer no reason to doubt that long-established principles of judicial immunity provide adequate protection . . . . Judicial immunity prevents such “domination by other branches” by giving a Judge absolute immunity from liability for official acts performed within the scope of his or her jurisdiction.<sup>103</sup>

So why are all of these judges paralyzed and unable to grant bail under existing valid law to these thousands of Texan citizens? They have the constitutional power to do so and it will be the rare district attorney who will prosecute based on the statements of the Court. Even if they do, the

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101. Press Release, Ken Paxton, Attorney General of Texas, AG Paxton: Texas Supreme Court Over-turns Injunction Against Governor Abbott’s Executive Order Prohibiting the Release of Dangerous Individuals, (Apr. 23, 2020), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-texas-supreme-court-overturms-injunction-against-governor-abbotts-executive-order> [https://perma.cc/4Y8Q-SH8M]

102. *In re Abbott*, 601 S.W.3d at 809.

103. *Id.* at 813.

Court told the judges they would have blanket immunity, for they were simply doing their job.

The acts or failure to act by the Texas Supreme Court and the nearly one thousand district and county court judges is a complete mystery. Allowing such damage to the integrity of the judicial system generally, to their own personal reputation as a judge, and to simply tolerate the unlawful detention of thousands of Texas citizens would seem to require a very significant reason to act in this manner. There is simply no concrete evidence as to why this is occurring.

#### V. CONCLUSION

Finally, it is unclear if these multiple violations of separation of powers is having or will have any lasting effect on the functioning of our government or citizens' respect for and willingness to abide by the laws and orders of our state officers. At the present time, however, there appears to be no awareness by the media or citizens generally as to what has happened as described in this Article. Such actions cannot stand, and there is a truly significant need to confront all involved for an explanation and justification for what has and has not happened during the life of Executive Order 13. However, the most telling effect is a report by the University of Texas at Austin, Lyndon B. Johnson School of Public Affairs citing the total number of COVID deaths in county jails, eighty percent of whom were in pre-trial detention and were not convicted of a crime.<sup>104</sup>

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104. Michele Deitch et al., *Covid and Corrections: A Profile of Covid Deaths in Custody in Texas*, LYNDON B. JOHNSON SCHOOL OF PUB. AFFAIRS 18 (Nov. 2020), <https://repositories.lib.utexas.edu/bitstream/handle/2152/83635/Profile%20of%20COVID%20deaths%20in%20custody.pdf> [<https://perma.cc/R9S7-73F7>].