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# Checking and Balancing Emergency Powers in Texas

## Key Points

- Chapter 418 of the Texas Government Code does not provide meaningful checks and balances on state and local executive authority that is exercised in times of crisis.
- In the absence of constitutional and statutory protections, there have been numerous instances of abuse and misgovernment, particularly at the local level.
- In 2023, the Texas Legislature should make it a priority to enhance its role during periods of prolonged disaster and provide additional oversight of executive actions.

## Introduction

The Texas Disaster Act of 1975, codified as [Chapter 418 of the Texas Government Code](#), confers special authority upon state and local executives during times of disaster so that they may respond decisively to an imminent threat or an existing crisis. The rationale underlying the law is both pragmatic and reasonable; however, as the COVID-19 pandemic demonstrated, the law can be applied in a way that renders it unrecognizable as originally intended.

During the height of the pandemic, sweeping emergency powers gave rise to misgovernment on a grand scale, particularly at the local level. In one small but illustrative example, city officials in Cleburne, Texas, prevented a man and his wife from shopping together at an area Walmart, permitting only one to enter the store while forcing the other “to wait in the car” ([Dexheimer, 2020, para. 1](#)). In another instance, Harris County officials sought to criminalize noncompliance with their authoritarian diktats by levying “a fine not to exceed \$1,000” on certain minor infractions ([Sterling & Haugen, 2020, p. 1](#)). County officials even considered penalizing violators with jail time.<sup>1</sup> Fortunately, a mix of preemption and public outrage prompted officials to abandon course early on<sup>2</sup>; however, the county’s mere entertainment of such a harsh penalty sent a clear message about its ambition and tolerance. In yet another example, Tarrant County Judge Glen Whitley issued an executive order in March 2020 that, among other things, empowered county employees to “commandeer or use any private property” ([Exec. Order of County Judge B. Glen Whitley, 2020, p. 1](#)). The overreach garnered widespread criticism, with one commentator remarking that “Whitley has overstepped his judicial powers and applied a state law incorrectly” ([Bamburg, 2020](#)). Another legal scholar declared: “Americans enjoy certain fundamental protections, even during disasters. Some of these protections appear to have been jeopardized by Tarrant County’s original executive order, which granted local officials the authority to commandeer private property without having to

<sup>1</sup> According to the *Texas Tribune*, “A draft of Hidalgo’s order had mentioned a punishment of up to 180 days in jail—which is also listed online as a potential punishment for violating myriad aspects of the county’s stay-at-home order. But spokeswoman for the judge said that not wearing a face covering could only lead to a \$1,000 fine, not jail time” ([Sparber, 2020, para. 13](#)).

<sup>2</sup> On preemption, the *Houston Chronicle* reported in June 2020 that: “Gov. Greg Abbott effectively gutted Hidalgo’s first attempt to require masks in late April, when he prohibited cities and counties from punishing residents for noncompliance. Hidalgo’s original order on April 22 included potential fines of \$1,000” ([Despart, 2020, para. 7](#)). In terms of public outrage, Lt. Gov. Dan Patrick ([2020](#)) offered stinging criticism of the forced masking initiative, tweeting: “On the same day they are moving to close \$60M hospital because it wasn’t needed @LinaHidalgoTX orders mandatory masks in Harris Cnty—the ultimate government overreach. These kind [sic] of confused government policies fuel public anger—and rightfully so.” Similar rebukes were offered by then-president of the Houston Police Officers’ Union Joe Gamaldi ([2020](#)); U.S. Congressman Dan Crenshaw ([2020](#)); and Dr. Steven Hotze ([Andu, 2020, para. 2](#)).

meet due process requirements or other criteria. While that troubling provision was removed from future iterations of the executive order, its initial inclusion proves worrisome” ([Sterling, 2020, p. 3](#)). Of course, the judge amended the controversial order to strike the commandeering provision, but only after public opinion had soured and threats of legal action began to stir.

These are but a few examples of the extraordinary abuses that occurred at the height of the pandemic; countless others abound.<sup>3</sup> On some level, it is alarming that such gross government overreach was allowed to take place, especially in a state whose rallying cry is *Come and Take It*. At the same time, it is unsurprising that unchecked government authority led to exploitation and injury. An abundance of research argues that the former oftentimes engenders the latter. For example, one scholar writes: “To handle an emergency, the government generally needs to assume extra powers. These emergency powers, however, may become a source of abuse if not controlled” ([Olsson, 2009, p. 103](#)). The reason why abuse is the likely outcome is that power has an intoxicating effect on those who wield it. Emergency powers tempt those in power by “provid[ing] a reason for the executive to declare an emergency on dubious grounds” and by “giv[ing] the executive the excuse needed to use excessive force” ([p. 105](#)). In certain instances, the academic literature observes a proportionality between the breadth of emergency powers allowed and the level of injustice experienced. In one study, for example, researchers Christian Bjørnskov and Stefan Voigt ([2018](#)) found that easy-to-access emergency powers prompted both disastrous outcomes and extreme violations of civil liberties. Bjørnskov and Voigt write: “We find that when emergency constitutions allocate more powers to, for example dissolve parliament, expropriate and temporarily suspend basic rights, more people are killed during any natural disasters. We also show that the death toll rises faster with the size of the event when the emergency provisions make it easier and less politically costly to call a state of emergency” ([p. 27](#)). Of course, Bjørnskov and Voigt’s findings do not reflect Texas’ COVID-19 experience. But they do provide a general critique of emergency powers at-large and make clear that a government’s misuse of this extraordinary authority may be worse than the crisis itself. There is therefore a need for constitutional reforms to ensure the protection of

civil liberties and the rule of law in both ordinary and emergency situations.

In response to actual and potential abuses of power by public authorities, the next Texas Legislature should overhaul Chapter 418 of the Government Code to create additional checks and balances during times of emergency. The most important of these reforms entails enhancing the Legislature’s role in providing oversight and direction.

### Playing a Larger Role

To balance the sudden need for decisive executive action in an emergency with the protection of constitutional rights, Texas’ disaster laws should be reworked to give the Legislature a larger supervisory role during prolonged crises. Its involvement is needed to check state and local executive abuses and ensure robust political participation. Though the particulars of such reform may vary, the ideal legislation will integrate the following principles ([Quintero, 2021](#)):

- **Primacy.** Affirm that, under our system of government, the Legislature has primacy over creating, voiding, and nullifying laws.
- **Exclusivity.** Make explicit that some authority is reserved solely for the legislative branch.
- **Clarity.** Specify executive branch duties versus the Legislature’s role in times of crisis.
- **Transparency.** State and local executive orders and directives should be prominently posted online in a timely fashion.
- **Accountability.** Empower the Legislature to override state and local executive actions during a period of prolonged disaster. The Texas Legislature should also have the authority to convene itself into session after a definitive period of time to provide proper oversight.

Adopted in concert, reforms predicated on the preceding principles will better position the state’s chief democratic institution to assist and provide oversight in times of extended crisis and uncertainty. In turn, more robust representation will promote public trust and instill confidence.

<sup>3</sup> In the Legislator’s Guide to the Issues: 2021-2022, the Texas Public Policy Foundation ([2020, para. 4](#)) notes the many varieties: “government overreach has been a persistent problem at the local level, with county judges and city mayors taking some alarming actions, such as extending disaster declarations indefinitely; proposing excessive fines and criminal penalties for noncompliance; threatening to commandeer private property; imposing unconstitutional demands on houses of worship; and placing onerous restrictions on certain businesses, such as the requirement that restaurants track customers. Some local governing bodies—like the city of Austin—have even empowered unelected bureaucrats to issue emergency orders dictating intimate details about a person’s life.”

## Developing a Framework for Reform

During the regular session of the 87th Texas Legislature, policymakers considered a raft of legislation that proposed to reform the state's disaster laws in various ways. While much of the legislation ultimately failed to become law, several proposals contained provisions worth taking note of for possible inclusion in future bills.

For example, the introduced version of Senate Bill 1025 (2021) proposed changes to affirm that only the Legislature has the authority to take one or more of the following actions during an emergency:

- Suspend a provision in the Code of Criminal Procedure, Election Code, or Penal Code to appropriately respond to the disaster;
- Restrict or impair the operation or occupancy of businesses or places of worship in this state by category or region to appropriately respond to the disaster; or
- Renew or extend the governor's state of disaster declaration.

The initial filed bill also required the governor to reconvene the Legislature if the exercise of the powers mentioned above became necessary. The bill prescribes that, "The governor by proclamation shall convene the legislature in special session to respond to a declared state of disaster if the governor finds that the authority of the legislature ... should be exercised and the legislature is not convened in regular or special session" (SB 1025, 2021, p. 1). By defining the circumstances in which the authority might be exercised, the bill checks executive overreach while still providing an avenue by which they may be invoked.

Another small-but-beneficial pair of provisions included in every version of SB 1025 (2021) would have required the governor to convene the Legislature for the purpose of renewing a statewide disaster declaration and also prohibited the executive from re-upping it without approval from lawmakers. The exact language reads:

If the governor finds that a state of disaster ... requires renewal and the legislature is not convened in regular or special session, the governor by proclamation shall convene the legislature in special session to renew, extend, or otherwise respond to the state of disaster. The governor may not declare a new state of disaster based on the same or a substantially similar finding as a prior state of disaster subject to this subsection that was terminated or not renewed by the legislature. (p. 2)

**State legislators should also have the authority to pass laws and resolutions deemed necessary to the situation or to "consider any other subject stated in the Governor's proclamation convening the Legislature."**

To bolster these requirements, policymakers also considered an accompanying constitutional amendment. Among other things, Senate Joint Resolution 45 (2021, p. 2) would have limited the governor's ability to declare a state of disaster to no more than 30 days unless the declaration was renewed by the Legislature and the emergency met one of the following criteria:

- Exists in at least two fifths of the counties in Texas;
- Affects at least half of the population in Texas; or
- Affects at least two thirds of the counties in three or more trauma service areas in Texas.

If enacted, this proviso, along with the other aforementioned requirements, would substantially improve the Legislature's ability to provide oversight during extended crises by ensuring its participation, as opposed to the passive role it plays now. Once involved, the legislative branch's purview should be broad.

A crisis-called session should see legislators afforded broad authority to renew or terminate state and local executive orders issued during the emergency. State legislators should also have the authority to pass laws and resolutions deemed necessary to the situation or to "consider any other subject stated in the Governor's proclamation convening the Legislature" (SJR 45, 2021, p. 2). Empowering the Legislature to be proactive within this fixed scope is both prudent and complementary of the executive authority.

Continuing on with the issue of authority, any proposed legislation should also include explicit preemption language clarifying that state orders and direction supersede those promulgated by political subdivisions. Such a change will prevent future controversies over whose orders prevail and perhaps avert costly litigation in times that can ill afford it. To that effect, the engrossed version of SB 1025 (2021, p. 6) offers language to consider: "A declaration of local disaster

... may not conflict with, or expand or limit the scope of, a declaration of disaster ... unless expressly authorized by a proclamation or executive order issued by the governor.”

Finally, emergency actions taken by every branch of government—but especially those enforced by state and local executives—should be undertaken a fully transparent way. This might take the form of requiring state and local executives to post online executive orders and directives immediately after their adoption. It might also entail instructing governmental entities to hold public meetings electronically and

guaranteeing a public comment period, assuming no threat to public safety exists.

Together, these reforms offer specific and powerful ways to reimagine Chapter 418 of the Government Code. They will better balance the competing needs for decisive action with due consideration and natural rights. Perhaps most importantly, reforming the state’s disaster laws accordingly would strengthen our existing system of checks and balances, the lynchpin of our constitutional republic. ★

## References

- Andu, N. (2020, April 23). *Harris County Judge Lina Hidalgo sued over face mask requirement*. Texas Tribune. <https://www.texastribune.org/2020/04/23/harris-county-face-mask-lina-hidalgo/>
- Bamburg, A. (2020, April 15). *Tarrant County judge removes controversial section of legal order allowing seizure of private property*. Southeast Texas Record. <https://setexasrecord.com/stories/531770202-tarrant-county-judge-removes-controversial-section-of-legal-order-allowing-seizure-of-private-property>
- Bjørnskov, C., & Voigt, S. (2018, June 3). You Don't Always Get What You'd Expect - On Some Unexpected Effects of Constitutional Emergency Provisions. *Law & Society: International & Comparative Law eJournal*. <http://dx.doi.org/10.2139/ssrn.3189749>
- Crenshaw, D. [@DanCrenshawTX]. (2020, April 22). *No. No. No. Should guidelines for masks in confined spaces emphatically promoted? Absolutely. But we will NEVER support 180 days* [Thumbnail with link attached] [Tweet]. Twitter. <https://twitter.com/DanCrenshawTX/status/1253045085681389568>
- Despart, Z. (2020, June 19). *Hidalgo orders Harris County businesses require customers wear masks as hospitalizations rise*. Houston Chronicle. <https://www.houstonchronicle.com/news/houston-texas/houston/article/hidalgo-harris-county-mask-order-coronavirus-covid-15352520.php>
- Dexheimer, E. (2020, May 6). *As COVID-19 Restrictions Drag on in Texas, Legal Challenges Gain a Foothold*. Houston Chronicle. <https://www.houstonchronicle.com/politics/texas/article/covid-19-legal-hurdles-abbott-houston-san-antonio-15249367.php>
- Exec. Order of County Judge B. Glen Whitley. (2020, March 24). <https://www.tarrantcounty.com/content/dam/main/global/Covid-19/TarrantCountyExecutiveOrder-Executed-3-24-20%20-003.pdf>
- Gamaldi, J. [@JoeGamaldi]. (2020, April 22). *Everyone should be wearing a mask in public, I wear 1 everyday. But making not wearing 1 punishable by law* [Image attached] [Tweet]. Twitter. <https://twitter.com/JoeGamaldi/status/1252983902148399108>
- Olsson, S. (2009). Defending the Rule of Law in Emergencies Through Checks and Balances. *Democracy and Security*, 5(2), 103-126. <https://www.jstor.org/stable/48602632>
- Patrick, D. [@DanPatrick]. (2020, April 22). *On the same day they are moving to close \$60M hospital because it wasn't needed @LinaHidalgoTX orders mandatory masks in* [Thumbnail with link attached] [Tweet]. Twitter. <https://twitter.com/danpatrick/status/1253030636178341893>
- SB 1025. Introduced. 87th Texas Legislature. Regular. (2021). <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB01025I.pdf>
- SB 1025. Engrossed. 87th Texas Legislature. Regular. (2021). <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB01025E.pdf#navpanes=0>
- SJR 45. Introduced. 87th Texas Legislature. Regular. (2021). <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SJ00045I.pdf>
- SJR 45 Bill Analysis. 2021. Senate Research Center. 87th Texas Legislature. Regular. (2021, March.) <https://capitol.texas.gov/tlodocs/87R/analysis/pdf/SJ00045I.pdf>
- Sparber, S. (2020, April 22). *Harris County latest to mandate face masks as criticism mounts that the requirement is 'government overreach'*. Texas Tribune. <https://www.texastribune.org/2020/04/22/harris-county-mask-order-coronavirus/>
- Sterling, S., & Haugen, M. (2020, October). *Exposing Overreach: Harris County*. Texas Public Policy Foundation. <https://www.texaspolicy.com/wp-content/uploads/2020/10/Haugen-Sterling-Exposing-Overreach-Harris-County.pdf>

- Sterling, S. (2020, June). *Exposing Overreach: Tarrant County*. Texas Public Policy Foundation. <https://www.texaspolicy.com/wp-content/uploads/2020/06/Sterling-Overreach-Tarrant-County.pdf>
- Texas Public Policy Foundation. (2020, September). *Legislator's Guide to the Issues 2021-2022: Government Emergency Powers*. Retrieved October 10, 2022, from <https://www.texaspolicy.com/wp-content/uploads/2020/09/2021-22-Lege-Guide-1-pager-GFTP-Government-Emergency-Powers.pdf>
- Texas Disaster Act of 1975, Tex. Government Code § 418.001 (1975 & rev. 1987). <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.418.htm>

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