



BOND IN THE SHADOW OF COVID-19

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EXECUTIVE ORDER GA-13

Executive Order

BY THE
GOVERNOR OF THE STATE OF TEXAS

Executive Department
Austin, Texas
March 29, 2020

EXECUTIVE ORDER
GA 13

Relating to detention in county and municipal jails during the COVID-19 disaster.

WHEREAS, I, Greg Abbott, Governor of Texas, issued a disaster proclamation on March 13, 2020, certifying under Section 418.014 of the Texas Government Code that the novel coronavirus (COVID-19) poses an imminent threat of disaster for all counties in the State of Texas; and

WHEREAS, the Commissioner of the Texas Department of State Health Services has determined that COVID-19 represents a public health disaster within the meaning of Chapter 81 of the Texas Health and Safety Code; and

WHEREAS, I have issued numerous executive orders and suspensions of Texas laws in response to the COVID-19 disaster, aimed at protecting the health and safety of Texans and ensuring an effective response to this disaster; and

WHEREAS, the jail population in Texas presents unique challenges in mitigating against and responding to the spread of COVID-19; and

WHEREAS, my office has worked with the Texas Commission on Jail Standards and with state and local officials to address these challenges while ensuring public safety for all Texans; and

WHEREAS, several counties are now reportedly considering the broad-scale release of arrested or jailed individuals as a result of COVID-19, including potentially those who have committed felonies, in order to reduce the size of the jail population; and

WHEREAS, such releases from county or municipal jails of those charged with, convicted of, or having a history of offenses involving physical violence or threats of physical violence would not only gravely threaten public safety, but would also hinder efforts to cope with the COVID-19 disaster; and

WHEREAS, a statewide standard is needed to avoid disparate release policies or practices that may endanger the public safety of Texans; and

WHEREAS, the Texas Judicial Council has recently reminded judges that individuals who pose a significant risk to the community or the victim, or who present a significant risk of flight, should be detained, and Texas judges are legally required and oath-bound to determine bail on an individualized basis after considering the factors mandated by

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
3:30PM O'CLOCK
MAR 29 2020

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Personal Recognizance Bonds under Tex. Code Crim. Proc. Art. 17.03 are suspended.

The right of an accused to obtain his release within a prescribed period of time in the event that the State cannot guarantee his constitutional right to a speedy trial is suspended.

Tex. Code Crim. Proc. Art 17.151.

The right of an individual jailed in one county to obtain release when the demanding jurisdiction has failed to take custody within 11 days is suspended.

Tex. Code Crim. Proc. Art 15.21.

Good Time credit and cumulative sentencing credits suspended for violent offenses or for offenders with prior criminal history of violence.

The GPS Ankle Monitoring condition of release as an alternative to confinement afforded by

Tex. Code Crim. Proc. Art 42.035 is suspended for all offenders previously convicted of violent offenses or serving a sentence for such an offense.

Emergency Management Directors and county judges and mayors are prohibited from releasing prisoners in the event of a State Emergency.

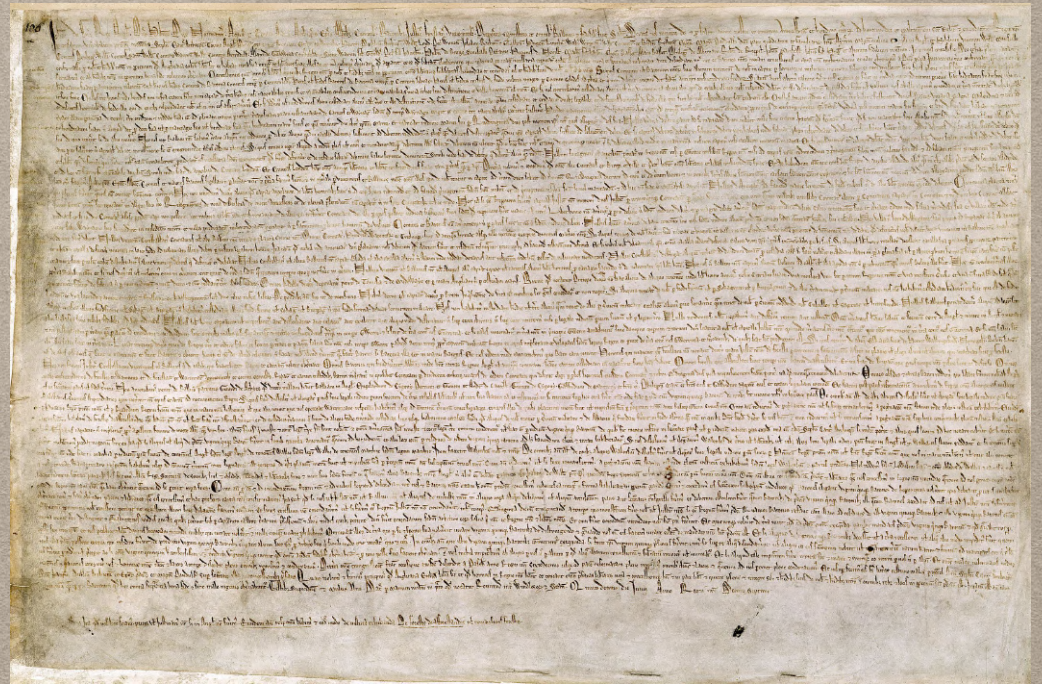
FIRST PRINCIPLES

- Bail is a fundamental right
- Amend. VIII, U.S. Constitution:
 - “Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted”
- Amend. V, U.S. Constitution:
 - “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property without due process of law.”

FIRST PRINCIPLES

- Art. I § 9, Cl. 2, U.S. Constitution:
 - “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.”

WHERE DO THESE IDEAS COME FROM? MAGNA CARTA



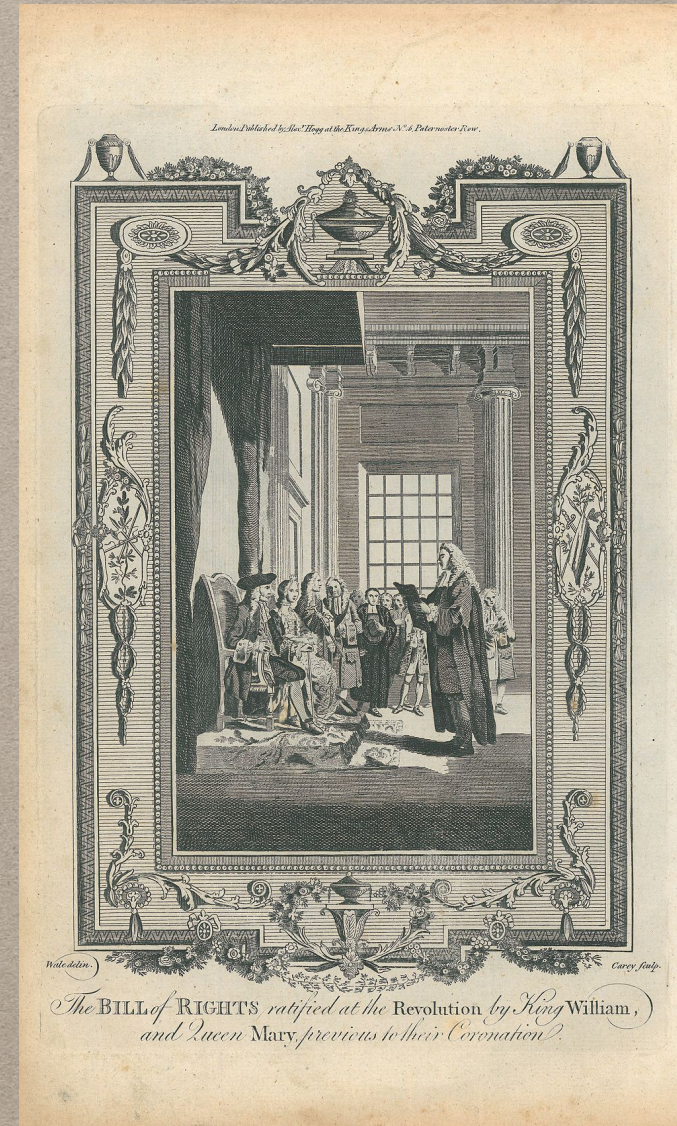
THE ENGLISH COMMON LAW

- Post - Magna Carta abuses led to the enactment of the Habeas Corpus Act



ENGLISH COMMON LAW

- Continued abuses led to the Declaration of Rights under William & Mary in 1689.



“WELL UNDERSTOOD”

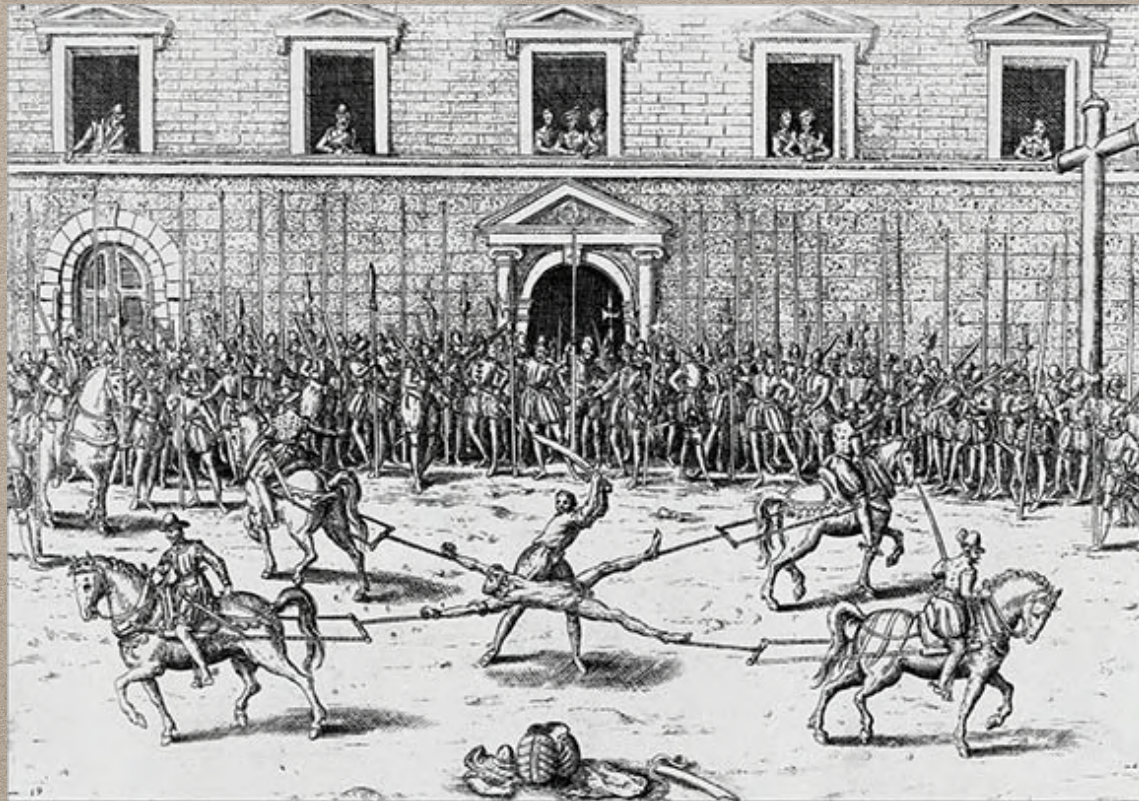
- By the time of our founding, the concept of Habeas Corpus and the rights it protected was “well understood” by the framers of the Constitution.
- Drew on the historical principles of English Common Law

- The Suspension Clause protects citizens from “not just a generic right to due process, but also a particular demand . . . that persons within protection detained for criminal or national security purposes be charged criminally and tried in due course or discharged.” Tyler, Amanda; The Forgotten Core Meaning of the Suspension Clause; 901 Harvard L. Rev. 125 at 907 (2012).

TEXAS CONSTITUTION

- Article I § 28, Texas Constitution:
- “No power of suspending the laws in this State shall be exercised except by the Legislature.”
- Article I § 29, Texas Constitution:
- “To guard against transgressions of the high powers herein delegated, we declare that everything in this “Bill of Rights” is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.”

PUNISHMENT BEFORE TRIAL & UNCONSTITUTIONAL CONDITIONS OF CONFINEMENT



UNITED STATES V. SALERNO, 481 U.S. 739 (1987).

- Pretrial detention, in the ordinary course, is not intended to be "punishment."
- "Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'"
- "We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive in, in relation to Congress' regulatory goal."

MONTANO V. ORANGE COUNTY, 842 F.3D 865 (5TH CIR. 2016).

- "A properly-stated condition-of-confinement claim is not required to demonstrate actual intent to punish; intent may be inferred from an entity's decision to subject detainees to an unconstitutional condition . . . A county allowing a staph infection to persist within a jail, for instance, serves no legitimate government interest."

MONTANO V. ORANGE COUNTY, 842 F.3D 865 (5TH CIR. 2016).

- “When a government policy serves no legitimate government interest, curtails an individual’s caring for himself, and denies him medical care, that government ‘transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, ***but from the limitation which it has imposed on his freedom to act on his own behalf.***”