KEN PAXTON
ATTORNEY GENERAL *of* TEXAS

BORDER CRISIS

Liberty & Justice for Texas

TO MY FRIENDS AND ALLIES IN TEXAS LAW ENFORCEMENT, PRIVATE PROPERTY OWNERS, AND CITIZENS:

America is in a border crisis. Texas bears the brunt of it. Worse, a combination of federal inaction and an intentional, illegal unwinding of successful Trump-era immigration measures have left local law enforcement, private property owners, and citizens figuring out how to clean up the mess.

Hundreds of thousands of illegal aliens are pouring over our border. They are temporarily detained—if at all—before being released, and then make their way through your counties, cities, and property. They bring with them property destruction, theft, financial costs, risks of disease, crime, and the cartels.

The federal government caused this crisis. Texans pay the price. Local law enforcement, governmental officials, and Texans are left searching for answers and help. Solutions are difficult to come by.

I have sued the Biden Administration six times for their border crisis and am involved in eight total lawsuits with them on immigration matters. We're winning. But there is still more that must be done.

I have prepared this packet of information for you that outlines the basic legal concepts to consider as Texans face these unprecedented challenges—circumstances brought on by a federal government that has abdicated its responsibility to secure our border and protect its citizens. Ultimately, the goal of this information is to help local officials, law enforcement officers, and private property owners as they work to protect the persons they represent as well as the freedom, property, and lives of all Texans.

I stand ready to assist you in using all the powers I have as your Attorney General. To that end, we have set up an email address you can use to send us immigration-related information, complaints, and recommendations: **bordercrisis@oag.texas.gov**. My attorneys will monitor this around the clock, and, so long as the situation is appropriate and the law allows, we will help.

For American and Texan Safety and Sovereignty,

Ken Paxton

Ken Paxton
Attorney General of Texas
January 24, 2022

Do you have any illegal immigration- or border-related information, complaints, tips, leads, or recommendations? Please contact us at **bordercrisis@oag.texas.gov**. Where appropriate and allowed by law, Attorney General Paxton will assist.

This is not formal legal advice from the Texas Attorney General.

KEY STATUTES AND SUPREME COURT AND FIFTH CIRCUIT CASES

Several cases from the United States Supreme Court and the Court of Appeals for the Fifth Circuit, which covers Texas, have implications for the present immigration crisis. You should be mindful of these cases and their lessons. But first, the major federal statute that provides the architecture of the United States' immigration law can be found in the Immigration and Nationality Act:

Immigration and Nationality Act (INA)

The INA is a comprehensive set of laws governing legal immigration, naturalization, work authorization, and the entry and removal of aliens. It also establishes an enforcement regime to deter violations of federal immigration law, including through the imposition of penalties upon persons who violate INA requirements. Congressional authority to prescribe rules on immigration does not always imply exclusive authority to enforce those rules. Sometimes, Congress has expressly authorized states and localities to assist in enforcing federal immigration law, as in INA Section 287(g) discussed below. Still, states may be precluded from taking actions if federal law would thereby be thwarted.

Arizona v. United States, 567 U.S. 387 (2012)

In 2010, the State of Arizona enacted the "Support Our Law Enforcement and Safe Neighborhoods Act" to combat last decade's immigration crisis. It contained four key provisions that were litigated up to the United States Supreme Court:

- Section 2(B): requires police to check the immigration status of persons who they detain before releasing them and allows police to stop and detain anyone suspected of being an illegal alien
- Section 3: makes it a state crime for someone to be in the United States without proper authorization from the federal government
- Section 5(C): makes it a state crime for illegal aliens to apply for a job or work in Arizona
- Section 6: authorizes state law enforcement officials to arrest without a warrant any individual otherwise lawfully in the country if they have probable cause to believe that the individual has committed a deportable offense

President Obama's Department of Justice sued Arizona, arguing that the state law usurped and was preempted by the federal government's exclusive authority to regulate immigration laws and enforcement. Despite receiving support from the State of Texas and others, which argued that states have concurrent authority to enforce federal immigration laws, Arizona lost before the district court and court of appeals. The case eventually made its way to the United States Supreme Court.

In June 2012, the Court struck down three of the four major provisions of Arizona's law:

- Section 2(B) was struck down in part, with the Court saying that law enforcement could conduct a status check "during the course of an authorized, lawful detention or after a detainee has been released"
- Section 3 was struck down as preempted because Congress left no room for states to regulate in that field, or even to enhance federal prohibitions
- Section 5(C) was struck down as preempted because it imposed an obstacle to the federal regulatory system
- Section 6 was struck down as preempted because whether and when to arrest someone for being unlawfully in the country is a question solely for the federal government

Justices Scalia, Thomas, and Alito dissented, arguing that Arizona's statute was a valid exercise of the state's power to exclude people from its territory, long recognized as inherent to sovereignty. Justice Thomas went further: he said that the statute presented no actual conflict with federal law.

The decision nearly killed other states' willingness and ability to establish and enforce their own immigration policies. Nevertheless, *Arizona v. United States* helps clarify the boundaries of where non-federal government entities may operate.

Whren v. United States, 517 U.S. 806 (1996)

Two police officers pulled over two men driving a car at an unreasonable speed in a high-drug area. Upon approaching the car, the officers noticed one of the men holding bags of crack in plain sight. The men were charged with possession with intent to distribute.

Before trial, defense counsel moved to suppress the drug evidence, claiming that the traffic stop was a pretext to investigate possible drug crimes without probable cause, and thus a breach of the Fourth Amendment. The dispute over this question wound its way up to the United States Supreme Court. The Court held that the temporary detention of a motorist upon probable cause to believe that he had violated traffic laws does not violate the Fourth Amendment's prohibition against unreasonable seizures, even if another reasonable officer would not have stopped the motorist absent some additional law enforcement objective.

Under *Whren*, an officer who makes an otherwise permissible arrest—one supported by probable cause—will be able to support that arrest even if a defendant claims that it was motivated by his immigration status. Officers should not be deterred from their law-enforcement duties due to the federal government's refusal to enforce federal immigration law.

***Trump v. Hawaii*, 138 S. Ct. 2392 (2018)**

In 2017, President Trump, seeking to improve vetting procedures for foreign nationals traveling to the United States, signed a presidential proclamation restricting entry of people from certain countries deemed to have inadequate immigration information and security protocols. This was known as President Trump's "travel ban."

The State of Hawaii sued, challenging the application of President Trump's restrictions to several Muslim-majority countries and arguing, among other things, that the proclamation was motivated by "anti-Muslim animus" and thus constituted religious discrimination in violation of the Establishment Clause of the First Amendment.

The Supreme Court confirmed that the President's order was religiously neutral on its face and upheld the validity of President Trump's decision. But it did so after citing campaign statements by the President and some of his advisors, as Hawaii argued that these statements showed that the President acted under an unconstitutionally discriminatory motivation. While the Court ultimately vindicated the order, *Trump v. Hawaii* counsels law-enforcement agencies to avoid statements which can be unfairly construed as demonstrating prejudice against a race, ethnicity, religion, or other identifiable group.

The lesson? In passing new local laws, ensure they are neutral on their face and in application. And avoid the misimpression that any law or its application is motivated by animus toward a particular group. In short, all government action should be based on legitimate public interests and be fairly and equally applied.

***Brown v. Plata*, 563 U.S. 493 (2011)**

This U.S. Supreme Court decision held that a court-mandated prison population limit was necessary to protect prisoners' Eighth Amendment constitutional rights (no cruel and unusual punishment).

The details of this case are not important here. But it tells a cautionary tale for local law enforcement: ensure your prisoners are as well-taken care of as possible to avoid intervention by the courts.

DEFENSE OF PERSONS AND PROPERTY

The Attorney General hears from Texans about the very real rise in threats and fears that local law enforcement and citizens have while on private property and in their homes. Many questions that we have received revolve around when a Texan can use force against someone trespassing or intruding into their home or property. Unfortunately, there is no single right answer or bright-line rule for Texans to follow in these situations. The following is an attempt to highlight the current laws in Texas regarding the use of force and deadly force for Texans.

Defense of Persons

The Texas Penal Code guides Texans on the very limited circumstances in which they may use "force" and "deadly force" in response to a provocation. Many citizens have heard of the Castle Doctrine or Stand Your Ground laws. The Texas Penal Code simply refers to the conglomeration of these legal issues as the legal justification of Self Defense, found in Section 9 of the Texas Penal Code.

It is important for Texans to understand that Self Defense is a legal justification for the action taken, and it can only be raised at trial. That means that after the decision to use force or deadly force is made, that actor may be arrested, incarcerated in jail, have their case presented to a grand jury, and then, later, may ultimately present this justification to a jury of their peers that decides the actor's guilt. To be clear, a police officer or jury will be judging the decision to use force to determine whether the force was reasonable and immediately necessary and could easily view the choices and circumstances differently than the actor.

Texas law allows the use of force when the actor "reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force." Tex. Penal Code § 9.31(a).

Deadly force is defined as "force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing death, or serious bodily injury." Tex. Penal Code § 9.01(3). The use of any deadly weapon is likely to fall within the definition of "deadly force." A firearm is defined as a deadly weapon.

A person can use deadly force as a justification for their action if they are justified in using force (as discussed above) AND it is in response to the use or attempted use of deadly force against the actor. Use of deadly force can be used to prevent the imminent crimes of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, or aggravated robbery. Tex. Penal Code § 9.32(2)(B).

A person can defend another person if the person would be justified in the use of force or deadly force AND the person reasonably believes that the use of force or deadly force is immediately necessary to protect the other person. Tex. Penal Code § 9.33.

Defense of Property

The law further provides justification of deadly force for the defense of property under very limited circumstances. The actor must reasonably believe the deadly force is immediately necessary. If those circumstances exist, the actor can use deadly force to prevent the imminent crimes of arson, burglary, aggravated robbery, and theft or criminal mischief at night. Tex. Penal Code § 9.42.

Further, with even more restrictions, deadly force can be used to prevent

a criminal from fleeing immediately after committing burglary, robbery, aggravated robbery, or theft at night. The law states that deadly force can be used in these circumstances only if the property cannot be recovered or protected by any other means, or the use of less-than-deadly force would expose the actor to a substantial risk of death or serious bodily injury. Tex. Penal Code § 9.42.

We sympathize with the fears and desperation that Texans feel during these unprecedented times, but the use of force is a serious response that will likely lead to the actor being subjected to the criminal justice system, with very little predictability of the outcome. The use of force for self-defense, whether deadly or not, is a serious response and should be a last resort. Always contact law enforcement for help unless the circumstances absolutely leave you no time or ability to safely do so. As frustrating as our present circumstances are, never take the law into your own hands—it could be you that pays the ultimate price. Whether to defend one's person and property is a question that can only be answered at the time it arises, but we know that the decision will be scrutinized by others after the decision is made.

TOOLS FOR CITY & COUNTY GOVERNMENT OFFICIALS & LAW ENFORCEMENT

Law Enforcement Considerations

Texas Police Officers and Sheriffs have a duty to uphold the law and may arrest anyone that they have probable cause to believe has committed a crime. Law enforcement professionals have a whole array of offenses they can investigate and arrest for. For example, from the Tex. Penal Code:

Section 15.02 Criminal Conspiracy
Chapter 20A Trafficking of Persons
Section 20.02 Unlawful Restraint
Section 20.03 Kidnapping
Section 20.04 Aggravated Kidnapping
Section 20.05 Smuggling of Persons
Section 20.06 Continuous Smuggling
Section 28.02 Arson
Section 28.03 Criminal Mischief
Section 30.02 Burglary of a Habitation
Section 30.04 Burglary of a Vehicle
Section 30.05 Criminal Trespass
Section 31.07 Unauthorized Use of Motor Vehicle
Section 46.02 Unlawful Carrying of a Weapon
Section 71.02 Engaging in Organized Criminal Activity

Also, Texas Penal Code § 12.50 provides for enhanced punishments for certain crimes in areas subject to a disaster declaration, including a declaration made by the "presiding officer of the governing body of a political subdivision under Section 418.108 Texas Government Code." Tex. Penal Code § 12.50.

Law Enforcement Can Determine the Immigration Status of Persons Under Lawful Detention or Arrest

Texas Government Code § 752.052 says that local governments cannot prohibit peace officers from:

(1) inquiring into the immigration status of a person under a lawful detention or under arrest;
(2) with respect to information relating to the immigration status, lawful or unlawful, of any person under a lawful detention or under arrest, including information regarding the person's place of birth:
   a. sending the information to or requesting or receiving the information from United States Citizenship and Immigration Services, United States Immigration and Customs Enforcement, or another relevant federal agency;
   b. maintaining the information; or
   c. exchanging the information with another local entity or campus police department or a federal or state governmental entity;
(3) assisting or cooperating with a federal immigration officer as reasonable or necessary, including providing enforcement assistance; or
(4) permitting a federal immigration officer to enter and conduct enforcement activities at a jail to enforce federal immigration laws.

In sum, any jurisdiction that wants its officers to inquire about immigration status has the authority to do so and should follow whatever processes are available to contact federal authorities concerning the suspect.

Federal Delegation of Immigration Enforcement Authority via INA Section 287(g) Agreements

Section 287(g) of the Immigration and Nationality Act allows the Department of Homeland Security (DHS) to enter into formal written agreements (Memoranda of Agreement or MOAs) with state or local police departments and deputize selected state and local law enforcement officers to perform the functions of federal immigration agents. The MOAs are negotiated between DHS and the local authorities and include delegation of authority to a limited number of police officers. All of this must be done under the supervision of Immigration and Customs Enforcement (ICE). Deputized officers are required to abide by federal civil rights laws and regulations.

In general, deputized officers are authorized to:

- interview individuals to ascertain their immigration status;
- check DHS databases for information on individuals;
- issue immigration detainers to hold individuals until ICE takes custody;
- enter data into ICE's database and case management system;
- issue a Notice to Appear (NTA), which is the official charging document that begins the removal process;
- make recommendations for voluntary departure in place of formal removal proceedings;
- make recommendations for detention and immigration bond; and
- transfer noncitizens into ICE custody

Many local law enforcement entities in Texas have 287(g) Agreements. The Agreements should be reviewed carefully. Consider whether all the parties are upholding their parts of the Agreement. If not, there may be a basis for a lawsuit.

Local Officials May, Under Certain Circumstances, Declare a State of Local Disaster

The presiding officer of a political subdivision may declare a state of local disaster under Tex. Gov't Code. § 418.108.

What is a disaster?

- "[T]he occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, extreme heat, cybersecurity event, other public calamity requiring emergency action, or energy emergency." Tex. Gov't Code § 418.004.

A declaration:

- activates the appropriate recovery and rehabilitation aspects of all applicable local or interjurisdictional emergency management plans and authorizes the furnishing of aid and assistance under the declaration. Tex. Gov't Code § 418.108(d).
- allows a county judge or mayor to order the evacuation of all or part of the population from a stricken or threatened area if doing so is necessary for the preservation of life or other disaster mitigation, response, or recovery. Tex. Gov't Code § 418.
- allows a county judge or mayor to "control ingress and egress from a disaster area" and "control the movement of persons and the occupancy of premises in that area." Tex. Gov't Code § 418.108(g).
- enables the jurisdiction to request, and other local government entities or organized volunteer groups to provide, mutual aid assistance. Tex. Gov't Code § 418.109(d). This request may be made pursuant to the statewide mutual aid system, which allows mutual aid between local government entities without the necessity of a written in-place mutual-aid agreement. Tex. Gov't Code § 418.111.

Local disaster declarations under Chapter 418 of the Texas Government Code may be made by the appropriate local officials without state approval. The contours of local disaster declaration authority and application have not been rigorously tested in an immigration context, so jurisdictions should use caution and prudence in enacting them.

Local Officials May Request the Governor Declare a State of Emergency

Local officials may request the Governor "proclaim a state of emergency and designate the area involved" if a clear and present danger of the use of violence exists and/or in response to a natural or man-made disaster. Tex. Gov't Code § 433.011. (These declarations are only good for 72 hours unless extended by the Governor, and extensions can only be in 72-hour increments. Tex. Gov't Code § 433.003.) "On application of the chief executive officer or governing body of a county or municipality during an emergency, the governor may proclaim a state of emergency and designate the area involved." Tex. Gov't Code § 433.001

This state of emergency gives the Governor authority to coordinate local law enforcement agencies, which are required to cooperate. Tex. Gov't Code § 433.004. These local agencies may request the Governor call in "state military forces" if the local government "believes [the emergency] cannot be controlled by the local law enforcement agencies alone." Tex. Gov't Code § 433.005.

After the Governor declares a state of emergency following an application from a county or municipality, the Governor may issue reasonable directives calculated to control effectively and terminate the emergency and protect life and property. Tex. Gov't Code § 433.002. The directives may provide for:

- control of public and private transportation in the affected area;
- designation of specific zones in the affected area in which, if necessary, the use and occupancy of buildings and vehicles may be controlled;
- control of the movement of persons;
- control of places of amusement or assembly;
- establishment of curfews.

Tex. Gov't Code § 433.002(b).

Other Things the Attorney General Can Do for You

Tex. Gov't Code § 402.028, entitled "Assistance to Prosecuting Attorneys," provides in relevant part:

(a) At the request of a district attorney, criminal district attorney, or county attorney, the attorney general may provide assistance in the prosecution of all manner of criminal cases, including participation by an assistant attorney general as an assistant prosecutor when so appointed by the district attorney, criminal district attorney, or county attorney.

(b) A district attorney, criminal district attorney, or county attorney may appoint and deputize an assistant attorney general as assistant prosecutor to provide assistance in the prosecution of criminal cases, including the performance of any duty imposed by law on the district attorney, criminal district attorney, or county attorney.

Tex. Gov't Code § 402.042, entitled "Questions of Public Interest and Official Duties," empowers certain authorized requestors to ask the Attorney General to issue "a written opinion on a question affecting the public interest or concerning the official duties of the requesting person." This is commonly known as an "Attorney General Opinion."

Tex. Gov't Code § 402.043, entitled "Questions Relating to Actions in Which the State is Interested," directs the Texas Attorney General to "advise a district or county attorney of this state, on the attorney's request, in the prosecution or defense of an action in which the state is interested before a district or inferior court if the requesting attorney has investigated the question involved and submitted a brief to the attorney general."

Tex. Gov't Code § 418.193, entitled "Attorney General as Legal Advisor on Issues Related to Declared Disaster, authorizes the Texas Attorney General to "provide legal counsel to a political subdivision subject to a declared state of disaster under Section 418.014 [giving the governor power to declare a state of disaster] on issues related to disaster mitigation, preparedness, response, and recovery applicable to the area subject to the disaster declaration." Several different local government officials may submit a request for counsel under this statute. Tex. Gov't Code § 418.193(c).