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## ***Ultra Vires Update***

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For the 2017 Administrative Law Seminar, Mr. Bruce Bennett presented a paper that was not merely just an *ultra vires* update, but a comprehensive and thorough analysis of the *ultra vires* doctrine of sovereign immunity since the Texas Supreme Court's decision in *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009). Not content with this, he also included thoughtful and detailed suggestions for reform.

I could not hope to duplicate this effort, short of copying his paper, removing his name, and inserting mine—which, I understand, is frowned upon. Further, as Mr. Bennett noted in his paper, prior to the *Heinrich* decision in 2009, the Texas Supreme Court rarely used the phrase *ultra vires* in the sovereign immunity context—that is, connection with claims against the state or its instrumentalities or officers or agents acting in their official capacities.

By contrast, a Westlaw search revealed over 50 such *ultra vires* appellate decisions since the end of last year's Administrative Law Conference in August 2017. Four of these decision are from the Texas Supreme Court. Given this, it seems to me that, not only could I not hope to duplicate Mr. Bennett's paper from last year, I could not even possibly review all the new *ultra vires* cases in a 30 minute presentation or in a written paper that was not completely unmanageable.

None of these recent decisions is as significant as the Supreme Court's decisions in *Houston Belt & Terminal Railway Co. v. City of Houston*, 487 S.W.3d 154 (Tex. 2016) and *Hall v. McRaven*, 508 S.W.3d 232 (Tex. 2017), both of which were covered in 2017. Therefore, I have chosen to limit my review to the four decisions from the Supreme Court, together with select cases from the courts of appeal that illustrate how they are trying to understand and apply the lessons of *Houston Belt & Terminal Railway* and *Hall*. These cases are summarized below, after a brief background review.

**A. Background: *Houston Belt & Terminal Railway Co. v. City of Houston* and *Hall v. McRaven*,**

Following the *Heinrich* decision, it was generally believed that an *ultra vires* claim would lie for a government official's failure to perform a ministerial act and for an act that exceeding the official's authority. It was understood, however, that no *ultra vires* claim was possible for acts within an official's discretion, even when the official "got it wrong," and the decision was subject to reversal in a suit for judicial review. *Houston Belt & Terminal Railway* changed this understanding.

*Houston Belt & Terminal Railway* concerned the determination of "impervious surface" on a tract of real property for purposes of taxation. The relevant City of Houston ordinance instructed the director of public works and engineering to determine the area of impervious surface based on "digital map data associated with tax plats and assessment rolls or other similar reliable data as shall be determined by the director." *Houston Belt & Terminal Railway*, 487 S.W.3d at 159. The director made the determination based upon aerial images and did not consider the digital map data. *Id.* The Supreme Court held that the plaintiffs could state an *ultra vires* claim, even though the ordinance appeared to grant the director discretion as to the method used to determine the amount of impervious surface. *Id.* at 168-69. The opinion in *Houston Belt & Terminal Railway* appears to suggest that only when a government official has absolute discretion to act will his or her exercise of discretion be protected from an *ultra vires* claim. *Id.* at 163.

The next year (2017), the Supreme Court decided *Hall v. McRaven*. In that case, the chancellor of the University of Texas system refused to produce unredacted student-admission records based upon his conclusion that federal privacy law forbade disclosure of the records without redactions. A member of the board of regents sued to compel disclosure. The trial court held that the refusal to produce was not *ultra vires* and both the court of appeals and the Supreme Court affirmed.

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