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## **Fear the Walking Quorum: TOMA Penalties Return from the Dead**

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## The “Crime”

In August 2015, Montgomery County Judge Craig Doyal, County Commissioners Charlie Riley and Jim Clark, and their political consultant Marc Davenport were all involved in negotiations with the chair of local Texas Patriots PAC to arrive at a bond proposal that would be acceptable to the Patriots.

Davenport, representing Doyal and Riley, reached out to the chairman of the local Texas Patriots PAC.<sup>1</sup> After an unsuccessful road bond measure was defeated the preceding May, the county officials were eager to strike a deal with the activists who had thwarted the previous measure at the polls. The negotiations were memorialized in a “memorandum of understanding” outlining the parameters of the road bond proposal to be placed before the voters on the November 2015 ballot. The terms of the “M.O.U.” included the amount of the potential bond, another amount for a subsequent bond measure in 2018, and details regarding the projects that were eligible to be funded with bond proceeds. In exchange for the limited parameters of the bond, the PAC would agree to publicly endorse the measure for passage.

At the time, the Texas Open Meetings Act (“TOMA”) made it a crime if a member or group of members of a governmental body “knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.”

## The Indictments

In June 2016, County Judge Doyal and Commissioners Riley and Clark were indicted for conspiring to circumvent TOMA. Davenport, the political consultant, was also indicted. Though not a member of the governing body, Davenport was charged as a party to the conspiracy to circumvent the law.<sup>2</sup>

County Judge Doyal, as a member of the County Commissioners Court, was indicted for violation of TEX. GOV’T CODE § 551.143. The indictment alleged:

*As a member of a governmental body, to wit: the Montgomery County Commissioner’s [sic] Court, knowingly conspire to circumvent Title 5 Subtitle A Chapter 551 of the Texas Government Code (hereinafter referred to as the Texas Open Meetings Act), by meeting in a number less than a quorum for the purpose of secret deliberations in violation of the Texas Open Meetings Act, to wit: by engaging in a verbal exchange concerning an issue within the jurisdiction of the Montgomery County Commissioners Court, namely, the contents of the potential structure of a November 2015 Montgomery County Road Bond.”<sup>3</sup>*

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<sup>1</sup> <https://www.yourconroenews.com/neighborhood/moco/news/article/Emails-show-negotiation-of-upcoming-road-bond-9511241.php>

<sup>2</sup> This paper is limited to Doyal’s case in which the Court of Criminal Appeals ultimately found the law to be unconstitutional and which eventually triggered a legislative response.

<sup>3</sup> Indictment issued June 24, 2016

## **Trial Court**

Doyal filed a motion to dismiss on the grounds that §551.143 was overbroad in violation of the First Amendment and was unconstitutionally vague. The trial court granted the motion and dismissed the indictment.

## **Court of Appeals**

The State appealed contending that the statute did not violate the Constitution. The court of appeals agreed, concluding that the statute did not violate the First Amendment and was not unconstitutionally vague.<sup>4</sup> In response to Doyal's First Amendment claims, the court of appeals held that §551.143 was content-neutral because it was "directed at conduct, i.e., the act of conspiring to circumvent TOMA by meeting in less than a quorum for the purpose of secret deliberations in violation of TOMA."<sup>5</sup> The court further concluded that the strict scrutiny standard was inapplicable because the prohibition in TOMA "is applicable only to private forums and is designed to *encourage* public discussion."<sup>6</sup>

With respect to the vagueness, the court of appeals concluded that the statutory terms "conspire," "circumvent," and "secret," although undefined, have commonly understood meanings.<sup>7</sup> Relying on an opinion of the Texas Attorney General, the court of appeals concluded that the statute applies to "members of a governmental body who gather in numbers that do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body."<sup>8</sup> Under this construction, the court concluded that the statute "describes a criminal offense with sufficient specificity that ordinary people can understand what conduct is prohibited."<sup>9</sup>

The court of appeals reversed the trial court's dismissal and remanded the case for further proceedings.<sup>10</sup>

## **CCA Ruling**

The Court of Criminal Appeals ("CCA") granted Doyal's petition for discretionary review of the court of appeals decision. Numerous amicus briefs were filed. Two amicus briefs were filed in support of Doyal's contention that the statute was unconstitutionally vague: one on behalf of the Texas Association of School Boards, the Texas Association of School Administrator, and the Texas Council of School Attorneys; and another on behalf of the Texas Conference of Urban Counties. A third amicus brief was filed on behalf of the Texas Municipal League, the Texas City Attorneys Association, and the Texas Association of Counties "to inform the Court of how city and county officials desperately need guidance as to what they can and cannot do." The Texas

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<sup>4</sup> *State v. Doyal*, 541 S.W.3d 395 (Tex. App.—Beaumont 2018).

<sup>5</sup> *Id.* At 401.

<sup>6</sup> *Id.* (emphasis in *Doyal*)

<sup>7</sup> *Id.* At 402

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

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