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COVID-19: EMERGENCY ELECTION AUTHORITY AND ADAPTATIONS

The spread of the novel coronavirus disease (COVID-19) throughout the United States has caused widespread economic and social challenges not seen for almost a century. This upheaval was seen in the decisions of governors, legislatures, and the U.S. Supreme Court on how to handle elections scheduled for this spring and summer. These decisions were complicated by most states lacking emergency election statutes or, when states did have such statutes, the statutes being vague or providing minimal guidance.

As discussions of a potential “second wave” of COVID-19 in the fall continue, concerns have been raised about how to ensure safe and secure elections. While other disasters in the 21st Century provide examples of how elections preparation and administration have previously been altered, none of these events dealt with a public health concern created by individuals in close proximity to one another and provide minimal assistance with the current crisis.

Four elements of Kansas statute have been identified that would likely impact election emergency issues in the state. The first is the restrictions passed by the Legislature during the 2020 Special Session through amendments to the Kansas Emergency Management Act (KEMA). The second is the authority generally granted the Governor during an emergency under KEMA. The third is the Kansas Secretary of State’s ability to provide alternative election procedures during an emergency or disaster if it is impossible for voters to receive ballots otherwise. The final element is the ability of all voters to request absentee ballots for individual elections without the need to provide a specific excuse or reason for the request.¹

In response to the COVID-19 pandemic and other disasters, a variety of experts, such as the National Association of Secretaries of State and the Lawyer’s Committee for Civil Rights Under Law, have provided suggestions and recommendations for how states can strengthen their election emergency laws in order to easily respond to future disasters. The four main categories these recommendations fall into are: 1) statutory changes that codify election powers and procedures during an emergency; 2) the need for contingency planning by state and local officials; 3) having clear plans of how to communicate between state officials, local officials, and the public about election alterations during an emergency; and 4) the use of additional appropriations to help make the general election in November safe and secure in response to COVID-19.

This memorandum will provide background on how previous election emergencies were handled, address emergency election law in Kansas, detail what emergency election statutes exist in neighboring states to Kansas, and provide information on current policy-expert suggestions for election adaptations in light of the pandemic.

¹ Kansas law does not provide for permanent advance ballot voter status. See 2019 Supp. KSA 25-1122(h) and 2019 Supp. KSA 25-1122d(c).

21st Century Election Emergencies

Four national emergencies have occurred during the 21st Century that have caused widespread adaptations and changes to primary and general elections.

September 11, 2001

The first of these emergencies occurred on September 11, 2001, with the attacks on the World Trade Center in New York City. In response to the unfolding emergency, the New York City Board of Elections contacted a member of the New York Supreme Court who utilized judicial authority to suspend the ongoing primary elections in New York City on the basis that they could not be carried out in compliance with state law. The Governor of New York declared a state of emergency later that day and utilized his emergency powers to suspend all state elections. The state legislature then acted in the following days to pass a statute that officially rescheduled the elections for September 25, 2001. The text of this statute stated only those individuals eligible to vote in the initial primary would be able to vote in the rescheduled primary, and all votes would need to be recast except for absentee or military ballots that had already been received by election officials.

Hurricane Katrina (2005)

Hurricane Katrina struck New Orleans and the southern coast of the United States on August 29, 2005. Though the hurricane was quite large in scope, it primarily affected election activity in New Orleans. The widespread destruction of polling locations, election equipment, and displacement of residents saw the state's governor postpone the primary, general, and proposition elections for that fall "until such time as [they] may be rescheduled."² The elections were originally rescheduled for February and March 2006 and then subsequently rescheduled to occur no later than the end of April 2006.

Hurricane Sandy (2012)

When Hurricane Sandy made landfall in New York and New Jersey on October 29, 2012, it created a far greater impact on elections because it struck both a more densely populated area and a higher profile election cycle. Unlike Hurricane Katrina in New Orleans, which only impacted state and local elections, Hurricane Sandy struck weeks before a federal election cycle that included congressional and presidential elections. Thus, the response seen in its wake was markedly different than the response to Katrina, because the ability to postpone the elections, as seen in New Orleans, would have been more difficult, if not impossible, due to the federal offices on the ballot. Both the states of New York and New Jersey declared states of emergency several days prior to the hurricane making landfall. In New Jersey, this allowed the Lieutenant Governor, who is the chief election officer, to utilize emergency powers to alter election procedures and regulations as needed. Lieutenant Governor Kim Guadagno exercised this authority by issuing directives requiring local election officials to do the following:

- Extend the deadline for receipt of mailed requests for mail-in ballots from Tuesday, October 30 to Friday, November 2;

2 Michael T. Morley, "Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks," *Emory Law Journal* 67, 3 (2018): 559.

- Keep election offices open during the weekend prior to Election Day;
- Extend normal operating hours of election offices;
- Require local election officials to confirm access and electricity to all polling locations;
- Waive residency requirements for local election board members, restrictions on polling locations, and restrictions on ballot couriers for voters relocated to state-run shelters;
- Notify voters of all changes to polling locations through newspaper notices, public service announcements, and their websites;
- Allow any voter displaced by the hurricane to cast a provisional ballot at any polling location in the state, which would be transmitted to the voter's respective home county; and
- Allow any voter displaced by the hurricane to utilize procedures for military and overseas voters that allowed for ballot requests, blank ballots, and completed ballots to be transmitted between voters and election offices *via* email or fax.

Similarly, Governor Andrew Cuomo of New York authorized all voters within the federally declared disaster zone to cast a provisional ballot at any polling location within the state. The voter's ballot would only be counted for races in which they were legally eligible to vote and all ballots would be transmitted to each voter's respective home county.

Hurricane Matthew (2016)

Most recently, Hurricane Matthew struck the southeastern seaboard on October 6 and 7, 2016. While this did not disrupt either the primary or general elections, it caused issues with the voter registration deadlines in both Florida and Georgia, which were set for October 11. When neither state chose to extend the registration deadlines, several lawsuits arose arguing that the delays of naturalization ceremonies and closure of election offices meant the deadlines should be extended to compensate for the lost time and access. The courts in Florida agreed because some offices were closed from the time the hurricane hit until after the deadline. As such, the courts estimated in excess of 100,000 potential voters were stopped from registering and ruled that voter registration should be extended in the state until October 18, 2016. Similar lawsuits were brought in Georgia. The Georgia courts, however, decided that rather than extending the deadline for the entire state, only the deadlines for the specific counties that had been impacted should be extended.

Kansas Statutes and Emergency Election Authority

Kansas has four statutes that appear to impact the ability of officials to alter elections in the case of an emergency. HB 2016 (2020 Special Session) is the most recent law that addresses emergency election authority. Section 33(f), which amends KSA 2019 Supp. 48-925, states the Governor shall not have the power under KEMA or any other law to alter or modify

any provisions of the election laws of Kansas, including, but not limited to, the method by which elections are conducted or the time of such elections. This provision will sunset on January 26, 2021, and revert to the language prior to the enactment of HB 2016.

Prior to HB 2016 and after its sunset, the authority granted to the Governor of Kansas during a declaration of emergency in KSA 2019 Supp. 48-925 could potentially allow for emergency election authority. Specifically, four sections of the statute appear to give the Governor authority that could potentially be used to alter election procedures within the state:

- KSA 2019 Supp. 48-925(c)(1) grants the governor the authority to suspend regulatory statutes for the conduct of state business or the rules and regulations of any state agency if strict compliance would prevent or delay “necessary actions in coping with the disaster”;
- KSA 2019 Supp. 48-925(c)(7) enables the governor to control the entrance and exit of individuals to, from, and within a disaster area;
- KSA 2019 Supp. 48-925(c)(10) requires all state and local government agencies and officials to cooperate and assist; and
- KSA 2019 Supp. 48-925(c)(11) stipulates that the Governor may “perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population.”

These sections, while not directly addressing emergency election authority, are all sections that could potentially be used to authorize election adjustments to address the concerns of the COVID-19 pandemic or other disasters of statewide magnitude.

Additionally, KSA 25-622 authorizes the Kansas Secretary of State to designate temporary, alternative methods for distribution of ballots in cases of war, natural or man-made disasters, equipment failure, or other emergencies that make it impossible for voters in a voting area to obtain ballots. However, the statute does not define the threshold of what constitutes being “impossible” for a citizen to get his or her ballot. Thus, it is unclear whether the potential inability of a citizen to acquire a ballot at his or her polling location without risking the individual’s health would meet the threshold of “impossibility” required under the statute. Potential issues of interpretation also arise with regard to this statute’s applicability to absentee ballots.

Finally, 2019 Supp. KSA 25-1122(a) states all citizens may apply to receive an absentee ballot in the mail in order to vote by mail in a specific election, regardless of reason they are requesting such a ballot.³ This absentee ballot policy is different from many other states that require an individual to meet one element of a set of criteria in order to be eligible to vote absentee. In order to receive a Kansas ballot in the mail, one must fill out and submit an application with the county election official, typically the county clerk, and a ballot will be mailed to one’s home to be filled out, signed, and returned either *via* mail or in person. However, when paired with the previous emergency election statute and the current crisis, questions could arise as to whether Kansans having access to apply for absentee ballots would mean ballots are not “impossible” to obtain even if physical polling places are deemed unsafe due to transmission concerns for COVID-19.

3 *Ibid.*

Election Emergency Powers in States Surrounding Kansas

When surveying election emergency laws in other states, the National Conference of State Legislatures (NCSL) found that 45 of the 50 states had some form of election emergency laws. Though all the laws varied greatly in the powers authorized and to whom they were given, the three most common powers were the abilities to reschedule or postpone elections, change polling place locations, or both change polling place locations and reschedule or postpone elections. The general emergency powers given to the governors of Colorado, Iowa, Kansas, Nebraska, and Oklahoma also allow the governors to suspend regulatory statutes, which could apply to some election regulations and statutes.

Colorado

Colorado is one of five states that carries out all of its elections by mail-in ballots only. This uncommon system of election delivery is reflected in the state's election emergency laws and the lack of priority assigned to polling stations or other elements of in-person voting. The only election emergency law pertaining to polling locations simply states that during an emergency, the locations of polling places and ballot drop-off locations may be moved. Otherwise, during an emergency, Colorado law allows for district court judges to change the dates of special elections, allows replacement ballot requests for ballots lost because of an emergency or natural disaster, and changes procedures and ballot design requirements.⁴

Iowa

Iowa law authorizes the State Commissioner of Elections, which is the Secretary of State, to exercise emergency powers during a natural disaster or emergency, but only if said disaster or emergency would make determining the results of the election impossible. Furthermore, the statute charges the State Commissioner of Elections to adopt rules that will describe when emergency powers would be utilized and what those powers would entail.⁵ These rules can be found in chapter 21 of the Iowa Administrative Code and prescribes the authority and alternative procedures allowed to occur. Specifically, the rules address federal elections separately from local and state elections. During an election where a federal office is on the ballot, the election cannot be postponed. The only emergency measures allowed are to relocate polling places, modify methods of voting, reduce the number of precinct election officials, and any other modifications that would "enable the election to be conducted on the date and during the hours required by law." Furthermore, primary elections held in June of even-numbered years and any special elections with federal offices on the ballot cannot be postponed. The only exception to this would be if a federal or state court were to extend the time established for closing polls, at which point additional procedures would be put in place regarding the casting of votes during that time.⁶

Missouri

Missouri law provides both the Secretary of State and the Supreme Court with election emergency powers. The Secretary of State is empowered during times of emergency to allow

4 CRS 1-5-108, CRS 1-5-703, CRS 1-7.5-115(1), CRS 1-8.3-105(2), CRS 32-1-103(21)

5 Iowa Code 47.1

6 Iowa Administrative Code 721-21.1 (47)

absentee ballots to be transmitted by either fax or an electronic means. Meanwhile, the Supreme Court is authorized to establish election panels for counties where a disaster has been declared. These election panels would oversee the relocation of polls and the rescheduling of elections within their designated county or counties.⁷

Nebraska

Nebraska, in comparison, appears to provide the least amount of election emergency powers and authority of any of the states that border Kansas. State law does not appear to authorize any individual or organization to alter or change election procedure, but rather the Secretary of State has developed an “Election Emergency Preparedness Guidelines” for local jurisdictions. While the Nebraska Secretary of State’s website references these guidelines given to county officials, the agency does not provide a copy of its guidelines on this website for public review.

Oklahoma

Of the states that border Kansas, Oklahoma’s election emergency statutes contain the most robust system for altering and adapting elections during an emergency. When a declaration of emergency is made by the governor, the secretary of the State Election Board may make a separate declaration of election emergency. Once this is done, the Oklahoma Secretary of State then has the authority to reschedule elections or provide a means to continue elections. Specific powers granted to the Secretary of State include, but are not limited to, changing the ballot format as necessary, prescribing procedures for counting ballots, prescribing procedures for a recount of ballots, and applying special rules to allow military and overseas citizens to vote when federal or local laws could not be complied with because of the emergency. The state’s laws also prescribe that any ballot partially counted must have the reason for a partial count recorded on the back of the ballot and signed by the counter. Furthermore, once all ballots are counted manually, the counters must execute a certificate of vote to attest to the correctness of the total. Finally, during an emergency, all ballot transfer boxes must be sealed and sent to the county election board.⁸

Expert Suggestions for Election Adaptations

In response to the threat of the COVID-19 pandemic, as well as prior emergencies and disasters, a variety of experts and organizations have provided suggestions and recommendations for ways to address the ongoing issues of election emergencies. These recommendations cover a broad range of issues and perspectives. Furthermore, while some recommendations and suggestions are specific to the threat of COVID-19, others are more broad suggestions for election emergencies in general. The majority of the suggestions and recommendations can be grouped into four categories: statutes, contingency planning, communication, and appropriations.

⁷ 115.024 R.S.Mo., 115.291 R.S.Mo.

⁸ 26 Okla St. 22-101 *et seq.* and 26 Okla St. 14-135

Statutes

The primary recommendation from an article about election emergency law in the *Emory Law Journal*⁹ was that all states need to ensure adoption of some type of emergency election law. The author discussed the events surrounding Hurricane Mathew in 2016 and how both Florida and Georgia dealt with the issue of the voter registration guidelines. The author argued because neither state had definite election emergency laws, it forced the nonpartisan court system to deal with the inherently political issue of voter registration deadline extensions. The author concludes all states need clear and specific election emergency statutes that would provide guidance for state and local officials on how to adjust or alter election procedures and dates during an emergency.

The Lawyer's Committee for Civil Rights Under Law (LCCRUL), a nonpartisan and nonprofit civil rights organization, recommends several specific laws or rules for adoption to aid voting during an election emergency.¹⁰ This organization recommends during an emergency, displaced voters are allowed to vote provisional ballots at any state polling location and that those ballots would be transferred to the voter's home county. The LCCRUL also suggests adopting measures to allow the emailing of blank absentee ballots to voters and to ensure adequate time is allowed for the return of absentee ballot requests and absentee ballots themselves during emergencies or disasters. Finally, the LCCRUL recommends the adoption of rules or statutes that would minimize congestion at polling locations by allowing for extended hours for polling locations and additional early in-person voting time during an emergency.

Contingency Plans

An article¹¹ by the National Association of Secretaries of State (NASS) focused on recommendations to ensure contingency plans are in place to address election emergencies. NASS articulates four specific types of contingency plans that it believes each state needs to develop. The first is for state election officials to work closely with the governor's office and the state emergency management department to develop a plan on state efforts to manage potential election disruptions during an emergency. The NASS also recommends state election officials work with local election officials to develop contingency plans that outline procedures for managing elections during an emergency.

Further recommendations from the LCCRUL also included ensuring contingency plans are created for the emergency recruitment of poll workers and methods of storing and testing voting machines during an emergency.

9 Michael T. Morley, "Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks," *Emory Law Journal* 67, 3 (2018).

10 Lawyer's Committee for Civil Rights Under Law, *Expecting the Unexpected: Election Planning for Emergencies*, 2013.

11 National Association of Secretaries of State, "State Laws & Practices for the Emergency Management of Elections: Report of the NASS Task Force on Emergency Preparedness for Elections," Updated April 2017.

Communication

The final recommendations from NASS and the LCCRUL centered on having communication plans and strategies in place for an emergency. They highlight the need to have a plan to ensure communication between state and local election officials throughout an emergency, especially if traditional or normal means of communication are unavailable. The other key element suggested by both organizations was for states to develop strategies on how voters would be informed of changes, such as poll location changes, altered hours of operation, or any other changes to standard election procedures and expectations.

Appropriations

In tandem with, or in lieu of, policy legislation, legislatures can utilize their power to appropriate money to bolster responses to the emergency. This option is seen in the Kansas Secretary of State's Office receipt of additional federal monies to be used for elections this fall and their announcement of how these funds will be spent.¹² The additional funding has come from the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act, which was passed by Congress on March 29, 2020, to provide additional funding for a variety of programs and initiatives to combat the COVID-19 pandemic. Included in the CARES Act was additional money to be disbursed to states *via* the Help America Vote Act (HAVA) system, which was initially passed into law in 2002 and provides states with moneys to help with election security based on state matching funds. The Secretary of State's Office has received an additional \$4.6 million of federal funds through the CARES Act that must be spent by December 2020 and will require a 20.0 percent state match within two years. The Secretary of State's Office announced on May 7, 2020, that \$2.6 million of the additional funding would be used to reimburse Kansas counties for additional expenses due to COVID-19. Additionally, the Secretary of State's Office announced it will be purchasing approximately \$1.0 million of personal protection equipment (PPE) for Kansas poll workers, distributing PPE kits to each precinct, and providing each precinct with disposable pens so that each voter will get their own disposable pen. The PPE kits will include hand sanitizer, disinfectant spray, face masks, disposable gloves, and two plexiglass shields to help protect poll workers and voters.¹³

12 Kansas Secretary of State, "Schwab to Distribute \$2.6 Million to Kansas Counties for 2020 Elections," 2020.

13 *Ibid.*