



Texas Conservative Coalition Research Institute

Comments to the House Committee on Elections

September 18, 2020

Regarding the Committee Interim Charge 2: Make recommendations for establishing best practices for conducting an election during a declared disaster. Examine model legislation and statutes from other states pertaining to voting during a declared disaster when polls are inaccessible.

Introduction

Interim Charge 2 in the House Committee on Elections is of considerable importance, particularly in the current climate. Indeed, the State of Texas is currently operating “during a declared disaster.” The key passage in the committee’s charge, however, is the qualification of “when polls are inaccessible.” As of today, polls are very much accessible, much like most businesses. Even businesses and government services that were restricted during pandemic shutdowns—movie theaters, restaurants, sports arenas, and schools, to name a few—are now open. Additionally, Governor Abbott has taken the step of extending the early voting period by six days, giving voters more than two full weeks to find a convenient and safe time to vote in person. Thus, the committee’s charge, while important, should be forward looking.

Current Law Pertaining to Elections Held During a Declared Disaster

A declared disaster in Texas does not automatically affect elections or the ability to access polls. Indeed, in Texas, the Governor may declare a broad range of events a declared disaster. Examples certainly include COVID-19,¹ but also hurricanes,² incidents of violence,³ drought,⁴ severe weather events,⁵ flooding,⁶ thunderstorms and tornadoes,⁷ wildfires,⁸ explosions, and tropical storms,⁹ to name a few examples. Things like droughts, thunderstorms, and most severe weather, as well as incidents of violence and an isolated explosion resulting in a disaster, do not automatically merit the suspension of election laws, which should *always* be a last resort. Moreover, Texas has displayed a commendable adaptability in elections. For example, in 2010 a fire destroyed nearly all electronic voting machines in Harris County and the machines could not be replaced in time for the election. Officials encouraged people to vote early and by mail, and neighboring counties loaned extra equipment to Harris County, allowing election day to run smoothly.¹⁰

Governor Abbott has used the powers of declaring a disaster and suspending regulatory statutes prudently. In March, when the Pandemic had just begun and uncertainty abounded, Governor Abbott postponed May primary runoff elections until July.¹¹ More recently, Governor Abbott extended early

voting for the upcoming November uniform election date. That change does not fundamentally alter the manner in which elections are held, but makes an already simple process less burdensome.

Despite numerous—indeed *continuous*—declared disasters in Texas, there has not been a meritorious occasion for the Governor to suspend laws in a manner that fundamentally changes the election process.

Approaches in Other States

Should the Texas Legislature choose to pursue a formal approach to changing the election process during a declared disaster, it should do so with extreme caution, and the threshold for altering the normal statutorily provided process should be even high. If polls can be open, and are open, then the process should remain as it is under normal conditions.

As the *National Conference of State Legislatures* explains (“NCLSL”), “[s]tate statutes relating to election emergencies vary greatly.”¹² Idaho, Kentucky, New York, Oregon, South Dakota, and Utah have provisions for the delay and reschedule of elections. Alaska, Arkansas, California, and fifteen other states have provisions for relocating polling locations when necessary. Florida, Hawaii, Louisiana, Maryland, South Carolina, and Virginia have the ability to both delay and reschedule and relocate.¹³

NCSL partnered with *William & Mary Law School* and the *National Center for State Courts* in 2018 to explore different options for states during election emergencies. It found that a common problem in various state approaches was that they were either too prescriptive or too general. In efforts to evaluate the sufficiency of laws, legislators should ask: Does the existing law or regulation:

- Address only Election Day emergencies, or emergencies that hit during the run-up to an election?
- Focus on the effects of an emergency, as opposed to the type of emergency?
- Sufficiently accommodate the potential for cybersecurity issues? Legislators could recommend that state agencies review options for support and assistance activities offered by the Department of Homeland Security, including pre-event emergency preparedness training.
- Consider statutory or regulatory designation of the state’s chief election official (or designee) to regularly communicate with federal, state and local agencies that provide response to emergency events for purposes of designating plans to protect election resources where possible. Such communication can be coordinated through resources such as the National Emergency Managers Association database.
- Provide authority for extension of deadlines, election postponements, or public outreach to address the loss of public participation in elections affected by an emergency event?
- Provide authority for changing a polling location if needed?
- Apply UOCAVA standards for voting for first responders and utility workers who are out of state to provide emergency services, thus making it possible for them to vote even though they are absent?

- Require that a sufficient quantity of ballots be produced, or that there be an alternative method for producing ballots, such as the use of ballot-on-demand printers, in case of an emergency?
- Specify minimum storage requirements to protect ballots from hazardous conditions?
- Require an emergency plan be filed with state or local authorities before each election by local election officials?

These are all relevant questions worth considering. A common theme underlying these questions, however, is that measures should be taken to ensure that the existing statutory process for voting be used, whatever that may be. In Texas, voting is conducted in person, with an accommodating early voting period, and mail-in ballots for select categories of individuals who are exempt from the presumption that the civic duty of voting can and should be conducted in-person.

Only the Legislature Should Change Voting Laws

In light of this charge's topic, it is difficult to ignore the ongoing efforts by one political party in Texas to change state election law without Legislative action. Until a recent order¹⁴ from the Texas Supreme Court forced its cessation, Harris County had been sending unsolicited mail-in ballot applications to all of its more than 2 million voters, whether they qualified for mail-in ballot voting or not. As Attorney General Ken Paxton correctly pointed out in the State's appeal, sending these ballots exceeds statutory authority under the Election Code and "will sow confusion" ahead of the November election as millions of voters receive mail-in ballots they do not qualify for.¹⁵ Harris County's actions are tied to ongoing efforts to convince state and federal courts to change Texas's election law and hold November's election via mail-in ballot. The Texas Supreme Court and the Fifth Circuit Court of Appeals have rejected these efforts.¹⁶ As the Fifth Circuit points out in the opening line of the opinion: "In Texas, in-person voting is the rule."¹⁷

Conclusion

It is prudent to consider the state's approach to elections in times of emergency, but "declared disasters" are not typically incidents that disenfranchise voters. To the extent that such is the case, Governor Abbott has shown that the Governor's powers during a declared disaster are sufficient to address cases of potential disenfranchisement. To the extent that the Legislature does consider a codified approach to voting during a declared disaster, it should thoughtfully consider the questions produced by NCSL, but it should also recognize that voting in Texas is not particularly burdensome. The typical early voting period is nearly two weeks long. Many counties now offer county-wide voting, meaning that voters may cast a ballot at any polling location in the county. It is not difficult to find a convenient polling location at a convenient time. For voters who will be absent or do have difficulty reaching the polls, mail-in voting addresses those needs. The occasion for re-assessing emergency voting should not be a pretext for re-examining the system entirely.

ENDNOTES

- ¹ <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/press03132020.pdf>
- ² https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/proc08252020_disaster.pdf
- ³ <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/proc05312020.pdf>
- ⁴ <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/proc03022020.pdf>
- ⁵ <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2019/proc10212019.pdf>
- ⁶ <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2019/proc09192019.pdf>
- ⁷ <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2017/proc05012017.pdf>
- ⁸ <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2017/proc03112017.pdf>
- ⁹ <https://lrl.texas.gov/scanned/govdocs/Rick%20Perry/2010/proc090910.pdf>
- ¹⁰ <https://www.ncsl.org/research/elections-and-campaigns/election-emergencies.aspx>
- ¹¹ <https://gov.texas.gov/news/post/governor-abbott-postpones-runoff-primary-election-in-response-to-covid-19>
- ¹² <https://www.ncsl.org/research/elections-and-campaigns/election-emergencies.aspx>
- ¹³ <https://www.ncsl.org/research/elections-and-campaigns/election-emergencies.aspx>
- ¹⁴ <https://www.txcourts.gov/supreme/orders-opinions/2020/september/september-15-2020/>
- ¹⁵ https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/2020.09.11_14COA_Emergency_29.3_ApplicationBRIEF.pdf
- ¹⁶ <http://www.ca5.uscourts.gov/opinions/pub/20/20-50407-CV1.pdf>;
<https://www.txcourts.gov/media/1446711/200394.pdf>.
- ¹⁷ <http://www.ca5.uscourts.gov/opinions/pub/20/20-50407-CV1.pdf>