Handling Presidential Election Emergencies Under the Electoral Count Reform Act

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September 11, 2001, was election day in New York City.

Municipal primary elections for offices including mayor, scheduled for that fateful day, were postponed due to the emergency circumstances brought about by the 9/11 terrorist attacks. This rescheduling was an application of election emergency laws, offering insights into how legal frameworks can adapt to extraordinary situations to maintain the integrity of the electoral process.

The decision to delay the New York City municipal primary was governed by existing state laws designed to address emergencies affecting elections. The legal provisions that enabled the postponement of the primary due to a declared emergency are rooted in a broader context of state and federal laws that seek to ensure the resilience and continuity of democratic processes in the face of unforeseen disruptions.

These laws are crafted to provide flexibility and responsiveness, allowing election authorities to make necessary adjustments to protect the electoral system's integrity and public safety, while also restraining the possibility for partisan or other abuse. 9/11 tested these provisions in a manner that had not been previously anticipated, highlighting both the strengths and limitations of the existing legal framework.

In the decades since, state and federal laws governing emergency postponement or extension of elections have been improved, ensuring that events like terrorist attacks are included along with the possibility of natural disasters.

Now with concerns about political violence on the rise, a disturbing new possibility arises: not international terrorism incidentally falling on a local off-cycle election day, but deliberate politically motivated violence targeting polling places, counting centers, or other critical infrastructure on our most critical of election days: a presidential contest.

Hopefully, the 2024 election will encounter no such problems. But local, state, and federal officials should be broadly familiar with the applicable laws. To that end, this resource offers both an explanation of the relevant federal law and a general overview of common state provisions.

Federal Law: Affirming and Requiring Adherence to State Law

Presidential elections in particular are affected by a recently enacted federal statute, the Electoral Count Reform Act of 2022. This overhaul of the antiquated Electoral Count Act of 1887 was a response to the efforts to exploit ambiguities in the effort to overturn the results of the 2020 election. Among its relevant provisions is an updated definition of "election day," including the rules for extending it.

The Constitution gives to each state the power of determining how to choose presidential electors, the members of the Electoral College who formally meet in mid-December. Every state has long accorded this power to the voters, in the form of a statewide election choosing (even if they no longer appear on the ballot) among slates of elector candidates pledged to each party's candidates for president and vice president.

However, the Constitution gives to Congress the power to determine "the Time of chusing [sic] the Electors." Congress has designated the first Tuesday after the first Monday in November, the familiar nationwide general election day. But this time-setting power also enables Congress to enforce a general principle: the states must choose and implement their electoral system on the designated day in November. After that, the results of this process are final, pending only the ministerial and non-discretionary tabulation of votes cast on or before that day. State legislatures have no power to meet post-election and decree a different manner of choosing electors. ECRA reflects this by repeatedly referring to state law "enacted prior to election day."

3 USC § 1 provides, in full:

> **"The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day."**

3 U.S.C. § 21(1) then offers the following definition:

> **"Election day" means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State, except, in the case of a State that appoints electors by popular vote, if the State modifies the period of voting, as necessitated by force majeure events that are extraordinary and catastrophic, as provided under laws of the State enacted prior to such day, "election day" shall include the modified period of voting.**

This provision was hammered out in changes made by the Senate to reassure the House, where a version of Electoral Count Act reform by Reps. Cheney (R-WY) and Lofgren (D-CA) had stricter and more detailed restrictions on extending voting due to an emergency.

One compromise was the insertion of the phrase "force majeure." This term of art borrows from a long-established and common concept in contract law. Force majeure refers to unforeseeable events that are beyond the control of the relevant party, in this case the states. Examples might include natural disasters or man-made disasters. The point is that legal disputes over the conduct of the election are not covered, such as an administrative problem at the polling place or litigation over the validity of certain votes cast. These things are under the control of the state and so, even if a catastrophic failure, do not count as force majeure. Instead, they are to be handled through the judicial procedures for a disputed election provided elsewhere in ECRA.

One thing ECRA did not do is constrain how long an "extended period of voting" can last under pre-established state laws, or impose any geographical limit on whether this could apply only to an affected area or would be conducted statewide. This serves to avoid any conflict between how the presidential election is handled in the emergency and the state laws governing every other election on the ballot. At such a late date states splitting presidential from non-presidential races such as by printing new ballots is impractical. The timing of extended voting is therefore constrained only by the deadline to certify electors in early December, a month or more from election day.

In general, a few principles can inform what's generally desirable in the case of having to extend voting due to an election day emergency, constrained by the need to follow pre-established state laws.

For statewide elections such as the presidential race, it is preferable for any extended voting to apply uniformly statewide, rather than being limited to the geographic area particularly affected. This is to ensure fairness and equal treatment of all voters across the state. A disaster might only directly affect a particular city or county, but applying extended voting to only a heavily Democratic-leaning area and not Republican-leaning parts of the state, or vice versa, would understandably be seen as unacceptably biased. Such disparities could also implicate constitutional equal protection and statutory civil rights concerns, including possible racial disparities in which voters are or aren't granted an extended voting window.

State election agencies, in most states the secretary of state or an elections commission, should prepare and distribute more detailed practical guides to local administrators outlining the state's laws and procedures. Any decisions about extending vote should, unless assigned elsewhere by state law, be made

by a statewide official such as the secretary of state, governor, or other executive authority, rather than at the local level. In many states, the possibility of such declarations is tied to the governor's declaration of a disaster or emergency.

Federal law restrains these decisions through two essential requirements: states must follow their laws enacted prior to election day, and states may only extend voting due to force majeure events and not due to legal disputes, administrative failures, or a disputed recount.

A devastating earthquake in California, or a major hurricane making landfall in Florida, would be covered. A man-made emergency such as an industrial disaster or radiation leak from a nuclear power plant, necessitating large-scale evacuations, is another possibility. Terrorist attacks or mass shootings, either targeting polling places or on a sufficient scale to seriously disrupt voters' ability to get to the polling places, would also count.

The disaster in question does not have to happen on election day itself, only close enough to seriously disrupt election day. The day before, or a few days before, could still necessitate an extended period of voting. A large enough disaster might push that timeframe out into weeks before election day, but only in the most extreme cases.

In all cases, the relevant state authorities making the call on extended voting should refer to careful legal analysis of the particular state laws. Under the intense time crunch of responding to an emergency with potentially only a few hours to make a decision, these analyses should also be prepared and distributed in advance in every state, ideally in the form of an attorney general's formal guidance. And legislators should carefully revisit election codes to make sure emergency procedures track desirable policy, are clear and unambiguous, and comport with the limits of federal law. As always, the most essential principle of disaster management applies to the electoral context: hope for the best, but be prepared.


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