

## **DAILY SLANT: Cross your fingers for an uneventful Election Day**

**By Jerry Goldfeder**

I started [worrying about Election Day disasters](#) after 9/11. After all, that was a primary election day in New York City, and I was the campaign lawyer for the leading Democratic candidate for mayor, Mark Green. Of course, it was appropriate for the election to be postponed, but until we could find Gov. George Pataki no one knew what to do. At first, a Supreme Court Justice overseeing the election decided that because the police were no longer at the polling sites in lower Manhattan, he would suspend voting. Finally, the governor, exercising his plenary power, simply cancelled all elections throughout the state. The state Legislature scheduled a do-over two weeks later.

Fast forward to 2012. In that year, Superstorm Sandy hit the New York metropolitan area a week before the presidential election, destroying various polling places and displacing thousands of voters. Gov. Andrew Cuomo, on the day before the election, issued an executive order permitting those affected to cast ballots anywhere in the state rather than at their pre-designated poll sites. Gov. Chris Christie permitted impacted New Jersey voters to cast a ballot on the internet. Neither of these last-minute palliatives was particularly effective, but at least alternative options were provided. As it turns out, the damage was sufficiently localized so that the state's winner was as predicted.

What 9/11 and Sandy should have taught us is that a last-minute, ad hoc response to Election Day disruption is inadequate. Unfortunately, there appears to be no thought-out, comprehensive plan for such exigencies. In fact, there are very few states that have any contingency plans beyond a governor exercising his or her general plenary powers. This is astonishing. Indeed, in 2004, the House of Representatives voted that it would never postpone a presidential election in the face of a terrorist attack. To do so, according to the resolution, which passed 419-2, "would demonstrate weakness." Of course, this position is admirable, but, frankly, not exactly conscientious.

By design, except for several federal constitutional and statutory requirements, all 50 states and Washington D.C. enact their own laws and conduct elections as they see fit. There are common themes, of course, but rules relating to voter eligibility, registration, absentee voting, recounts and the like, reflect the state's priorities and policies – and there are approximately 3,000 counties across the country implementing these laws. That is why, in 2000, we watched the spectacle of local officials in Florida using inconsistent standards to ascertain whether a ballot was a vote for George W. Bush or Al Gore. Ultimately, the **U.S. Supreme Court found this process unconstitutional** and ended the election. Nevertheless, local control of elections continues – even for president of the United States.

So, if there is a disaster on or before Election Day this year, **there is no national plan**. If, for example, there is a severe storm in Miami-Dade County, or an earthquake in Los Angeles – **or, God forbid, a terrorist attack in New York City** – it would be up to the affected state as to how to respond, and voters are at its mercy. The threshold question is whether a state has the authority to postpone its presidential vote. Assuming it does – and this is open to debate – if the attack or storm is localized, can voting in the rest of the state proceed? If so, would the results in the rest of the state count – or would that state's final totals be held in abeyance until displaced citizens have a chance to vote a week or two later? In a close election, these decisions matter.

Our decentralized presidential system has its merits – neither Vladimir Putin nor anyone else can hack into a centralized database to disrupt our election. On the other hand, we are all at the mercy of each state's voting rules, and their idiosyncratic interpretation of what to do if disaster strikes within its borders. We are left, therefore, to simply hope for an uneventful election day.

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