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ATTORNEY GENERAL OPINION NO. 2024-5

Daniel W. Krug
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Re: Vacancy in office of commissioner; Vacancies created by increase in number of districts; Governor; Election options

Synopsis: The expedited process in subsections (b) and (c) of the former version of K.S.A. 19-203a only applied when county commissioner vacancies were to be filled at a special election.

Dear Mr. Krug:

As the Russell County Attorney, you ask whether the timelines in K.S.A. 19-203a, as it existed prior to April 18, 2024, applied to all vacancy elections under that statute or merely special elections. We conclude that the timelines applied only to special elections.[1]

1. Statutory Background

K.S.A. 19-203a was enacted as part of a 2017 bill that removed the Governor's ability to appoint the new county commissioners when a county opts to add commissioner seats. The 2017 law created a vacancy election process instead.[2] That version of K.S.A. 19-203a, which prevailed from 2017 through earlier this year, stated:

[1] Given impending election deadlines, this conclusion was communicated to you via letter on May 3, 2024, noting that a formal opinion would be forthcoming. This, of course, is that formal opinion.
[2] *See* H.B. 2006 § 2, ch. 36, 2017 Kan. Sess. Laws 216, 216–17.

> (a) The governor, within five days of the board of county commissioners adopting a resolution dividing the county into the number of districts approved by voters following the election expanding the size of the board of county commissioners as provided in K.S.A. 19-204(c), and amendments thereto, in consultation with the board of county commissioners, shall either: (1) Declare the election to be held at the next regularly scheduled general election; or (2) declare the date of the special election required under K.S.A. 19-203(c), and amendments thereto.
>
> If the decision is to call a special election, the vacancy election shall be on a day not less than 75 days nor more than 90 days from the date of the board of county commissioners adopting such resolution.
>
> (b) The county chairperson of each political party that has obtained official recognition shall call a convention for a date not less than 15 days and not more than 25 days after the governor's declaration. Such party shall nominate a candidate to fill the vacancies that have occurred due to the expansion of the size of the board of county commissioners.
>
> (c) Independent candidates may be nominated by petition of not less than 5% of the qualified electors within the county commission district. Any such petition shall be filed with the county election officer within 25 days of the governor's declaration.[3]

During its most recent session, however, the Legislature amended that statute.[4]

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[3] K.S.A. 19-203a.

[4] Now it reads:

> (a) Vacancies created in the office of commissioner by the board of county commissioner's [*sic*] adoption of a resolution or by judicial order pursuant to K.S.A. 19-204a, and amendments thereto, dividing the county into the number of districts approved by voters following an election expanding the size of the board of county commissioners pursuant to K.S.A. 19-204(c), and amendments thereto, shall be filled at the next regularly held general election.
>
> (b) (1) If at the next regularly held general election more than a simple majority of commissioners are elected, persons elected to the positions created by an increase in the number of commissioner districts shall be elected for two-year terms and shall serve until their successors are qualified. Thereafter, such commissioners shall be elected to four-year terms and shall serve until their successors are qualified.
>
> (2) If the next regularly held general election is in an odd-numbered year, persons elected to the positions created by an increase in the number of commissioner districts shall be elected for either one-year or three-year terms as determined by the board of county commissioners so as to prevent the election of more than a simple majority of commissioners at any subsequent general election. Such persons shall serve until their successors are qualified.

In summary, the recent bill (1) eliminated the Governor's choice between a special election and general election, mandating that all such vacancy elections occur in conjunction with the general election; (2) clarified that "general election" includes both odd- and even-year elections; (3) eliminated the special nomination process associated with these vacancy elections; and (4) imposed procedures to make sure the commissioner terms remain staggered.

2. Factual Background

In November 2023, Russell County voted to increase the size of its county commission from three seats to five. After that vote, and in accordance with the version of K.S.A. 19-203a then in effect, Governor Kelly decided that the new vacancies would be filled at the next regularly scheduled general election—i.e., the election scheduled for November 5, 2024.[5] The Governor's declaration was issued on December 21, 2023.[6]

Following this declaration, two of the county's recognized political parties (the Democrats and Republicans) held conventions and purported to select party nominees. But only one of those parties did so within twenty-five days of the declaration. At any rate, both parties had selected their professed nominees by January 22, 2024.

H.B. 2661, which amended K.S.A. 19-203a, was introduced in the House of Representatives ten days later, on February 1. It eventually made its way through both houses and was approved by the Governor on April 4. As mentioned above, among the things H.B. 2661 did was to eliminate both special elections and the special nomination process associated with these vacancy elections; however, the legislative history contains no mention of the nomination process or timelines.[7]

> (c) For purposes of this section, "general election" means the same as defined in K.S.A. 25-2502, and amendments thereto.

See H.B. 2661 § 3, 43 Kan. Reg. 451, 451 (Apr. 18, 2024).

[5] Letter from Gov. Laura Kelly to Daniel Krug, Russell Cty. Attorney (Dec. 21, 2023) (on file with the Att'y Gen.).

[6] *Id.*

[7] *See* S. Comm. on Local Gov't, Minutes, Mar. 5, 2024, at 1–2, *available at* https://perma.cc/TD56-SB95; H. Comm. on Local Gov't, Minutes, Feb. 7, 2024, at 2, *available at* https://perma.cc/DU5B-SMEB. Despite the timing, the situation in Russell County does not appear to have been on the legislators' minds. Rather, the primary proponents of the bill were all from Pottawatomie County. *See* Kan. Legislature 2023–2024 Session, HB 2661 Committee Minutes and Testimony, https://perma.cc/BC3L-WNXP (last visited Apr. 12, 2024). That county had voted to expand its commission in 2022 and the Governor had likewise directed the vacancy election to occur at the next regularly scheduled general election. The Pottawatomie County Commission believed that general election would occur in the fall of 2023, but the Governor interpreted the term "general election" as referring to the election occurring in fall of 2024. This created a conflict with another statute: K.S.A. 19-202(c) states that "terms of office for the board of county commissioners shall be staggered in such a way that no more than a simple majority of commissioners is elected at any general election";

3. Analysis and Conclusions

You ask whether the twenty-five-day timelines in the old K.S.A. 19-203a(b) and (c) applied just to special elections. And we conclude that, yes, the best reading of the statute is that those subsections only applied when vacancies were to be filled via special election, not when they were to be filled at the next general election.

But we admit that we do not reach this conclusion easily. When it comes to interpreting statutes, the language of the statute controls.[8] "Ordinary words are given their ordinary meanings," and we can neither "add language that is not found in [the statute]" nor "exclude language that is found in it."[9] The problem here is that the text of the statute has at least two permissible readings on the point in question.

The strongest textual case for applying the timelines to both types of election comes from the fact that the Legislature cut K.S.A. 19-203a into subsections, all on the same organizational level (i.e., subsections (b) and (c) are independent portions of the statute, not subordinate subsections of an overarching (a)). Where a statute is divided into these distinct parts, each "end[ing] with a period," it "strongly suggest[s] that each [such part] may be understood" as a complete whole that is not dependent on the language of any other part for its operation.[10] Applying this rule of construction would thus divide the statute into three distinct subject areas, each of which is fully effective within itself. Subsection (a) is about the timing of the vacancy election, subsection (b) is about party nominations for any such vacancy election, and subsection (c) is about independent candidates who wish to run in any such vacancy election. Although subsection (a) acknowledges the possibility that the Governor could order vacancies filled at either a special election or the next general election, subsections (b) and (c) make no distinction between these two possibilities. They simply declare that the nomination processes outlined therein shall proceed from the Governor's declaration and must be completed within twenty-five days. Thus, one could read the statute to say that subsections (b) and (c) apply to all vacancy elections, regardless of when they occur.

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electing the new Pottawatomie County commissioners at the next general election would've put too many commissioners on the ballot at once. Letter from John D. Watt, Cty. Counselor, Pottawatomie County, to Elections Div., Office of the Secretary of State, et al. (Jan. 9, 2023); *accord* Sen. Kristian O'Shea et al., Written Testimony in Support of HB 2661, H. Comm. on Local Gov't (Feb. 7, 2024) (describing Pottawatomie County problem and attaching Watt letter), *available at* https://perma.cc/2FJE-3DDM.

[8] *State v. Paul*, 285 Kan. 658, 661, 175 P.3d 840 (2008).

[9] *Id.* (citation omitted).

[10] *Jama v. ICE*, 543 U.S. 335, 344 (2005). *See generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 156–60 (2012) (discussing the scope-of-subparts canon).

But this organizational logic is complicated by another potentially telling choice the Legislature made: the paragraph break after the first sentence in subsection (a). Ordinarily, a subsection containing multiple sentences would just continue on to the next sentence. Indeed, subsections (b) and (c)—both of which contain two sentences each—do precisely that. "In writing, a paragraph break often signals that a new idea is coming."[11] Arguably, then, the paragraph break was intended to address a new topic and provide a new umbrella for subsections (b) and (c)—thus cabining the effect of subsections (b) and (c) to the topic of that new paragraph (i.e., special elections). In other words, the phrase beginning the new paragraph ("If the decision is to call a special election") could be read as modifying the timelines that follow in those subsections.

Of course, one must be wary of relying too much on formatting clues such as these. Sometimes formatting is added by a printer or editor on codification and, in such cases, is not a reliable guide to legislative intent.[12] However, in this specific case the paragraph break came about through amendments in the Senate Committee on Ethics, Elections and Local Government[13] and thus was part of the text in both houses when they took final action on the bill, and part of the enrolled bill that the Governor approved.[14]

We are thus left to delve into the statute's purpose. *Why* would the Legislature mandate a speedy, atypical nomination process for this small subset of elections?

In asking this question, we are cognizant of the pitfalls of a purposive or consequentialist approach to statutory interpretation. But even the foremost proponents of textualism only go so far as to call a "half-truth" the idea "that consequences of a decision provide the key to sound interpretation," and they even say that "[s]ome outcome-pertinent consequences—what might be called textual consequences—are relevant to a sound textual decision."[15] "[I]nterpretation always depends on context, [and] context always includes evident purpose."[16]

The ultimate point is this: statutes should be interpreted to "make . . . sense . . . *where the language permits*."[17] That last phrase is an important qualifier. The text

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[11] *United States v. Butler*, 949 F.3d 230, 235 (5th Cir. 2020); *accord M.F. v. Dep't of Human Servs.*, 928 A.2d 71, 83 (N.J. Super. Ct. App. Div. 2007).
[12] Scalia & Garner, *supra*, at 156.
[13] *See* H.B. 2006 (2017) (as amended by Senate committee), *available at* https://perma.cc/7YN3-M5GC.
[14] Furthermore, any weakness in this formatting evidence would apply with equal force to the argument-from-subparts supporting a contrary reading. So, in the end, it's a wash.
[15] Scalia & Garner, *supra*, at 352.
[16] *Id.* at 63. *See generally id.* at 56 (distinguishing between purposive interpretation and the proper use of purpose within a textualist framework).
[17] *Id.* at 39 (emphasis added).

must remain supreme.[18] But purpose is relevant insofar as it can be derived from the text itself.[19]

Now, the purpose of the speedy nomination/candidate qualification process in subsections (b) and (c) is not evident from the face of K.S.A. 19-203a alone. But "the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view."[20] And when we consider the other laws relating to (a) candidate nomination and qualification and (b) expanding a county commission, the purpose of the special nominating process and timeline (and the consequent reason for those provisions only applying to special elections) comes into focus.

Under ordinary state law, there are two ways for a person to earn a spot on the general-election ballot: either collect a sufficient number of signatures in support of one's independent candidacy or be nominated by a recognized political party.[21] Independent candidates must file nominating petitions by the Monday prior to the first Tuesday in August.[22] Political-party nominations are obtained by winning a primary election[23] held on the first Tuesday in August[24] or, for smaller parties, being selected by a party convention.[25] To appear on their party's primary-election ballot, candidates must have filed the necessary paperwork (and, if required, paid the necessary fee) by June 1 of the election year.[26] Nominations via convention must likewise be reported no later than June 1.[27]

As to expanding a county commission, that can only happen via a countywide vote at a November general election.[28] After a vote to do so, the board of commissioners must divide the county into new commissioner districts no later than January 1 of

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[18] *See Merryfield v. Sullivan*, 301 Kan. 397, 399, 343 P.3d 515 (2015) ("[T]he best and only safe rule for determining the intent of the creators of a written law is to abide by the language that they have chosen to use." (citation omitted)).
[19] Scalia & Garner, *supra*, at 56.
[20] *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting) ("[T]he meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." (citing *Red Bird v. United States* (*Cherokee Intermarriage Cases*), 203 U.S. 76 (1906); *McKee v. United States*, 164 U.S. 287 (1896); *Talbott v. Bd. of Cty. Comm'rs*, 139 U.S. 438, 443 (1891))); *accord State v. Flummerfelt*, 235 Kan. 609, 616, 684 P.2d 363 (1984).
[21] *See* K.S.A. 25-202. The law also provides for write-in candidacies. *See, e.g.*, K.S.A. 25-305(h). But because (former) K.S.A. 19-203a did not address write-in candidacies, we likewise do not address that type of candidacy here.
[22] *See* K.S.A. 25-305.
[23] K.S.A. 25-202(a).
[24] *See* K.S.A. 25-203.
[25] K.S.A. 25-202(b).
[26] K.S.A. 25-205(a).
[27] *See* K.S.A. 25-305(a).
[28] K.S.A. 19-204(c).

the following year.[29] And then, under the old version of K.S.A. 19-203a, the Governor had to decide whether to fill the vacancy via special election or general election "within five days of the board" adopting the new commissioner districts.

With this background in mind, the purpose of the expedited process in K.S.A. 19-203a—and why it only applies to special elections—becomes clear. Because the vote to expand a county commission will always have occurred in a November general election, and the Governor's election choice will always be made no later than January 6, there is plenty of time to comply with the various summer candidacy deadlines when the Governor chooses to have the vacancy filled at the next general election. However, if the Governor chooses a special election, it becomes impossible to comply with the ordinary deadlines because the old version of K.S.A. 19-203a stated that the special election had to be held "not . . . more than 90 days from the date of the board of county commissioners" adopting the new commissioner districts. In other words, the latest any special election could be held—assuming all actors took the maximum time allowed by statute—was April 1 (or March 31 in a leap year).

Thus, the purpose of the statute's expedited process was to provide an alternate way to proceed when the ordinary election deadlines could not apply. Because that would only ever happen in a special election, the best reading of K.S.A. 19-203a is that the process in subsections (b) and (c) only applied to special elections.

We emphasize that this is a permissible reading of the enacted text (as we explained in our analysis of the statute's organization and formatting) rather than a distortion of the text to support some vague purpose or legislative intent. We have used a purpose evident from reading the statute *in pari materia* to choose between two otherwise equally plausible interpretations of the text.[30]

The consequence of this reading on Russell County's upcoming elections is relatively straightforward: the nominating conventions held in January were ineffectual;[31] the ordinary nominating process applies.

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[29] K.S.A. 19-204a. If the county commission fails to act by January 1, the chief judge of the district court must draw the new lines no later than January 31. *Id.*

[30] *Accord* Scalia & Garner, *supra*, at 57.

[31] Although Kansas law allows nomination via convention for smaller parties (as mentioned above) neither the Democratic Party nor the Republican Party qualifies for this exception. *See* K.S.A. 25-202(b).

/s/ Kris W. Kobach

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