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December 11, 2020

ATTORNEY GENERAL OPINION NO. 2020- 12

The Honorable Mark Samsel  
State Representative, Fifth District  
508 E. 4th Street  
Wellsville, KS 66092

Re: Constitution of the State of Kansas—Legislative—Organization and Sessions  
  
Constitution of the State of Kansas—Miscellaneous—Continuity of State and  
Local Government  
  
Legislature—General Provisions—Preorganizational Meetings of Members-  
Elect; Miscellaneous Provisions; Convening of Legislature; House Roll-Call  
System and Equipment  
  
Militia, Defense and Public Safety—Emergency Interim Legislative Succession  
Act—Quorum and Vote Requirements; Emergency Location of State  
Government; Place of Legislative Session

Synopsis: A "meeting" of the Legislature has constitutional significance that does not attach to any other body in State government. Article 2, § 8 of the Kansas Constitution requires the Legislature to meet in the state capital city but not within the Capitol Building. To "meet," Legislators must "come together," which requires simultaneous physical presence within one room. At a minimum, a quorum of the Senators or Representatives must be together in a room to constitute a meeting of that house and to vote on final action on a bill. A quorum is only established when a majority of the members of the Senate or of the House, respectively, are present in the same room. Bills passed by a procedure inconsistent with requirements of the Kansas Constitution may be subject to challenge in court and will be invalidated if found constitutionally infirm. Cited herein: K.S.A. 46-142; 46-157; 46-601; 48-1308; 48-1312; Kan. Const. Art. 1 § 5; Art. 2, §§ 2, 8, 13, 15; Art. 15, § 8.

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Dear Representative Samsel:

As State Representative for the Fifth District, you ask our opinion on two questions concerning the convening of the Kansas Legislature for the 2021 Session: Whether the Legislature may convene outside of the Capitol Building so long as it convenes within the city limits of Topeka, and whether a quorum must be contemporaneously and physically present to pass a bill. For the reasons discussed below, we think the answer to each of your questions is yes.

You raise these questions against the backdrop of the COVID-19 pandemic and indicate your interest in finding a means for providing social distancing for legislators during the Legislative Session.<sup>1</sup> You suggest that an arena or other large facility in Topeka would provide more space for social distancing or, alternatively, that legislators could remain in their offices or at other locations in the Capitol Building and “then appear in the chamber, individually or in smaller groups, to speak, ask questions, offer amendments, vote, or otherwise participate” instead of physically coming together in the chambers of the Senate or House of Representatives.

As a prefatory matter, we limit our analysis to the requirements of the Kansas Constitution. While legislative rules, customs or statutes also may affect the answers to your questions, rules, customs or statutes may be changed, repealed or amended by the Legislature itself so long as that is accomplished in a manner consistent with constitutional requirements. Thus, any constitutional restrictions or limitations establish the outer boundary of flexibility for the Legislature on the two questions of procedure that you pose.

With this context in mind, we turn to your first question, concerning the place of meeting.

### Place of Meeting

The Kansas Constitution requires that “all sessions [of the Legislature] shall be held at the state capital.”<sup>2</sup> “Capital” is not defined in the Constitution although it does reference “capital” in connection with a “city.”<sup>3</sup> That constitutional reference is consistent with the ordinary meaning of “capital,” which is “a city serving as a seat of government.”<sup>4</sup> In Kansas, our capital is Topeka.<sup>5</sup> Therefore, as you correctly note, the plain language of the Constitution limits the

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<sup>1</sup> “Social distancing” refers to the practice of maintaining a six-foot distance from persons who are not in one’s household, to reduce the spread of COVID-19. *Social Distancing*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (updated July 15, 2020; last accessed Oct. 28, 2020). We note that the Governor’s Executive Order No. 20-52, mandating the wearing of masks or other face coverings, excepted “persons engaged in an activity or event held or managed by the Kansas Legislature.”

<sup>2</sup> Kan. Const. Art. 2, § 8.

<sup>3</sup> Kan. Const. Art. 15, § 8.

<sup>4</sup> *Capital*. Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/capital> (last accessed Nov. 30, 2020). In contrast, “capitol” refers to “the building in which a state legislative body meets.” *Capitol*. Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/capitol> (last accessed Nov. 30, 2020).

<sup>5</sup> The Wyandotte Constitution set Topeka as the temporary seat of government, pending a popular vote, and the voters in the November 5, 1861, election set Topeka as the permanent capital of the state. Kansas Historical

Legislature to meeting in Topeka but does not specify where within Topeka the Legislature must meet. Indeed, at the time this constitutional provision was adopted in 1861, it could not have referred exclusively to the current Capitol Building because that building had not yet been built.

Although the plain text of the Kansas Constitution allows the Legislature to meet anywhere within the city limits of Topeka, the Constitution also specifically authorizes the Legislature to "determine the rules of its proceedings,"<sup>6</sup> and the Legislature has exercised that constitutional authority through several current rules that explicitly require legislative action to occur in the respective chambers of the Senate or House of Representatives.<sup>7</sup> Similarly, current statutes

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Society, Wyandotte Constitutional Convention, available at <https://www.kshs.org/kansapedia/wyandotte-constitutional-convention/17884> (last accessed Nov. 25, 2020). See also Kan. Const. Art. 15, § 8.

<sup>6</sup> Kan. Const. Art. 2, § 8.

<sup>7</sup> The Rules require presence in chambers from the very start of each legislative day. The Senate President must "take the chair at the hour fixed for the convening of the Senate, and the roll shall be called in order to ascertain if a quorum is present." Rule 2, Rules of the Kansas Senate, 2017-2020 (January 2017), available in PDF at [http://kslegislature.org/li/b2019\\_20/chamber/senate/rules/](http://kslegislature.org/li/b2019_20/chamber/senate/rules/) (hereinafter, "Senate Rules"). Senate Rule 3 states that, "No Senator shall fail to attend when the Senate is in session without first obtaining leave of the Senate, unless prevented from attending by sickness or other sufficient cause." Likewise, in the House, the Speaker "shall take the chair each day" and "[t]he first business each legislative day shall be the taking of the roll." Rules 102, 103. Rules of the Kansas House of Representatives, 2019-2020 Biennium (January 2019), available in PDF at: [http://www.kslegislature.org/li/m/pdf/house\\_rules.pdf](http://www.kslegislature.org/li/m/pdf/house_rules.pdf) (hereinafter, "House Rules"). Presence in the House chamber of all Representatives is required, unless a member has a verified illness or other legislative business or is granted an excused absence by the Speaker. House Rule 105.

Presence in the chambers for voting is essential under the Rules. "In the absence of a quorum, the Senators present, by majority vote, may take such measures as they shall deem necessary to secure the presence of a quorum." Senate Rule 2. To secure the physical presence of members for a vote, the Rules authorize extraordinary measures. Senate Rule 38 sets out the procedures for a "call of Senate" to obtain the presence of absent members. "When a call is demanded, the President shall order the doors of the Senate to be closed and all members to be in their seats unless excused by the President." Senate Rule 38. A Senator who is absent without sufficient excuse "may be sent for and taken into custody by the Sergeant at Arms." *Id.* Likewise in the House, Rule 301 states that, "[i]n the absence of a quorum, no business shall be transacted by the House." House Rule 302 states that, in the absence of a quorum, "the members present may do what is necessary to attain a quorum," and House Rule 2508 provides for a "call of the House" similar to that described for the Senate.

For casting a vote, Senate Rule 20 states: "No Senator shall be allowed to vote unless the Senator is seated within the Senator's assigned seat within the Senate chamber when the vote is taken." Senate votes are taken verbally by roll call. House members vote by pressing a button on their desks. The House derives the authority to use this form of voting from K.S.A. 46-601, which states: "The vote of the members of the house of representatives of the Kansas Legislature may be taken and recorded by mechanical, electrical, or electronic or any combination thereof means in all cases where the yeas and nays are required by the constitution of Kansas or ordered by members of the house. All such voting shall be taken and recorded by the use of modern equipment properly installed and operated." The current equipment consists of the buttons installed on the Representatives' desks and two large electronic display screens installed in the top corners of the House chamber. House Rule 2504(a) states: "A member may vote only when at their desk or at any place within the chamber of the House when authorized by the presiding officer, who shall direct the chief clerk to so vote for such member." House Rule 2504.

It is not only voting that must be done from the floor. Addressing the chamber or participating in debate also requires physical presence. For example, House Rule 1701 states, "[a]ny member desiring to request the floor shall press the member's 'speak bill' button." Further, "[m]embers shall address the House from the microphone located in the well of the House chamber." House Rule 1704. Senate Rule 14 refers to Senators

require physical presence in the respective chambers for certain purposes.<sup>8</sup> Of course, both houses of the Legislature have the ability to adopt, amend, suspend, or revoke their rules, and statutes can be amended.<sup>9</sup> However, such actions must be conducted in accordance with the statutes and rules of the Senate and of the House in effect at the time of any such action.

#### Contemporaneous Presence of a Quorum

Your second question asks “whether a quorum must be contemporaneously and physically present to pass a bill.” Our Constitution grants the Legislature general authority to “determine the rules of its proceedings,”<sup>10</sup> but the Legislature’s exercise of that *general* authority must be consistent with *specific* procedural requirements set forth in the Constitution. Among our Constitution’s specific procedural requirements for the Legislature to enact law are the interrelated commands that “[n]o law shall be enacted except by bill,”<sup>11</sup> that “[a] majority of the members then elected (or appointed) and qualified of each house, voting in the affirmative, shall be necessary to pass any bill”<sup>12</sup> as evidenced by “[t]he affirmative and negative votes upon the final passage of every bill ... entered in the journal,”<sup>13</sup> and that bills be “consider[ed]” only during “session[s]” that occur when the Legislature is “meet[ing].”<sup>14</sup>

Any bill enacted in violation of constitutional procedures may be vulnerable to litigation challenging its validity. For example, legislation enacted in violation of the Constitution’s specific requirement for presentment to the governor is invalid.<sup>15</sup> So too is legislation that fails

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“rising to debate.” Physical presence enables robust debate, a fundamental aspect of representative government.

<sup>8</sup> In addition to legislative rules, statutes also require that particular legislative activities occur in the respective chambers. For example, K.S.A. 46-142 explicitly requires the members-elect of the Legislature to be physically present in the State Capitol for preorganizational meetings on the first Monday in December of specified years. The members-elect of the Senate “shall meet at the state capitol ... [and] convene ... in the senate chamber.” Likewise, “persons elected to the house of representatives ... shall meet at the state capitol ... [and] convene ... in the house of representatives.” K.S.A. 46-157 directs legislators to convene in regular session at a specified time and date, “at 2:00 o’clock p.m. of the second Monday of January,” and the place is implicitly understood to be in the legislative chambers.

<sup>9</sup> Senate Rules 67, 68; House Rules 2311, 3701. We note that in states where significant changes to the conduct of legislative business have been authorized — whether by state constitution, statutes, or legislative rules — certain conditions must exist to trigger the authority to implement such changes. National Conference of State Legislatures, *Continuity of Legislature during Emergency*, <https://www.ncsl.org/research/about-state-legislatures/continuity-of-legislature-during-emergency.aspx#Remote> (dated Aug. 27, 2020; last accessed Nov. 20, 2020). Also, in most if not all of the states, the duration for such changes is explicitly limited, typically to the length of a declared disaster or to the end of a legislative session. *Id.*

<sup>10</sup> Kan. Const. Art. 2, § 8

<sup>11</sup> Kan. Const. Art. 2, § 20.

<sup>12</sup> Kan. Const. Art. 2, § 13.

<sup>13</sup> Kan. Const. Art. 2, § 10; *see also Ziegler v. Junction City*, 90 Kan. 856, 136 P. 223 (1913) (holding that the journals of the Legislature are conclusive as to what provisions were actually passed by the Legislature and finding an enrolled, published bill invalid).

<sup>14</sup> Kan. Const. Art. 2, § 8.

<sup>15</sup> *See State ex rel. Williams v. Robb*, 163 Kan. 502, 516 (1947).

to meet the constitutional requirement for specific enactment language<sup>16</sup> and legislation that violates the Constitution's prohibition on multiple subjects in a single bill.<sup>17</sup>

Against that backdrop, we turn to your specific question, which requires us to determine what constitutes a constitutional "meet[ing]" of the Legislature during which a bill may be passed.<sup>18</sup> Although we are aware of no cases in which Kansas courts have addressed that specifically, we observe in general that the Kansas Supreme Court has invalidated statutes by interpreting constitutional provisions to have meaning not readily apparent from their plain text.<sup>19</sup> Therefore, we think it prudent for the Legislature to be reluctant to depart from well-established procedures for enacting bills, in order to avoid the risk that legislation enacted through novel legislative procedures will be held invalid because its enactment violated our Constitution.

The Legislature is the only body specifically required by our Constitution to "meet,"<sup>20</sup> and the Constitution specifically references the "place of meeting,"<sup>21</sup> implying that the requirement to meet involves a physical location. The Legislature also is the only body for which our Constitution defines a "quorum," which is "[a] majority of the members then elected (or appointed) and qualified of the house of representatives or the senate,"<sup>22</sup> and the only body expressly required to perform certain of its business – specifically, the "consideration" of bills

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<sup>16</sup> See *State v. Kearns*, 229 Kan. 207, 209 (1981) (holding the Campaign Finance Act "unconstitutional and void" because the bill did not include the constitutionally-mandated enacting clause, "Be it enacted by the Legislature of the State of Kansas").

<sup>17</sup> The "one-subject rule" refers to Article 2, § 16 of the Kansas Constitution, which states: "No bill shall contain more than one subject, except appropriation bills ..." See *State ex rel. Stephan v. Carlin*, 229 Kan. 665, 666 (1981) (invalidating a section of a Senate bill as an "unconstitutional enactment" because it was not germane to the other sections and thus violated the "one-subject rule"). Such challenges continue to this day. See, e.g., *KNEA v. State*, 305 Kan. 739 (2017) (considering a § 16 challenge to a bill but concluding the challenged section was germane and thus did not violate the one-subject rule).

<sup>18</sup> Because the Kansas Constitution sets specific procedural requirements for votes before a bill may "pass," Kan. Const. Art. 2, § 13, our analysis here focuses on what constitutes a "meet[ing]" for purposes of final action on a bill. See also Kan. Const. Art. 2, § 10 (referencing "final passage"). In settings that do not involve those specific constitutional requirements for final passage, such as action on bills in committees, the Legislature's general constitutional power to "determine the rules of its proceedings" may allow a different result for what constitutes a "meet[ing]." For example, during the COVID-19 pandemic, legislative committees frequently have met virtually and conducted business through videoconferencing; we think that is a permissible use of the Legislature's general constitutional authority to determine rules for its proceedings.

<sup>19</sup> See, e.g., *Hodes & Nauser v. Schmidt*, 309 Kan. 610 (2019) (invalidating statutes regulating abortion as violating a right "to assert bodily integrity" – a right the Court found within the "natural right of personal autonomy" it identified in the Kansas Constitution's Bill of Rights, though not expressly stated); *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127 (2019) (invalidating statute limiting noneconomic damages as violating the constitutional guarantee of the right to trial by jury); and the *Gannon v. Kansas* series of cases (repeatedly invalidating school-finance statutes as violating the Article 6 command that the Legislature "make suitable provision for finance of the educational interests of the state").

<sup>20</sup> See Kan. Const. Art. 2 § 8 ("The legislature shall meet ..."). No similar textual requirement to "meet" exists for the Kansas Supreme Court, see Kan. Const. Art. 3, § 3; the State Board of Regents or State Board of Education, see Kan. Const. Art. 6, §§ 2, 3; or the Supreme Court Nominating Commission, see Kan. Const. Art. 3, § 5. The nearest parallel is a constitutional convention, which nonetheless is not textually required to "meet" but is required to "convene at the state capital." See Kan. Const. Art. 14, § 2.

<sup>21</sup> Kan. Const. Art. 2, § 22 (emphasis added).

<sup>22</sup> Kan. Const. Art. 2, § 8.

– while it is “meet[ing]” in a “session.”<sup>23</sup> The Constitution also prescribes with particularity how certain of its business may be accomplished during such a meeting, specifically the passage of bills by a constitutional majority<sup>24</sup> that is memorialized in a constitutionally required journal.<sup>25</sup> The Legislature also is the only body upon which the Constitution imposes limits on its ability to cease meeting – *i.e.*, to adjourn.<sup>26</sup> Thus, a “meet[ing]” of the Legislature has constitutional significance that does not attach to any other body in state government.

While we cannot say with certainty that novel forms of casting votes on passage of bills are forbidden by our Constitution, we can say with a high degree of confidence that the most legally defensible interpretation of this unique constitutional requirement for the Legislature to “meet” requires a contemporaneous physical gathering together of legislators to pass a bill. Several factors counsel for this conclusion.

First, in interpreting our Constitution or statutes, we give common words their ordinary meanings,<sup>27</sup> and the definition of “meet” is “to come together with, especially at a particular time or place.”<sup>28</sup> That modern dictionary definition, which contemplates a contemporaneous physical gathering, is consistent with what would have been the common understanding of “meet” when our Constitution was adopted in 1861. At that time, “meet” necessarily would have meant to physically gather together because common technology for remote communications, such as telephones or videoconferencing, had not yet been invented. Thus, the ordinary meaning of the constitutional requirement to “meet” – both now and when the Constitution was adopted – involves a contemporaneous physical gathering together of legislators.

Second, the reference in our Constitution’s text to the “place of meeting” notably uses “place” in the singular, not in the plural. This implies a single, physical location where legislators gather, as distinguished from a situation in which individual legislators may be in multiple separate places and communicate with each other remotely or appear only sequentially rather than contemporaneously at a common location in order to vote or perform other legislative acts.

Third, the existence in our Constitution of a definition of “quorum” suggests that one is required in at least some circumstances.<sup>29</sup> While the Constitution does not specify which legislative acts require a quorum, it stands to reason that at a minimum the requirement attaches to core legislative acts specified in the Constitution itself, such as voting to pass a

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<sup>23</sup> Kan. Const. Art. 2, § 8.

<sup>24</sup> Kan. Const. Art. 2, § 13.

<sup>25</sup> Kan. Const. Art. 2, § 10.

<sup>26</sup> Kan. Const. Art. 2 § 8 states: “Neither house may adjourn for more than two days, Sundays excepted, without the consent of the other;” however, “[i]n the case of disagreement between the two houses in respect of the time of adjournment, the governor may adjourn the Legislature to such time as [s]he deems proper, not beyond its next regular session.” Kan. Const. Art. 1, § 5.

<sup>27</sup> *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 659 (2016).

<sup>28</sup> *Meet*. Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/meet> (last accessed Oct. 16, 2020).

<sup>29</sup> Although our Constitution defines “quorum,” it never expressly requires the presence of a quorum or otherwise gives plain direction on the purpose for which “quorum” is defined.

bill on final action. The *sine qua non* of "quorum" is presence together. The Merriam-Webster Dictionary defines "quorum" as "the number [of] members of a body that when *duly assembled* is legally competent to transact business."<sup>30</sup> "Assemble" is defined as "to bring together (as in a particular place or for a particular purpose)."<sup>31</sup> Black's Law Dictionary defines quorum as "the minimum number of members ... who must be *present* for a deliberative assembly to legally transact business."<sup>32</sup> "Present" is defined as "in attendance, not elsewhere."<sup>33</sup> From these definitions, we conclude that intrinsic to the concept of quorum is the contemporaneous presence of a majority of the legislative body, assembled together.<sup>34</sup>

That plain-meaning analysis is consistent with the Kansas Supreme Court's interpretation of the quorum requirement:

"The constitution of our state ordains that a majority of each house shall constitute a quorum. The house of representatives consists of 125 members; 63 is a majority and a quorum. When a majority or quorum are present, the house can do business; not otherwise. A quorum possesses all the powers of the whole body, a majority of which quorum must, of course, govern. If less than 63 members are present in the house, there is no quorum. The body may adjourn from day to day, but cannot ... transact business..."<sup>35</sup>

You also inquire whether a situation in which a quorum is "readily present" within the Capitol Building as a whole, but not simultaneously present in the chamber, could satisfy constitutional requirements. You offer an example of legislators remaining in their offices or on different floors of the Capitol Building, observing the proceedings via legislative online streaming, and then appearing in the chamber individually or in small groups to speak, ask questions, offer amendments, vote, or otherwise participate.

The legislators and citizens who adopted the Kansas Constitution could not have contemplated a dispersed group as constituting a quorum, given that technology in 1861 did

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<sup>30</sup> *Quorum*. Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/quorum> (last accessed Oct. 26, 2020) (emphasis added).

<sup>31</sup> *Assemble*. Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/assemble> (last accessed Nov. 8, 2020).

<sup>32</sup> *Quorum*. Black's Law Dictionary (11<sup>th</sup> ed. 2019) (emphasis added).

<sup>33</sup> *Presence*. Black's Law Dictionary (11<sup>th</sup> ed. 2019). Senate Rule 2 states that if a roll call shows that a quorum is not present, "the Senators present, by majority vote, may take such measures as they shall deem necessary to secure the presence of a quorum."

<sup>34</sup> Longstanding principles of parliamentary procedure are based on this understanding of quorum. Pursuant to the general constitutional authority to "determine the rules of its proceedings," the Senate has adopted Robert's Rules of Order Newly Revised, 11<sup>th</sup> edition (Senate Rule 69), and the House has adopted Mason's Manual of Legislative Procedure, 2010 edition (House Rule 2312). Mason's Manual requires a quorum to be present to transact business and make acts valid. Mason's Manual of Legislative Procedure (Nat'l Conf. of State Legs., eds., 2010), § 550. Robert's Rules of Order state that a quorum is the "minimum number of members who must be present at the meetings of a deliberative assembly for business to be legally transacted." Robert's Rules, ch. II, § 3:3. Robert's Rules of Order state that a "meeting" is a "single official gathering of its members in one room or area to transact business for a length of time during which there is no cessation of proceedings and the members *do not separate* unless for a short recess." Robert's Rules (12<sup>th</sup> ed.), ch. IV, § 8:2(1) (emphasis added).

<sup>35</sup> *In re Gunn*, 50 Kan. 155, 32 P. 470, 476 (1893).

not permit remote observation or communication. At the time our Constitution was adopted, it was impossible for legislators to participate in legislative debate or to vote without being physically present at the single place where the same were occurring. Therefore, we conclude that to perform the constitutionally-defined act of passing a bill a quorum is necessary and is established only when a majority of the members of the Senate or of the House, respectively, are physically present together in the same room.<sup>36</sup> That conclusion is consistent with the Kansas Supreme Court's explanation that "[w]hen a majority or quorum are *present*, the house can do business; not otherwise. ... If less than 63 members are *present in the house*, there is no quorum. ... [I]f the major part withdraw so as to leave no quorum, the power of the minority to act ceases."<sup>37</sup>

Fourth, analogous precedent confirms this analysis. The State was presented during the Cold War, when nuclear or other attack on Topeka was of concern, with considerations analogous to those you raise about disrupted legislative operations during the COVID-19 pandemic. At that time, Kansans responded by amending our Constitution in 1959 to include what is now Article 15, Section 13, which grants broad authority for the Legislature to depart from ordinary requirements and take actions necessary to ensure continuity of government operations, including legislative operations, but only during "periods of emergency resulting from disasters caused by enemy attack."<sup>38</sup> This 1959 constitutional amendment is notable for several reasons: *First*, it establishes the precedent that for the Legislature to depart from its ordinary procedures that are constitutionally prescribed requires new authority to be granted by constitutional amendment; *second*, even while granting authority to depart from the general requirements for legislative procedure, the text of the 1959 constitutional amendment expressly reaffirms the principle that even during times the amendment would be in effect, "the legislature shall in all respects conform to the requirements of this constitution" except upon determining that "so to do would be impracticable or would admit of undue delay"; *third*, the inclusion in our Constitution of an exception to ordinary legislative procedures during disasters "caused by enemy attack" implies there is no such exception during other disasters, such as COVID-19;<sup>39</sup> and *fourth*, in the implementing legislation later adopted under authority of this 1959 constitutional amendment, the Legislature specifically provided for the convening of the Legislature outside Topeka<sup>40</sup> and the suspension of quorum requirements for the

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<sup>36</sup> We note also that dispersion of members is incompatible with Senate and House Rules concerning outside influences within the chambers. For example, House Rule 504 prohibits materials from being placed upon the desk of any member of the House unless the item is provided by another member and bears the signature of that member or by legislative staff. Other examples are discussed in note 47, *infra*. With a dispersed group, compliance with these Rules and their purpose could be compromised or, at the very least, called into question, undermining public confidence in the legislative process.

<sup>37</sup> *Gunn*, 32 P. at 476 (emphasis added).

<sup>38</sup> Kan. Const. Art. 15, § 13. K.S.A. 48-1303, enacted under the authority of this section, defines "attack" as "any action or series of actions taken by an enemy of the United States resulting in substantial damage or injury to persons or property in this state whether through sabotage, bombs, missiles, shellfire, or atomic, radiological, chemical, bacteriological, or biological means or other weapons or methods."

<sup>39</sup> This principle is reflected in the *inclusio unius est exclusio alterius* canon of interpretation. Notably, although the 1959 constitutional amendment occurred just 40 years after the 1918 flu pandemic, the Legislature did not see fit to include a pandemic (or any other type of emergency) as triggers that would allow it to invoke the special powers granted it under Article 15, § 13.

<sup>40</sup> K.S.A. 48-1308.

Legislature,<sup>41</sup> thereby necessarily implying those two requirements otherwise attach except when suspended during a disaster caused by enemy attack. Put another way, if the Legislature already had authority to depart from its then century-long practice of requiring the contemporaneous physical gathering together of a quorum of legislators in order to conduct legislative business such as passing bills, then the provisions of the 1959 constitutional amendment that authorize departure from ordinary procedural requirements would have been unnecessary.<sup>42</sup> The fact this amendment was proposed by the Legislature and adopted by the citizens of Kansas is strong evidence that no authority for the Legislature to depart from the ordinary constitutional requirements was otherwise available.

*Fifth*, at a more practical level, we note that our Constitution does impose several specific procedural requirements the Legislature must satisfy when passing bills: each bill must contain a specifically worded enacting clause;<sup>43</sup> "no bill shall be passed on the day it is introduced ..." except through a constitutionally-required procedure;<sup>44</sup> each bill must be signed by the presiding officers within 10 days after passage of a bill and presented to the governor;<sup>45</sup> and each bill and the votes thereon must be accurately recorded in a published journal of the body's proceedings.<sup>46</sup> Over the past century and a half of legislative practice in Kansas, formal and informal mechanisms and procedures that routinely confirm compliance with these sorts of constitutional requirements have developed. Most rely upon the physical presence together of legislators while debate is occurring and votes are being cast.<sup>47</sup> While it may be logically possible to replace these tried-and-true procedures with others that would accommodate legislators being dispersed, it also is foreseeable that disturbing well-established procedures could provide additional avenues for legal challenges to the validity of legislation enacted through non-customary processes, thereby increasing the risk that legislation may be invalidated because of procedural irregularities.

### Conclusion

Unlike any other state government body, the Legislature is specifically commanded by the Kansas Constitution to "meet," and our Constitution's text refers to a singular "place of meeting." That place must be in the state's capital city, which is Topeka, although the Constitution does not specifically require the place be in the State Capitol Building.

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<sup>41</sup> K.S.A. 48-1312.

<sup>42</sup> See *Gunn*, 32 P. at 478 (giving legal weight to "usual and customary" practice of the House of Representatives "to meet and transact business" in the chamber).

<sup>43</sup> Kan. Const. Art. 2, § 20.

<sup>44</sup> Kan. Const. Art. 2, § 15. An exception exists "in case of emergency declared by two-thirds of the members present in the house where a bill is pending." *Id.*

<sup>45</sup> Kan. Const. Art. 2, § 14.

<sup>46</sup> Kan. Const. Art. 2, § 10. See also notes 11-14, *supra*.

<sup>47</sup> Not only are legislators to be physically present, but other persons are to be absent from the floor. For example, Senate Rule 56 prohibits any person other than a legislator or a state officer or employee of the legislative branch from discussing any measure with a Senator on the floor of the chamber during the time the Senate is in session. House Rule 501 strictly limits the classes or persons who are allowed on the floor of the house, the cloakrooms, and the hallway at the west of the house chamber. House Rule 501 even prohibits anyone who is not a member to lean on the railings surrounding the area of the legislators' desks any time the House is on final action. The act of voting in the chamber is sacrosanct; during the vote, no person is allowed to approach the desk of a legislator, not even the Revisor of Statutes.

Our Constitution grants the Legislature broad general authority to determine the rules of its proceedings, and the Legislature has used that authority to allow flexible procedures for many legislative acts including how legislative committee meetings may occur. But the flexibility afforded by that general authority must yield to specific constitutional commands regarding legislative procedure.

The Kansas Constitution requires the Legislature to "meet" in "sessions" where bills are "consider[ed]." It requires a majority of members voting in the affirmative to pass a bill and commands that compliance with that requirement be confirmed through memorialization of each such vote in the journal. The Constitution also defines what constitutes a legislative "quorum," and the Kansas Supreme Court has explained that a quorum must be present "in the house" in order to transact business and, when a quorum ceases to be present, the legislators who remain lack authority to transact business. Taken together, these specific constitutional requirements strongly suggest that a quorum must be contemporaneously and physically present for either house of the Legislature to pass a bill on final action.

That conclusion is buttressed by precedent from the 1950s. When the Legislature sought the ability to depart from these (and other) basic procedural requirements in the event of enemy attack rendering impractical or impossible the physical gathering of our Legislature in Topeka, it concluded that seeking constitutional authority from Kansas citizens through a constitutional amendment was necessary to obtain that ability.

For these reasons and those described above, we think the contemporaneous physical presence of a quorum of a house of the Legislature is constitutionally required in order for that house to vote to pass a bill. While we recognize that a more-permissive interpretation of our Constitution's requirements may be plausible, departure from the well-established practice of physically gathering together a quorum in order to vote seems likely to invite legal challenges attacking the validity of legislation passed using novel procedures. We cannot provide assurance that those challenges would fail.

Sincerely,



Derek Schmidt  
Kansas Attorney General



AnnLouise Fitzgerald  
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