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Testimony on the Kansas Emergency Management Act and Economic Recovery
Presented to the Special Committee on Economic Recovery
By Kansas Attorney General Derek Schmidt

September 16, 2020

Chair Lynn, Vice Chair Tarwater, and Members of the Committee:

Thank you for your work to oversee and support our state's economic recovery even as the pandemic brought by the novel coronavirus continues. I appreciate this opportunity to provide information that may assist the Committee in its important work.

One of the keys to supporting economic activity is increasing certainty for businesses, consumers and the many others whose decisions and actions support our state and national economy. While the virus itself causes tremendous uncertainty, so too can the government's response to the virus. Therefore, it is important that we focus on what we can control. As citizens, we can exercise personal responsibility to promote economic activity by staying home when sick, socially distancing, wearing masks when appropriate, and maintaining proper hygiene. As government leaders, we want the government's actions to support economic recovery by increasing certainty, not to weigh down recovery by injecting even more uncertainty into an already difficult situation.

From the standpoint of the Attorney General's Office, we have kept in mind the importance of even-handed certainty as we have worked to assist other public entities in their virus response. Since Governor Kelly first declared a state of disaster emergency on March 12, 2020, the Attorney General's Office has worked with other state and local officials to help ensure that the extraordinary actions undertaken by state and local governments conform to the law. Over those months, we have worked closely and cooperatively with the Governor's Office, the Adjutant General's Department, the Legislature, other state entities and numerous local authorities and officials. That work is ongoing.

There is no doubt that the authorities granted by the Kansas Emergency Management Act (KEMA) have been, and remain, vitally important in our state's overall response to the virus. But at the same time, from our vantage point, we have identified provisions and uses of the KEMA that we recommend receive greater attention and modification when the Legislature reconvenes

in January. That statute was not designed to manage the sort of widespread, long-lasting, sometimes highly intrusive government response to disasters such as a pandemic that affects the state unevenly. The Legislature addressed some, but not all, of these issues in 2020 Special Session House Bill 2016 (HB 2016), although some (but not all) of the changes enacted by that legislation are temporary and will necessarily be revisited – a process that itself contributes to uncertainty.

On August 26, 2020, I testified before the Special Committee on the Kansas Emergency Management Act and recommended numerous policy considerations related to that statute be reviewed by the Legislature during its 2021 session. That broader testimony is attached as Exhibit A for context and for your consideration. I will focus here only on a few points that seem particularly relevant to the economic recovery work of your committee.

Economic Recovery

As the Legislature strongly asserted in HB 2016, one size does not fit all in responding to this virus. The ordering of overbroad statewide limits on gathering in person, and specifically the ordering of certain businesses and organizations to shutter on a statewide basis, proved to be an inadvisably blunt approach to managing this pandemic in Kansas. It is apparent that the early efforts to do so did little to contain the public health crisis but much to fuel the economic crisis. Even now, the hangover effect from those earlier, centrally-ordered statewide lockdowns – and a fear they will return – continues to stir strong debate and foster uncertainty in our state.

As you consider how to move forward, I would bring to the Committee's attention five points for consideration:

First, the Kansas Essential Functions Framework (KEFF) was perhaps a useful tool for emergency management purposes but was a poor yardstick for measuring which businesses could continue to operate and which would be closed by government order. By design, the KEFF established categories of *activity* that were essential but was crafted in terms so general they provided little help in differentiating between "essential" businesses that were to be spared closure by their government and "nonessential" businesses that would be ordered shut. This led to strange discrepancies, such as some big-box retailers remaining open while their mom-and-pop competitors were ordered closed. The fundamental problem was that the KEFF was a sledgehammer when what was required was a scalpel, and that problem was magnified when used to differentiate essential from non-essential businesses on a one-size-fits-all statewide basis as was the case before enactment of HB 2016.

Second, the problems of the KEFF's ambiguity were amplified by the absence of a transparent and effective mechanism for an aggrieved business to appeal a closure order. The somewhat ill-defined appeals process for essential/non-essential determinations stood in sharp contrast with, for example, the statutorily required procedure by which a citizen subject to a quarantine order

may challenge that order. *See, e.g.*, K.S.A. 65-129c(d)(establishing process for judicial review of quarantine order). It is reasonable to question whether the procedure used to appeal essential/non-essential determinations comported with basic requirements of due process before a business owner was deprived of property.

Third, the current structure of the KEMA requires all-or-nothing decisions whether to continue a state of disaster emergency involving contagious or infectious disease. We all saw the difficulty this presents play out last week, when the State Finance Council struggled with Governor Kelly's application to extend the current emergency declaration beyond September 15. The only dispute appeared to involve the governor's authority or willingness to exercise emergency powers granted by K.S.A. 48-925 in a manner that could close businesses, but the decision whether to extend also would affect statutory speedy trial suspension under 2020 Senate Bill 102, potential access to federal disaster-relief funds, and the ability to continue to mobilize state and local disaster-response resources. There is no legal or logical reason all of those authorities must be bundled together and triggered by the single action of declaring or extending a state of disaster emergency – no reason except that is how the KEMA currently is written.

But in other areas, the KEMA already allows a declaration of a state of drought disaster to exist without triggering a governor's access to the emergency powers delegated by K.S.A. 48-925; perhaps the Legislature should consider un-bundling access to the emergency powers under K.S.A. 48-925 from other authorities enabled by a disaster proclamation when the disaster is a long-term response to the spread of contagious or infectious disease. Separating the decisions to access or maintain these various authorities derived from the KEMA would tend to make the state's disaster response more nuanced and thus would decrease uncertainty as items that are agreed upon would not be jeopardized by those that are subject to dispute.

Fourth, the KEMA needs an effective method to ensure Legislative oversight and, when appropriate, revocation, of individual emergency orders of the governor issued under authority of K.S.A. 48-925. This basic concept of a check on use of emergency orders is already built into the KEMA; the problem is that the mechanism in the statute – revocation by concurrent resolution of the full legislative – is inoperable when the Legislature is out of session. That basic defect in the statute has led to considerable wrangling this year as the Legislature has struggled to find an acceptable alternative – the failed effort in 2020 House Concurrent Resolution 5025 that was disallowed by the Kansas Supreme Court in *Kelly v. Legislative Coordinating Council*, 460 P.3d 862 (2020); the provision in HB 2016 that requires State Finance Council review of emergency orders but does not allow for revocation; and the considerable disagreement over whether to extend the state of disaster emergency itself, which might have been avoided or at least mitigated if there existed an effective mechanism to more precisely check the use of later emergency orders. If an effective check on individual emergency orders were available, it seems likely many of the other difficulties in the KEMA would be minimized.

Fifth, the reality is that government orders restricting gatherings or specifically closing businesses during the COVID-19 pandemic have caused significant financial harm to some businesses and their owners. Some businesses have borne a disproportionate burden; for example, some will not reopen. The uncertainty is likely to continue well into the future as government actions earlier in the pandemic continue to be litigated. *See, e.g., County of Butler v. Wolf*, 2020 WL 5510690 (W.D.Pa.Sept. 14, 2020)(holding Pennsylvania Governor's gathering limits and shutdown orders earlier in the pandemic to have been unconstitutional). As that federal court explained: "[G]ood intentions toward a laudable end are not alone enough to uphold governmental action against a constitutional challenge. Indeed, the greatest threats to our system of constitutional liberties may arise when the ends *are* laudable, and the intent *is* good—especially in a time of emergency. In an emergency, even a vigilant public may let down its guard over its constitutional liberties only to find that liberties, once relinquished, are hard to recoup and that restrictions—while expedient in the face of an emergency situation—may persist long after immediate danger has passed." *Id*. at 1.

The KEMA already recognizes the basic principle that when an emergency response, which is designed to benefit the overall public good, results in disproportionate financial harm to some individuals, financial compensation may be required. *See* K.S.A. 48-933. But the KEMA does not *create* that right to compensation – the Fifth Amendment to the United States Constitution does. In light of the impact of the government's COVID-19 response on businesses, particularly certain small businesses, it would seem advisable for the Legislature to review the compensation policies reflected in the current law and determine whether they reflect the proper public policy.

Conclusion

Thank you for this opportunity to testify. These are important and difficult issues that must be addressed if our state is to improve the sort of legal certainty that can help foster and sustain an economic recovery, and I commend this Committee for undertaking this review. I would stand for questions.

Exhibit A

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Testimony on the
Kansas Emergency Management Act

Presented to the 2020 Special Committee on the Kansas Emergency Management Act
By Kansas Attorney General Derek Schmidt

August 26, 2020

Chairman Patton, Vice Chair Rucker, and Members of the Committee:

Thank you for this opportunity to present testimony during your review of the Kansas Emergency Management Act, K.S.A. 48-920 et seq. Although other specific emergency statutes may come into play during COVID-19 or any other particular emergency situation, this statute is the principal legal foundation for the state's overall response to emergencies ranging from tornadoes to floods to wildfires to the spread of animal or human infectious and contagious diseases.[1] Overall, it has worked well for the more than 45 years it has been in effect and has provided the solid, familiar basis for state-local emergency planning and coordination of response throughout our state.

Having said that, there can be no reasonable question that the KEMA's unprecedented use during the COVID-19 response – unprecedented in its combination of geographic scope, duration and intrusiveness of emergency orders issued under its authority – has revealed concerns, gaps and shortcomings in the Act that should be addressed and decided by the Legislature to reduce the likelihood they will need to be addressed and decided by the courts.[2] So I commend the Committee for undertaking this important review.

While KEMA has many provisions, I intend to focus principally on those in K.S.A. 48-924 and K.S.A. 2019 Supp. 48-925, both as amended by 2020 Special Session House Bill 2016, Secs.32 and 33, through which the Legislature has delegated to a Governor the power to issue emergency orders that have the "force and effect of law." During the response to COVID-19, it has been the use of these delegated powers that has presented some of the most difficult legal and public policy questions about the extended and extensive use of the KEMA.

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[1] In specific emergency responses, other statutes also come into play. For example, in the current COVID-19 response, public health authorities in Chapter 65 also play an important role.

[2] Failure to address legal shortcomings or ambiguities in the KEMA is likely to invite legal challenges to the statute itself. The Office of the Attorney General currently is defending the KEMA against one lawsuit challenging the constitutionality of provisions of the statute. See *Eric S. Clark v. Governor Laura Kelly et al*, in the District Court of Franklin County, Kansas, Case No. 20-CV-000061.

Continue Changes Already Made

In Attorney General Opinion 2020-06, we identified several legal concerns with the KEMA as it then existed. The Legislature addressed some of those concerns as part of 2020 Special Session House Bill 2016 (HB 2016), including:

- Important clarification of the language in K.S.A. 48-925(b), including making clear that the list of powers delegated to a governor by subsection (c) is comprehensive and not merely illustrative.
- Requiring each emergency order to specify which power(s) enumerated in K.S.A. 48-925(c) provides its legal authority.
- Substitution of civil enforcement for criminal enforcement of violation of emergency orders.

Those changes each remedied legal deficiencies that left the statute itself open to potentially successful legal challenges, and I encourage you to continue them and make them permanent.

Further Changes that should be Considered

In our view, other significant legal issues in the structure of the statute remain and we recommend they also be considered and, if you think appropriate, addressed by the Legislature:

- K.S.A. 48-925 is, at least in some applications, a delegation of legislative power by the Legislature to the Governor. While some of the executive actions it authorizes may be properly characterized as "administrative" (the power to fill in gaps as needed to implement laws enacted by the legislature) others are plainly "legislative" (the power to create new rules that have the force and effect of law). This distinction is important because the Kansas Supreme Court has explained that the Legislature's constitutional authority to delegate "administrative" power to the executive branch is significantly broader than its ability to delegate "legislative" power; indeed, there is indication in the case law that legislative power cannot be delegated at all. See, e.g., *Solomon v. State*, 303 Kan. 512 (2015) (Stegall, J., concurring) (discussing evolution of Supreme Court's nondelegation jurisprudence). The Supreme Court has recognized that "[a] delegated power constitutes administrative power if the delegation contains sufficient policies and standards to guide the nonlegislative body in exercising the delegated power." See *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cty./Kansas City, Kan*., 264 Kan. 293, 304 (1998).

  That is why K.S.A. 48-925(c)(11) – a sort of catchall delegation of power to a governor to "perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population" – presents particular concerns. In HB 2016, the Legislature began to address this issue by including new statutory limitations on that catchall delegation of power – it may be exercised only "in conformity with the constitution and the bill of rights of the state of Kansas and with the statutes of the state of Kansas" – and regulatory statutes may be suspended only "if strict compliance with the provisions of such statute, order or rule and regulation would prevent, hinder or delay in any way necessary action in coping with the disaster." But significant doubt remains as to whether those changes provide constitutionally sufficient limitations to render that sweeping delegation of power lawful. Ultimately, (c)(11) on its face purports to delegate to a governor authority to issue *any* emergency order, on *any* subject, with *any* effect that will have the "force and effect of law," provided only that the governor determines any such order to be "necessary to promote and secure the safety and protection of the civilian population" and with the only limitations being that the order itself does not offend the Constitution, the bill of rights, or any statute that has not been specifically

suspended. While welcome, those new limitations added by HB 2016 shed little light on the boundaries of the power that the Legislature has delegated to a Governor through K.S.A. 48-925(c)(11), which continues to appear dangerously close to a constitutionally impermissible delegation to a Governor of the legislative power vested by our Constitution exclusively in the Legislature.

- In addition, the mechanism built into the KEMA for a legislative check on a Governor's use of the delegated emergency powers – the revocation of any order by concurrent resolution – is itself constitutionally suspect in light of Kansas Supreme Court case law decided after this statutory mechanism was enacted in 1974. In *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, (1984) and *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cty./Kansas City, Kan*., 264 Kan. 293 (1998), the Supreme Court held that similar legislative efforts in the context of regulations to delegate power to the executive branch but retain control over how the executive uses that power violate the separation-of-powers established by the Kansas Constitution and are invalid. While our Supreme Court never has squarely decided whether this same analysis applies in the context of delegation of emergency powers, the reasoning of those cases invalidating the use of concurrent resolutions to check the use of delegated regulatory power would seem logically to apply here with equal force. Consequently, this legislative oversight mechanism in the KEMA is constitutionally suspect.

- In K.S.A. 48-925(c)(1), a Governor is delegated the extraordinary power to suspend state statutes. But the plain text of that subparagraph limits that power only to suspending "regulatory" statutes that "prescrib[e] the procedures for conduct of state business, or the orders or rules and regulations of any state agency which implements such statute." The statute provides no definitions or other clues, however, as to what those limiting terms in fact mean. What distinguishes a "regulatory" statute that may be suspended from other sorts of statutes that may not? What distinguishes a statute that "prescribe[s] the procedures for conduct of state business, or the orders or rules and regulations of any state agency which implements such statute" that may be suspended from other sorts of statutes that may not? In Attorney General Opinion 2020-08, we had occasion to raise these issues. While we were unable to discern a clear line delineating the boundaries of power delegated to a Governor under K.S.A. 48-925(c)(1), we relied on common definitions of those terms to conclude that because K.S.A. 2019 Supp.72-1138– commonly known as the local school district home rule statute – *grants* power to *local* school boards it is neither "regulatory" nor does it "prescrib[e] the procedures for conduct of state business, or the orders or rules and regulations of any state agency which implements such statute." It would be helpful for the Legislature to clarify the boundaries of the power it is delegating in (c)(1).

- In addition, it would be helpful for the Legislature to require a Governor to state with specificity which statutes are intended to be suspended by any particular order that exercises the power delegated in (c)(1). Consider, for example, the text of the March 12, 2020, proclamation of a state of disaster emergency, which broadly declared that the Governor "hereby suspend the provisions of any regulatory statute prescribing the procedure for conduct of state business, or the order or rules and regulation of any state agency which implements such statute, if strict compliance with the provisions of such statutes, order or rule and regulation would prevent, hinder, or delay in any way necessary action in coping with the disaster as set forth in K.S.A. 48-925(c)(1)." So too with the text of Executive Order 20-59, which declares statutes to be suspended but does not specify

which statutes – a problem we analyzed in Attorney General Opinion 2020-08. Kansans are left to speculate which statutes may have been suspended and which are intended to remain in effect. That lack of specificity injects a measure of ambiguity into emergency orders (or, in this example, into a state of disaster emergency proclamation) that at best is unhelpful and at worst may present due process issues involving their enforceability.

- On and after January 26, 2021, the text of K.S.A. 48-925(b) will state the powers in K.S.A. 48-925(c) are to be exercised by "orders and proclamations," while the text of K.S.A. 48-924(b)(1) states a Governor is to "proclaim" a state of disaster emergency. The commingling of the terms "orders" and "proclamations" does not appear to serve any purpose but injects a level of ambiguity. It would seem sensible to more precisely and consistently provide that states of disaster emergency are to be "proclaimed" and the exercise during a proclaimed state of disaster emergency of powers delegated in K.S.A. 48-925(c) is to be by issuance of "orders."

- K.S.A. 48-925 does not mention schools;[3] yet, during the current COVID-19 emergency response, that statute has been used to attempt specifically and in a targeted manner to regulate the operation of schools. Because the Kansas Constitution and state statutes specifically empower other entities – local school boards and the state board of education in particular – to make decisions regarding operation of schools, it would be advisable for the Legislature to clarify in statute how it intends a Governor's K.S.A. 48-925 delegated emergency powers to interact with the constitutional and statutory powers of those other entities. The absence of clarity in the statute was presented in Executive Order 20-59, which attempts to order schools (and *only* schools) to implement certain procedures to mitigate the spread of COVID-19 such as wearing masks, handwashing, social distancing and temperature checks. While perhaps all worthy policies for the safe operation of schools, these all appear to be matters that local school boards ordinarily have either constitutional (Kan. Const. Art. 6, § 5) or statutory (K.S.A. 2019 Supp.72-1138) authority to decide, perhaps under the "general supervision" of the state board of education (Kan. Const. Art. 6, § 2). Nothing in K.S.A. 48-925(c) specifically grants a Governor power to assume these sorts of operational decisions for public schools, and as discussed above the catchall delegation of power to a governor in K.S.A. 48-925(c)(11) is legally suspect as potentially overbroad in violation of the Kansas Constitution's separation of powers. Simultaneously, a Governor's authority to suspend statutes as delegated in K.S.A. 48-925(c)(1) is limited to "regulatory" statutes that "prescrib[e] the procedures for conduct of state business, or the orders or rules and regulations of any state agency which implements such statute" and does not appear to enable suspension of the school district home rule statute. See AG Opinion 2020-08. Rather than leaving this ambiguity to be settled by potential litigation, it would be helpful for the Legislature to decide what extraordinary authority it wishes to delegate (or not delegate) through KEMA to a Governor to make decisions regarding the operation of schools during an emergency and to express that clearly in the statute.

- Another important issue that has not yet arisen during the COVID-19 response but that the Legislature may wish to address is the interaction of KEMA emergency orders of a Governor with the home rule authority of other units of government. In particular, the Kansas Constitution

[3] The statute made no mention of schools prior to HB 2016. That measure, however, enacted New Sec. 7, which necessarily implies a Governor has authority under KEMA to issue orders that have the effect of closing school buildings. Beyond that specific reference to school closings, the amended statutes do not otherwise mention schools.

grants home rule authority to cities (Kan. Const. Art. 12, § 5), and in general that authority may be limited only by a uniform "enactment of the legislature." A Governor's emergency order exercising powers delegated by K.S.A. 48-925 is not itself an "enactment of the legislature." It is an order of the chief executive officer of the state. In other words, it appears doubtful whether a Governor's emergency order can preempt city home rule authority. Several of Governor Kelly's emergency orders in response to COVID-19 expressly purported to preempt local orders either entirely, see, e.g., Executive Order No. 20-16 (Establishing a statewide "stay home" order) and Executive Order No. 20-24 (Extending Executive Order 20-16), or in part, see e.g., Executive Order 20-18 (Temporarily prohibiting mass gatherings of more than 10 people) and Executive Order 20-25 (Temporarily prohibiting mass gatherings of more than 10 people to limit the spread of COVID-19 and rescinding Executive Order 20-18),[4] but did not address validly adopted local ordinances.

- HB 2016 established a mechanism by which local boards of county commissioners may review and adopt less-restrictive orders than a governor's emergency order relating to public health and a related mechanism by which those local boards may review and modify orders of local health officers. The public policy behind these provisions appears reasonable – to avoid one-size-fits-all orders that may be unnecessary in some parts of the disaster area and also to ensure that competing interests can be given consideration. If the Legislature intends to keep this basic policy in place, it should carefully review the text and operation of those provisions. For example, the statute authorizing "less restrictive" local orders never expressly states those less-restrictive local orders would replace the governor's order in that county (although the intent appears clear). Similarly, the current statutory language applies only to orders "relating to public health," which seems somewhat peculiar within the current architecture of the KEMA.

- Some consider the KEMA ambiguous as to whether a Governor may, in effect, circumvent a decision or action by the Legislature (or by operation of law) to end the state of disaster emergency. May a Governor declare sequential states of disaster emergency – perhaps each for the statutorily authorized 15 days – thereby avoiding the important limitations in the KEMA on a Governor's access to the delegated emergency powers? Although we doubt that end-run is legally permissible, clarifying the KEMA on that point may be advisable in order to avoid future disputes.

Broader Policy/Legal Questions Presented by using KEMA for Long-Term Responses

In addition to the specific legal questions and concerns above, I would raise several questions about the basic architecture of the KEMA that have arisen because of its unprecedented use during the COVID-19 pandemic:

First, is long-term access to these broad emergency powers as a substitute for legislative deliberations really wise or desirable in emergencies that may last for months or years? Most emergencies, e.g., tornadoes, floods, and wildfires are discrete, localized events that require a limited and targeted emergency response. But in the COVID-19 response, emergency powers have been used in an

[4] K.S.A. 48-935 is a uniform "enactment of the legislature" limiting ordinances that are in conflict with any provision of the KEMA or of the state disaster emergency plan or of the applicable local and interjurisdictional disaster emergency plans. However, the plain language does not prohibit a conflict with an executive order. Thus, the home rule power is not limited by a uniform enactment of the legislature.

unprecedented manner throughout the state and for extended periods of time and to require particularly sweeping actions by citizens, e.g., assembly limitations and business closures. It is reasonable to ask whether emergency orders, which substitute for the ordinary legislative process by which these sorts of decisions ordinarily would be made, really are the best way to make these sorts of significant decisions over an extended period of time. Compare, e.g., K.S.A. 48-1309 (automatically convening the legislature 90 days after an enemy attack).

Second, should the KEMA more precisely differentiate between or among procedures for declaring and sustaining different types of emergencies? Or among which emergency powers may be accessed for different types of emergencies? There already is precedent in the KEMA for this sort of distinction – the KEMA recognizes that responding to a contagious and infectious animal disease requires a different type of sustained emergency response and therefore establishes different mechanisms for extending emergency declarations for animal health emergencies than for other emergencies.[5] Perhaps further differentiation is advisable.

Third, who should be responsible for reviewing the legality of emergency orders? Currently, the KEMA requires no review or approval for legality. Governor Kelly has nevertheless generally sought legal review of our office before issuing her orders, and those reviews have identified numerous legal issues, many of which were then corrected before issuance. But the current system does not *require* any sort of legal review. By analogy, Kansas statute requires a pre-publication review and approval for legality by the attorney general before a regulation may be published and enter into force and effect, see the Rules and Regulation Filing Act, K.S.A. 77-415, et seq., but there is no similar safeguard in place for KEMA emergency orders. Particularly for a long-lasting emergency like COVID-19, a more structured mechanism to independently review and approve the legality of emergency orders exercising these extraordinary powers may be warranted.

Fourth, should there be a publication requirement before an emergency order can have the "force and effect of law"? Our Kansas Constitution and statutes require legislative bills to be published before they can have the force and effect of law, see Kan. Const. Art. 2, § 19, K.S.A. 45-310, and 45-312, and it seems peculiar indeed that during the chaos of an emergency a mere order of the governor may take on the force and effect of law without any publication requirement. We raised this concern in Attorney General Opinion 2020-06 in the context of criminal enforcement of emergency orders, but even absent criminal enforcement basic due process principles would seem to favor some type of formal publication requirement, at least to the extent an emergency order may impose duties or prohibitions on the conduct of individual citizens (as opposed to government entities).

Fifth, should there be a mechanism for enabling a state of disaster emergency to exist for purposes of qualifying for federal disaster assistance, or perhaps for other KEMA purposes such as activating emergency management plans, without necessarily enabling a Governor to access the emergency powers delegated by K.S.A. 48-925? This would prevent the concern that Kansas would risk losing federal disaster assistance unless the extraordinary powers delegated to a Governor to, in effect, make law are also in effect. During these sorts of long-term emergencies, it is now apparent it may become desirable to ensure continuity of federal assistance even while curtailing a Governor's use of the delegated emergency powers.

[5] Compare K.S.A. 48-924 and K.S.A. 2019 Supp. 48-924a.

Sixth, should the law require some sort of formal consultation procedure before (or immediately after) a Governor may proclaim a state of disaster emergency? Or before (or immediately after) a Governor may issue an emergency order pursuant to the KEMA? Under the House Bill 2016 amendments, a mechanism for post-issuance review by the State Finance Council of emergency orders has been established, until January 26, 2021. Is this the optimal mechanism? Or should some type of pre-issuance consultation be required?

Seventh, what mechanism should exist for revoking emergency orders issued by a Governor under authority of KEMA? The statute itself provides for revocation by concurrent resolution of the Legislature, and 2020 House Concurrent Resolution 5025 unsuccessfully attempted to provide for revocation by the Legislature Coordinating Council. But currently, no operable mechanism for revocation exists for most orders because the Legislature is not in session – even though legislative review and authority to revoke orders invoking emergency powers is a fundamental part of the architecture of the KEMA and plainly is a check the Legislature always has intended to exist in that statute. In that way, the status quo is inconsistent with the plain purpose of KEMA to authorize legislative revocation of a governor's use of delegated emergency powers.

Constitutional Amendment

A fundamental difficulty with relying upon the delegation of emergency power to a Governor to issue orders that have the "force and effect of law" as a principal means to manage long-lasting and widespread emergencies such as COVID-19 is that this method of lawmaking is fundamentally at odds with our system of self-government. As Justice Robert Jackson explained in his famous concurrence in the Steel Seizure Case that held unconstitutional President Truman's attempt to nationalize steel mills by use of emergency powers during the Korean War, "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and *that the law be made by parliamentary deliberations*."[6]

Therefore, while not part of KEMA, I encourage the Committee to review Article 15, Section 13, of the Kansas Constitution and to consider proposing modifications to that constitutional provision for consideration by Kansans as a constitutional amendment. That provision, which was adopted by Kansans in 1959 during the Cold War, provides:

> "Notwithstanding any general or special provision of this constitution, the legislature, in order to insure continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack, shall have the power and the immediate duty (1) to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations including, but not limited to, the financing thereof. In the exercise of the powers hereby conferred the legislature shall in all respects conform to the requirements of this constitution except to the extent that in the judgment of the legislature so to do would be impracticable or would admit of undue delay."

[6] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655, (1952) (emphasis added).

Notably, that constitutional mechanism ensures the *Legislature* remains able to perform its constitutional duties to ensure continuity of government operations that arise as part of a disaster response – but only when the disaster is "caused by enemy attack." This provision was designed specifically to help preserve an operational state government in the event of a nuclear strike that destroyed our capital city, and perhaps killed some of our leaders or made adherence to ordinary democratic practice impractical.[7] But it is now clear that other forms of disruption – such as the COVID-19 pandemic – also may operate to prevent or discourage the Legislature from gathering and performing its ordinary duties. In a long-lasting emergency like COVID-19, which invites a wide-ranging state government response, there is simply no reason the Legislature should be excluded from the decision-making processes of developing, authorizing, implementing and continually adjusting that response – at least to the extent the response may call for measures that ordinarily would be enacted through legislation – merely because physical gathering of the Legislature is inadvisable or because the Legislature it not in regular session. Kansas law already recognizes this necessity by providing continuity of government operations, see K.S.A. 48-1201 to 1503, but those mechanisms can neither foresee nor provide for all circumstances during an emergency that may call for a legislative response such as some of the subject matter that has been addressed (with questionable legality) by emergency orders during the COVID-19 response.

This basic principle of including the legislative branch in emergency decision-making is hardly novel – for example, Oklahoma law provides that whenever their Governor declares a "catastrophic health emergency," their "State Legislature shall automatically be called into Special Session at 8:00 a.m. on the morning of the second day following the date of such declaration for the purpose of concurring with or terminating the catastrophic health emergency."[8] Kansas law already includes a similar concept and provision requiring the Legislature to be called into special session to deal with a declared emergency, but once again it applies only the case of enemy attack. See K.S.A. 48-1309.

I raise the issue of constitutional amendment here because it seems many of the concerns presented by extended and extensive reliance on the delegation of sweeping emergency powers to a Governor could be avoided or at least ameliorated if there existed an effective mechanism for the Legislature to continue to operate effectively and safely during a prolonged emergency such as the COVID-19 pandemic. No one person – not even a Governor – should be solely responsible for both creating and enforcing law during a long-lasting emergency. Our system of self-government is replete with checks and balances that ensure no one branch of government, and no one government official, may wield disproportionate power, but many of those checks and balances are arguably disabled when KEMA is invoked.

Rather than focusing exclusively on how to delegate extraordinary long-term emergency powers to a Governor to make all decisions for emergency response during an extended emergency, and how to retain a legislative check over the use of those powers when the legislature is not in session, perhaps it would be sensible to propose a constitutional provision that would enable the Legislature to continue to perform functions that ordinarily require the exercise of legislative power. Of course, to accomplish that objective, a proposed constitutional amendment would need to address many questions: What would trigger its application and who would decide whether it is triggered? How would its use be ended and who would make that determination? Would the Legislature actually be in full-blown session or would it be limited in what subject matter could be considered? If the Legislature is not in session, should it be able to call itself into a type of limited emergency session in a less-burdensome manner than currently contemplated in our

[7] In 1961, the Legislature passed a series of emergency acts providing continuity of government measures, codified at K.S.A. 48-1201 – 1503.
[8] Okla. Stat. Ann. tit. 63, § 6405(C).

Constitution? In what manner would the Legislature be able to meet during an emergency session – virtually or physically in a location other than Topeka? How would important rules and procedures, such as the requirement for a quorum, be satisfied?

Such a constitutional amendment also could authorize the Legislature by statute (a) to delegate emergency powers to a Governor – or to other state entities or officials, for that matter and (b) to retain the ability to oversee use of those powers, such as by rejecting emergency orders by concurrent resolution or by action of a designated legislative body such as the LCC. If this authority were constitutionalized, it would avoid the difficult nondelegation and separation-of-powers concerns currently present in the KEMA as discussed above.

Conclusion

The COVID-19 emergency – which continues – has brought to light numerous difficult legal and policy issues presented by extended reliance on emergency powers as a means of governing. I encourage the Legislature to give serious consideration to adjusting the system to reduce obvious legal ambiguities and constitutional defects but also to address more fundamental questions about how governmental decisions should be made during a time of long-lasting emergency. Many of these concerns can be addressed by statutory amendments to the KEMA or to other statutes, but some may require amendment to the Kansas Constitution.