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Testimony on the Kansas Emergency Management Act

**Presented to the House Committee on the Judiciary
By Kansas Attorney General Derek Schmidt**

May 18, 2020

Chairman Patton and Members of the Committee:

Thank you for the opportunity to present information today regarding the Kansas Emergency Management Act, specifically K.S.A. 48-924, K.S.A. 48-925 and K.S.A. 48-939.

Since Governor Kelly first invoked the authority of those statutes by declaring a state of disaster emergency on March 12, 2020, our office has had the opportunity to look closely at provisions of the Act and how it operates. From the vantage point of that experience, I offer the following observations. Please consider these in the spirit of “issue spotting” – I am not prepared today to recommend specific actions be taken by the Legislature. Rather, I am attempting to identify for the Committee issues we have observed in the operations or structure of these statutes so the Committee may determine whether further scrutiny is appropriate.

1. Should the Legislature, by statute, confirm the validity of the state of disaster emergency proclamations on March 12 or April 30, or should the Legislature otherwise confirm the existence of a state of disaster emergency during that time period?
2. Should the Legislature enact by statute a mechanism by which a state of emergency may be continued after the *sine die* adjournment of the Legislature, while maintaining appropriate oversight?
3. Should the Legislature establish a mechanism to oversee the exercise of executive powers by the governor through the issuance of emergency orders under authority of K.S.A. 48-925 during the pendency of a state of emergency?
4. Does the language of K.S.A. 48-925(b) constitute an unlimited delegation of power to the governor to issue orders and proclamations that have the “force and effect of law” or is the exercise of power in the subsection limited to the subject matter enumerated in K.S.A. 48-925(c)?
5. Is the language in K.S.A. 48-925(b) that seems to authorize continuation of emergency orders with the “force and effect of law” after a state of disaster emergency has ended if those orders are approved by concurrent resolution of the Legislature consistent with Article II of the Kansas Constitution?

6. Do the mechanisms in K.S.A. 48-925 allowing the Legislature to terminate by concurrent resolution a state of disaster emergency or emergency orders of the governor comport with the Kansas Supreme Court's holding in *State ex rel Stephan v. House of Representatives*, 687 P.2d 622 (1984). Need they to?
7. Is K.S.A. 48-939, which authorizes criminal prosecution for violations of emergency orders, properly structured and appropriately tailored to the scope of subject matter that may be included in emergency orders? Should any constraint on criminal prosecution be implemented?
8. Is there any specific subject-matter limitation on the use of emergency powers the Legislature wishes to have in effect after it adjourns *sine die*? For example, HCR 5025 contained a limitation on emergency orders related to ammunition, but after the Kansas Supreme Court decision in *Kelly v. LCC* it is uncertain whether that provision is operable.
9. Does the Legislature wish any changes to emergency powers afforded to local authorities or otherwise authorized outside the Kansas Emergency Management Act?

Mr. Chairman, this may not be an exhaustive list, but these are nine issues we have spotted that may deserve discussion as matters of public policy. Of course, not all of them need be addressed prior to the *sine die* session on May 21.

Also, as you may be aware, the formal legal opinion of our office has been requested on several questions related to some of the subject matter above. We are working diligently to complete that opinion, and I am hopeful it can be available soon.

Thank you for the opportunity to provide this information.

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