

Testimony before House Judiciary Committee

May 18, 2020

Mike O'Neal on behalf of Kansas Policy Institute & Kansas Justice Institute

Re: Proposed amendments related to Covid-19 response experience

Mr. Chairman and members of the Committee

Thank you for the opportunity to provide input and suggestions regarding legislation relating to the Covid-19 response in Kansas. You have been briefed regarding some of the statutes in play and the executive branch actions in response to this unprecedented health emergency. While the existing Kansas statutory framework was helpful and provided a basis for action, it did not and does not address some procedural, practical and constitutional issues that have arisen in the wake of this particular emergency. Today we provide some background information and offer some suggestions for legislative action.

At the outset, it's important to note that statewide disasters, including health pandemics, are nonpolitical. They don't discriminate based on party affiliation. The statutory framework for responses must be tailored, applied and analyzed without regard to who occupies the Governor's office or who controls either chamber of the Legislature. Clearly the Legislature intended that the Governor play a leading role in addressing "disasters" within the state. The Governor has done so. Unlike the Legislature, the governor's office operates fulltime and has a multitude of resources available to provide advice and expertise to inform decisions necessary to respond to statewide emergencies such as the current one. That said, it's equally important to understand that the legal framework to address statewide (and even local disasters) is a legislative function.

The executive branch has only those powers derived from the Kansas Constitution or expressly delegated by the Legislature. The Kansas Constitution vests the executive power of the state in the Governor, "who shall be responsible for the enforcement of the laws of this state." (Kansas Constitution, Art. 1, Sec. 3.) Art. 1 does not, for example, grant general executive power to issue executive orders, other than executive reorganization orders, which are specifically authorized under Sec. 6. The Governor's power to issue orders to carry out her responsibility to enforce the laws of the state are those powers which have, from time to time, been delegated to her by law, passed by the Legislature and signed into law by the Governor.

In enacting what is commonly referred to as the Kansas Emergency Management Act (K.S.A. 48-904 *et seq.*), the Legislature created a framework for dealing with a variety of "disasters" by enacting procedures and delegating authority to various state officials, including, but not limited to, the Governor and Adjutant General. All executive power contained in the Act is power specifically authorized by the Legislature, including all limitations on that power.

Throughout this Covid-19 state response, K.S.A. 48-924 and 48-925 have been primarily cited as the authority under which the Governor has acted to help deal with the Covid-19 health emergency. K.S.A. 48-924 sets out the authority for the Governor to declare a state of emergency and K.S.A. 48-925 sets forth a list of actions the Legislature saw fit to delegate to the Governor to implement by executive order. Any such orders are to be administered by the Adjutant General.

You are all keenly aware of what has transpired since the Governor initiated her first Covid-19 related emergency declaration. Pursuant to K.S.A. 48-924 the order could not last past 15 days unless ratified by the Legislature by concurrent resolution, with the exception that the Governor could once apply to the State Finance Council for a single extension of not more than 30 days. Further, the law provides that the Legislature may terminate a disaster declaration at any time by concurrent resolution. The Legislature did, in fact, while still in session, pass a concurrent resolution extending the emergency declaration.

The HCR also put in place a procedure for LCC oversight of orders issued pursuant to K.S.A. 48-925. However, due to the manner in which the HCR was worded, LCC action was conditioned on the State Finance Council meeting as provided for in K.S.A 48-924. Because the HCR extended the emergency declaration by its own terms, there was no need to convene a meeting of the State Finance Council.

Accordingly, the emergency declaration, as extended by action of the Legislature in the HCR, ended on May 1, 2020. Here is where a flaw in current law becomes apparent. There is no authority in the Act for the Governor to extend emergency declarations on her own, nor is there any authority in the Act for the Governor to issue successive emergency declarations based on the same emergency. The Governor, as we know, in fact issued a second emergency declaration, wherein she acknowledged the lack of an “effective mechanism for additional extensions of the State of Disaster Emergency other than passage of another concurrent resolution through each legislative chamber.” (EO 20-28) Because the Legislature was not then in session, the Governor determined that she would simply issue a new emergency declaration and re-issue certain prior Executive Orders related to the original emergency declaration.

Unfortunately, there is no authority in current Kansas law for the Governor’s actions in that regard. I say “unfortunately” because there is a good argument to be made that such authority should, under proper circumstances, exist. We know from prior Kansas case law that the Governor does not have the authority to “fill in the gaps” in a statute. In *State ex rel. Stephan v. Finney*, 251 Kan. 559 (1992) the Kansas Supreme Court struck down the Governor’s unilateral approval of Indian gaming compacts.

There, Governor, Finney, also acknowledging the lack of any clear law allowing her action, relied on K.S.A. 75-107 which provided that “The Governor shall transact all the business of the state, civil and military, with the general government, except in cases otherwise specially provided by law.” The Court had little difficulty rejecting her argument stating:

“The carte blanche interpretation asserted by the Governor herein is massive in its implication and, additionally, would have serious problems if challenged on grounds that it constitutes an impermissible delegation of the legislature’s law-making powers.”

In addition, Governor Finney, like Governor Kelly today, relied heavily on expediency as a basis for her authority to act. She contended that the State was required to negotiate with a tribe and the time restraints in the federal act made the Governor’s office the only feasible party to such negotiations. The Court noted, however, that

“Any argument of expediency has a certain practical appeal. However, expediency cannot grant a power to the executive branch which the Kansas Constitution has denied it.”

The Court in *Finney* specifically mentioned K.S.A. 48-924 and 48-925 and the powers the Legislature granted the Governor there but noted: *This limited delegation of legislative power to the Governor is effective only during a period of disaster....”*

Finally, the *Finney* Court stated, quoting 38 Am Jur. 2D, Governor, Sec. 4, pp 934-35:

“Since the Governor is a mere executive officer, his [or her] general authority is narrowly limited by the constitution of the state, and he [or she] may not exercise any legislative function except that granted to him [or her] expressly by the terms of the constitution.”

1. Proposal to amend K.S.A. 48-924(b)(4)

Going forward, there is actually a simple amendment that could be made to K.S.A. 48-924 that would serve the interests of both the Governor and the Legislature. For whatever reason, the Legislature saw fit in passing KEMA to make a distinction between the ability to extend emergency orders dealing with human epidemics and those involving domestic animals. (See K.S.A. 48-924(b)(2) and (4).) Under current law the Governor’s emergency declaration involving a human contagious disease epidemic can be extended but once, unless the Legislature happens to be in session and can pass a concurrent resolution. However, if it’s an emergency declaration involving domestic animal contagious diseases, K.S.A. 48-924(b)(4) allows for successive extensions of 30 days each upon application to the State Finance Council. By striking the first sentence of that subsection, the ability to extend emergency declarations in 30 day increments would apply to the current emergency and any future ones. (See attached)

2. Proposal to amend K.S.A. 48-925

Once a state of emergency has been declared, the Governor’s power to issue Executive Orders addressing the emergency are contained in this statute, along with a provision that states that they are void after the expiration date of the emergency order and one stating that orders may be revoked at any time by concurrent resolution of the legislature.

Technically, K.S.A. 48-925(b) contains a provision that may well be unconstitutional as an unlawful delegation of the Legislature’s law-making powers. It provides that “the governor may issue orders and proclamations which shall have the force and effect of law during the period of a state of emergency...” It is a general rule of law that the legislature “may not delegate its power to make laws, but may enact a law in general terms which confers upon an officer or board administrative duties to enforce and apply the law.” *State ex rel. Anderson v. Fadely*, 180 Kan. 652 (1957). (See also, *Finney*, supra) The provision above would seem to confer law-making power to the executive, in contravention of law and the separation of powers doctrine.

The fact that this law has not been challenged to date is not an indication of its lawfulness. Rather than delegating law-making authority to the Governor, the statute should have delegated authority to the Governor

to investigate and make recommendations regarding the laundry list of potential actions contained in K.S.A. 48-925(c)(1-11) and submitted them to the Legislature for its approval and then for the Governor and Adjutant General to administer. This is not a policy suggestion, but rather a suggestion to make the law constitutional.

The problem arises when an emergency declaration and its related executive orders extend beyond the time that the Legislature is in session. The 2020 Legislature made provision for that by the near unanimous passage of HCR 5025. As stated above, the ability of the LCC to review and accept or reject emergency order-related executive orders was included, but only after initial State Finance Council action. Although that didn't take place then it has now taken place in connection with the recent limited extension of the Governor's second emergency declaration.

Adding this feature to the statute, either here or in the LCC statutes (K.S.A. 46-1201 *et seq*), would address the ongoing issue of the ability for the Legislature to act consistent with its non-lawmaking powers while not in session. For example, revoking an emergency declaration while in session is not an act of law-making. Concurrent resolutions do not make law but are, nevertheless, legal actions prescribed by law. In the case of KEMA, concurrent resolutions are utilized to extend or end emergency declarations and executive orders.

It is clear that the Legislature may, without running afoul of "unlawful delegation" arguments, appoint the LCC to act as the Legislature's representative when the Legislature is not in session. (See *Fadely, supra*) It is not an unlawful delegation because the Legislature is not delegating legislative power to another branch of government. The LCC is a legal extension of the Legislature. The term "represent" in the LCC statute (K.S.A. 46-1202) is not limited to court cases. K.S.A. 48-924(c) contains a provision allowing the Lt. Governor to act in the Governor's absence. Adding LCC representation during times when the Legislature is not in session is a similar accommodation.

It would also be prudent to take this opportunity to clear up confusion about the meaning of the term "session". Depending on the context, "session" may be deemed to mean from the second Monday in January until adjournment *sine die*. In the context of our current discussion, i.e., during the existence of a statewide emergency declaration, "session" should mean anytime the Legislature is adjourned. The irony of our current situation is that it has affected the ability of the Legislature, as a body, to be in "session".

If there is consensus that the Governor should have the power to issue executive orders having the "force and effect of law" during statewide emergency declarations, there must be a mechanism for timely and decisive legislative oversight. Such oversight is accomplished by the language of HCR 5025 and its language, amended to avoid the State Finance Council condition precedent, should be made permanent.

3. Proposal to amend powers of local health officials

Related directly to the issue of executive power, the existence of this statewide emergency declaration and EO 20-29 have placed a great deal of power in the hands of local health officials pursuant to K.S.A. 65-101 *et seq*. Specifically, K.S.A. 65-119 allows counties or local health officials to "prohibit public gatherings when necessary for the control of any and all infectious or contagious disease." K.S.A. 65-129b delegates power to local health officials to issue quarantine orders, subject to due process hearing rights of those affected pursuant to K.S.A.

65-129c. Local health officials are given authority under K.S.A. 65-202 to “use all known measures to prevent the spread of any such infection, contagious or communicable diseases...”

Indeed, when a statewide emergency was declared in March, many local health officials acted quickly to issue a broad range of orders. Many were patently overbroad, to the extent that, fortunately, the Governor intervened with Executive Orders of her own that superseded local orders to provide some degree of uniformity across the state.

A problem with the current statewide emergency is that the power to limit “public gathering” has been extended to encompass the power to bring private sector businesses to a standstill. It is unlikely that the Legislature, in referring to “public gatherings” in the law, could foresee the problems that undefined term would cause in 2020. (K.S.A. 65-119 was enacted in 1901.) The term “public gatherings” should not include businesses or other private facilities where a less intrusive option is available such as reasonable safety and sanitary protocols.

Arguments abound as to the necessity of forcing an economic shutdown of businesses in the state in order to combat Covid-19. There has been and will continue to be litigation relating to the scope and breadth of orders having the effect of shuttering businesses and causing widespread unemployment. The Governor and health officials need to be able to respond and administer the law the Legislature passed to deal with such emergencies. However, orders need to be reasonable, not infringe upon constitutional rights of Kansans and should not cripple the economy.

The Legislature should extend the due process rights and access to *habeas corpus* contained in K.S.A. 65-129c to those who, while they have not been specifically quarantined, have been prohibited from visiting family, working, operating their businesses, etc. by state action.

4. Proposal to amend K.S.A. 48-933

In addition, orders depriving businesses of the use of their property to generate income should be entitled to compensation as the state action constructively constitutes a “taking”. The vehicle for this remedy would be K.S.A. 48-933, which provides for compensation to property owners under certain circumstances relating to disaster emergencies.

State and local decisions need to be weighed and balanced against the potential that government may have to compensate for those decisions. Such a balancing of interests should inform and influence the nature and scope of emergency orders, since the overriding consideration should be for government to do what needs to be done to protect against the spread of disease while doing as little harm to Kansans and their livelihoods as possible. It will do Kansans little good to survive the virus but succumb to economic ruin where that can be avoided by employing a corroborative process between the executive and legislative branch.

48-924. Disasters; responsibilities of governor; state of disaster emergency. (a) The governor shall be responsible for meeting the dangers to the state and people presented by disasters.

(b) (1) The governor, upon finding that a disaster has occurred or that occurrence or the threat thereof is imminent, shall issue a proclamation declaring a state of disaster emergency.

(2) In addition to or instead of the proclamation authorized by K.S.A. 47-611, and amendments thereto, the governor, upon a finding or when notified pursuant to K.S.A. 47-611, and amendments thereto, that a quarantine or other regulations are necessary to prevent the spread among domestic animals of any contagious or infectious disease, may issue a proclamation declaring a state of disaster emergency. In addition to or instead of any actions pursuant to the provisions of K.S.A. 2-2114, and amendments thereto, the governor, upon a finding or when notified pursuant to K.S.A. 2-2112 *et seq.*, and amendments thereto, that a quarantine or other regulations are necessary to prevent the spread among plants, raw agricultural commodities, animal feed or processed food of any contagious or infectious disease, may issue a proclamation declaring a state of disaster emergency.

(3) The state of disaster emergency so declared shall continue until the governor finds that the threat or danger of disaster has passed, or the disaster has been dealt with to the extent that emergency conditions no longer exist. Upon making such findings the governor shall terminate the state of disaster emergency by proclamation, but except as provided in paragraph (4), no state of disaster emergency may continue for longer than 15 days unless ratified by concurrent resolution of the legislature, with the single exception that upon specific application by the governor to the state finance council and an affirmative vote of a majority of the legislative members thereof, a state of disaster emergency may be extended once for a specified period not to exceed 30 days beyond such 15-day period.

(4) ~~If the state of disaster emergency is proclaimed pursuant to paragraph (2), the governor shall terminate the state of disaster emergency by proclamation within 15 days, unless ratified by concurrent resolution of the legislature, except that when the legislature is not in session and upon specific application by the governor to the state finance council and an affirmative vote of a majority of the legislative members thereof, a state of disaster emergency may be extended for a specified period not to exceed 30 days.~~ The state finance council may authorize additional extensions of the state of disaster emergency by a unanimous vote of the legislative members thereof for specified periods not to exceed 30 days each. Such state of disaster emergency shall be terminated on the 15th day of the next regular legislative session following the initial date of the state of disaster emergency unless ratified by concurrent resolution of the legislature.

(5) At any time, the legislature by concurrent resolution may require the governor to terminate a state of disaster emergency. Upon such action by the legislature, the governor shall issue a proclamation terminating the state of disaster emergency.

(6) Any proclamation declaring or terminating a state of disaster emergency which is issued under this subsection shall indicate the nature of the disaster, the area or areas threatened or affected by the disaster and the conditions which have brought about, or which make possible the termination of, the state of disaster emergency. Each such proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and, unless the circumstances attendant upon the disaster prevent the same, each such proclamation shall be filed promptly with the

division of emergency management, the office of the secretary of state and each city clerk or county clerk, as the case may be, in the area to which such proclamation applies.

(c) In the event of the absence of the governor from the state or the existence of any constitutional disability of the governor, an officer specified in K.S.A. 48-1204 and amendments thereto, in the order of succession provided by that section, may issue a proclamation declaring a state of disaster emergency in the manner provided in and subject to the provisions of subsection (a). During a state of disaster emergency declared pursuant to this subsection, such officer may exercise the powers conferred upon the governor by K.S.A. 48-925, and amendments thereto. If a preceding officer in the order of succession becomes able and available, the authority of the officer exercising such powers shall terminate and such powers shall be conferred upon the preceding officer. Upon the return of the governor to the state or the removal of any constitutional disability of the governor, the authority of an officer to exercise the powers conferred by this section shall terminate immediately and the governor shall resume the full powers of the office. Any state of disaster emergency and any actions taken by an officer under this subsection shall continue and shall have full force and effect as authorized by law unless modified or terminated by the governor in the manner prescribed by law.

(d) A proclamation declaring a state of disaster emergency shall activate the disaster response and recovery aspects of the state disaster emergency plan and of any local and interjurisdictional disaster plans applicable to the political subdivisions or areas affected by the proclamation. Such proclamation shall be authority for the deployment and use of any forces to which the plan or plans apply and for use or distribution of any supplies, equipment, materials or facilities assembled, stockpiled or arranged to be made available pursuant to this act during a disaster.

(e) The governor, when advised pursuant to K.S.A. 74-2608, and amendments thereto, that conditions indicative of drought exist, shall be authorized to declare by proclamation that a state of drought exists. This declaration of a state of drought can be for specific areas or communities, can be statewide or for specific water sources and shall effect immediate implementation of drought contingency plans contained in state approved conservation plans, including those for state facilities.

History: L. 1975, ch. 283, § 4; L. 1991, ch. 292, § 1; L. 1994, ch. 248, § 12; L. 2001, ch. 163, § 11; L. 2002, ch. 88, § 5; May 2.