

MEMORANDUM

**TO: Chairman Fred Patton
Vice Chairman Bradley Ralph
Ranking Member John Carmichael
Members of the House Judiciary Committee**

FROM: Will Lawrence, Chief of Staff, Governor Laura Kelly

RE: Testimony on HB 2416

DATE: February 25, 2021

Dear Chairman Patton, Vice Chairman Ralph, Ranking Member Carmichael, and members of the House Judiciary Committee:

Thank you for the opportunity to testify regarding the contents of HB 2416 and discuss Governor Kelly's position on amendments to the Kansas Emergency Management Act.

I will begin my testimony where I have started in previous appearances before the committees reviewing this topic. KEMA is not simply a delegation of legislative power – it is a blending of both legislative and executive emergency power. The Kansas Constitution vests “supreme executive power” in the Governor. Kan. Const. Art. I, § 3. The Kansas Supreme Court has held that this vesting of “supreme executive power” is an affirmative grant of executive authority to the Governor. It does not rely on other legislative action to empower the governor with any executive authority. The vesting of supreme executive power, coupled with the governor's constitutional power as commander-in-chief of the militia, forms the basis of the governor's inherent authority to deal with emergencies. And KEMA itself recognizes this by stating that “[n]othing in the emergency management act shall be construed to . . . limit, modify or abridge the authority of the governor to proclaim martial law or exercise any other powers vested in the governor under the constitution.” K.S.A. 48-923(d).

The legislative branch provides a necessary and important oversight role when it comes to emergencies. However, the Governor is the one responsible for meeting the dangers presented to the state by an emergency. This is not only contemplated in state law, it is contemplated by the federal government. 44 CFR 206.35 and 206.36 provide that only the Governor of a State or Acting Governor in her/his absence may request an emergency or major disaster declaration from the President through the appropriate regional administrator. These same regulations require the Governor to take specific actions in their state prior to submitting their declaration request. The Governor must certify on behalf of the state, and if approved, it is the Governor that must sign the federal documents.

While HB 2416 appears to try and strike a balance in this regard, the bill presents a major challenge in allowing the Governor to be able to respond quickly in an emergency. Where an executive order issued under an emergency has to be pre-approved, it risks swift and thorough response in order to save lives and deal with rapidly changing dynamics and complexity increasingly prevalent in responding to emergencies. Regardless of the entity that is chosen to engage in review of executive orders, the review should come after the order is issued and effective as opposed to prior to. That takes the legislature from an oversight role to inserting itself as the executive in a time when there needs to be one decision-maker. Which should be the one elected by the people of Kansas to have the supreme executive authority vested in.

I think it is also important to consider the current response plan and the impact the declaration has. The Kansas Response Plan (KRP) requires a state of disaster emergency in order for the Kansas Division of Emergency Management (KDEM) to assist local governments with matters related to COVID-19 or other emergencies. The emergency declaration “shall activate” the disaster response and recovery portions of the state disaster emergency plan. The declaration “shall be the authority” for the deployment and use to which the plan or plans apply.” Here is what that means: without a declaration, the KRP is not in effect and without the KRP, neither KDEM nor the Adjutant General possesses the authority to implement the plan or perform their duties under KEMA. KDEM has no authority to task other agencies to assist with a response and cannot mission assign other state agencies, including the Kansas National Guard (KSNG).

The KRP provides the structure for supporting local jurisdictions that choose to have a state of disaster declaration in place at the local level. This ties together a complete spectrum of incident management activities across communities and the state by defining operational and resource coordinating structures. The KRP addresses all hazards that could impact Kansas and supports both county and federal emergency response plans. It is the nationally recognized best model.

Since March 12, 2020, the State Emergency Operations Center (SEOC) has been activated with 15 Emergency Support Functions (ESFs) and other supporting agencies. The KRP and Biological Annex has been implemented. As of February 17, 2021, the following resources have been provided:

- 4,327 resource requests received for personal protective equipment, supplies, personnel and equipment;
- 56,721 cases of PPE distributed from the disaster warehouse;
- 8,000,000 self-stable meals packaged;
- Over 5,300,000 meals distributed;
- 167 ventilators deployed across the state;
- 18,567 total night stays of individuals in non-congregate care shelters;
- KSNG has transported over 24,600 sample collections to Kansas Health and Environment Laboratory (KHEL); and
- KSNG has tested over 18,000 individuals within our underserved population.

Should the emergency declaration expire on March 31, 2021, the following would happen:

- SEOC would cease operations;
- Tort liability and immunity protections for individuals supporting the emergency management activities will end;
- Non-congregate sheltering for essential personnel including healthcare workers, emergency/first responders and public safety officials that require quarantine or isolation along with individuals living in congregate settings will end;
- Supplying bulk food to the Kansas food banks supporting communities, mobile food pantries, Harvesters Community Food Network and Second Harvest Community Food Banks will end;
- The use of contracted nurses to support state operated vaccine clinics will end;
- SEOC supported vaccination distribution and delivery to local health departments, nursing homes, assisted living centers, and state-run vaccination clinics for underserved populations and teachers will end;
- Transportation of test specimens to laboratories will end;
- Procurement and distribution of critical PPE, supplies, and medical equipment to include ventilators and powered air purifying respirators (PAPRs) will end;
- Support from 151 KSNG members currently supporting COVID-19 response (which is currently 100% federally funded) will end; and
- FEMA may end the states incident period and response costs moving forward would not be eligible for federal reimbursement.

The COVID-19 pandemic may very well be one of the longest lasting disasters in modern history. Governor Kelly issued an emergency declaration on March 12, 2020. That declaration is currently set to expire on March 31, 2021. We are still very much in a state of emergency for the COVID-19 pandemic. This is not unique to Kansas. I am unaware of any state that does not have an emergency declaration in place. While there is “light at the end of the tunnel,” the declaration should not end on March 31. Allowing it to expire would have devastating consequences on multiple levels including the vaccine distribution, delivery and administration.

The Governor’s position remains that any changes made to KEMA should be measured, targeted and limited as we are still in the middle of the response. Ensuring the current declaration continues for the foreseeable future is vital to bringing the COVID-19 pandemic to an end. The biggest challenge we have seen over time is the process for extending a declaration. The initial period of time for a declaration should be increased from the current 15 days to at least 21 days. This will provide more time for traditional emergencies to be handled and limit the number of times an extension may need to be requested, but still ensure that longer periods of emergency response receive appropriate oversight and approval for extension.