

**ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE**

March 16, 2011

1:35 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator Joe Paskvan
Senator Lesil McGuire
Senator John Coghill

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

CONFIRMATION HEARING

Attorney General - Department of Law (DOL)
John J. Burns

- CONFIRMATION ADVANCED

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

JOHN J. BURNS, Attorney General Designee
Department of Law (DOL)
Anchorage, AK

POSITION STATEMENT: Testified as designee to the position of Attorney General for the State of Alaska.

ACTION NARRATIVE

[1:35:34 PM](#)

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 1:35 p.m. Senators Coghill, Paskvan, McGuire, and French were present at the call to order. Senator Wielechowski arrived soon thereafter.

CONFIRMATION HEARING

Attorney General - Department of Law (DOL)

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CHAIR FRENCH announced the business before the committee would be the confirmation hearing of John J. Burns for the position of Attorney General for the State of Alaska. He expressed hope that the new Attorney General would serve a long time, because there is benefit to a lengthy tenure. He noted that he had submitted questions for Mr. Burns to answer.

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JOHN J. BURNS, Attorney General Designee, Department of Law (DOL), said he didn't seek this position but is honored to fulfill it. As an Alaskan of 51 years, he has a commitment to Alaska and a desire to contribute to the betterment of the state. He grew up in Nome, and spent a lot of time in villages such as Diomedes and King Island. His family moved to Fairbanks, where he has resided since. He is a graduate of the University of Alaska and the Puget Sound School of Law, and for the past twenty-five years has been an attorney in private practice. He also served for many years as an adjunct professor of business law at the University of Alaska Anchorage.

During the three months since his appointment, he has taken the opportunity to travel to Bethel, Nome, and Barrow, to meet with rural leaders, judges, law enforcement officials, and to visit women's shelters and youth facilities with the intention of better understanding the needs of rural communities. His objective as attorney general is to uphold the constitution and to enforce the laws of the State of Alaska, and to do so with dignity and integrity, being consistent with his ethical obligations.

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SENATOR WIELECHOWSKI joined the meeting.

[1:39:55 PM](#)

CHAIR FRENCH asked how he happened to go to law school

ATTORNEY GENERAL BURNS said his biologist father wasn't excited. He went straight to law school from undergraduate studies. After the first year it became enjoyable because it was a pursuit of knowledge, unrestrained from responsibilities.

During law school he continued working during the summers with Fish and Game in places like Scammon Bay and Hooper Bay and he traveled the Yukon River doing subsistence surveys. After law school he had an extended externship with Judge Rabinowitz and

was a Superior Court clerk working with four judges. This allowed him to learn the rule of law, the procedures, and what the judge was looking for. From there he worked at Birch Horton with 35-40 other attorneys, primarily on financial issues. He and a partner disassociated amicably to form a private practice. He has always tried to be the best lawyer possible and to improve.

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CHAIR FRENCH asked how many jury trials he has done and has he taken any to the Ninth Circuit.

ATTORNEY GENERAL BURNS answered he has not had a case go to the Ninth Circuit. He has had only four cases before the Alaska Supreme Court. His was mainly a motion practice. His philosophy is that everyone loses if you end in a trial.

CHAIR FRENCH asked who he works for in the role of attorney general. He added that he sees it as a dual role; you work for the governor and you work for the people.

ATTORNEY GENERAL BURNS responded he is the attorney for the governor and the state of Alaska. His first duty is to uphold the constitution.

CHAIR FRENCH noted he had worked in the civil arena and asked what he views as the biggest challenge facing the civil division and how he will address this.

ATTORNEY GENERAL BURNS said DOL has very dedicated attorneys. This leads to the primary concern that the workforce is aging; 25-30 percent is currently eligible for retirement. When these individuals leave, the state will be hurting. For this reason DOL needs to recruit and mentor attorneys. This is mentoring and succession planning. It is probably an issue that other departments face.

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SENATOR MCGUIRE thanked AG Burns for setting up face-to-face interviews with all legislators. He was tapped for this job and he left a successful practice to serve the state. This is one of the most important positions in the state and he has her support.

She asked his plan as the state looks forward 50-100 years with respect to resource development. The framers held the subsurface rights in common, for the people. There has been difficulty in

recent years; oil production is down, there was a setback in the NPRA ConocoPhillips lease, an EPA ruling that's been challenged, and a series of land that is controlled by the federal government. She asked what his mission will be with respect to resource development.

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ATTORNEY GENERAL BURNS said he's met with 59 members of the Legislature, all but the one who was rerouted by TSA.

He said it is his hope and dream that the rights and privileges of the statehood compact can be achieved. There have been significant issues in achieving those objectives. Litigation ought to be the last resort. Dialogue is the only way. Most of the state is owned by the federal government but that doesn't mean they should lock it up. It is his firm belief that dialogue will achieve more than litigation. He intends to dialogue with the federal government and work with the various stakeholders to come to some resolution. He also met with the House Finance Committee and they discussed these issues and how to work cooperatively.

He noted that he just returned from the National Association of Attorneys General (NAAG) meeting and the focus was that dialoging is of utmost importance. He also met with the Western Attorneys General and Secretary Salazar. It will be dialogue, but we recognize that litigation must always be an arrow in the quiver and we must always be willing to pull that arrow from the quiver. You can be assured that I will do whatever is consistent with the constitution to achieve this, he stated.

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CHAIR FRENCH asked what he sees will change the aging workforce.

ATTORNEY GENERAL BURNS said we are not necessarily looking for a younger workforce, but rather a good, solid workforce that is dedicated and has a good work ethic. We will continue to recruit, mentor, and retain, but most we must work through that succession plan.

Mentoring is very important. We need to work on developing that mentorship to provide good training in a systematic way. We will bring in educational work programs.

Accountability is also important and we haven't kept these statistics to date. Statistics aren't intended to show win/loss records. Statistics are good mentoring tools.

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CHAIR FRENCH asked about the criminal division where there may be too much turnover. He asked if Attorney General Burns sees this as a problem.

ATTORNEY GENERAL BURNS said he's been incredibly impressed with the attorneys in the criminal division. He spoke with Mr. Svobodny about turnover and he can report that it is below the national average. It is never good to lose a good attorney but after law school they have lots of debt and can get good trial experience and develop skills on the state's nickel. In five to seven years many move on and there isn't much that can be done about that other than keeping morale high and keeping the work varied and interesting.

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SENATOR PASKVAN mentioned the statistics for retirement and said it will be important to think about the golden handcuffs to keep those bright young attorneys working for the state for years to come.

ATTORNEY GENERAL BURNS said the DOL is looking into this.

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SENATOR WIELECHOWSKI asked how involved he is in the Point Thomson negotiations. There is concern that BP and Conoco feel left out and there is concern in the Legislature.

ATTORNEY GENERAL BURNS said the DOL is involved and aware of the concerns raised by producers and those are being addressed. Any resolution will be focused on the best interests of the state.

SENATOR WIELECHOWSKI said to the extent that Resources and Judiciary members could be included he would appreciate it, because that will have cascading affects. He is concerned that resources on the North Slope aren't being developed even though the producers are required to do so. He asked if Attorney General Burns had looked into this issue.

ATTORNEY GENERAL BURNS replied the DOL is addressing this and will try to provide a confidential overview to the Resources Committee.

SENATOR WIELECHOWSKI asked about tribal sovereignty and mentioned Kaltag. The tribal court issued a decision and the state disagreed and intervened.

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ATTORNEY GENERAL BURNS said sometimes a court has to define the issues and that's what was done in Tanana. It provides a little clarity on the jurisdiction of tribes to deal with children. The decision provides an opportunity to work cooperatively to ensure that the best interests of tribal children are protected. In Tanana some issues weren't addressed but need to be; for example, jurisdiction over nonmembers, and jurisdiction over a non-consenting member. He has been involved in Indian Child Welfare Act (ICWA) memorandum of understanding and he believes that Tanana provides a wonderful opportunity.

CHAIR FRENCH asked if he sees DOL crafting new guidelines for the state in the face of that ruling.

ATTORNEY GENERAL BURNS said the decision mandates that but it can't be done without dialogue. The Supreme Court could reinstitute Child in Need of Aid (CINA) provisions, but all parties recognize the importance of acting quickly to know what circumstances are important. Due process rights must be protected.

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CHAIR FRENCH asked about Kasayulie v. State and Moore v. State, both of which deal with school funding.

ATTORNEY GENERAL BURNS said he is aware of the cases. Kasayulie since 1997 has dealt with school construction funding. Moore on the other hand since 2004 deals with the state's obligation to provide quality education in all areas of the state. DOL continues to engage in dialogue regarding those matters and is seeking to do mediation coupled with a master to facilitate if mediation isn't successful. He would like to bring closure to both cases but resolution, particularly with Kasayulie, has to do with funding, which is within the purview of the Legislature.

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SENATOR PASKVAN asked him to comment on the state's position on intervening to establish R.S. 2477 access.

ATTORNEY GENERAL BURNS said the federal government is more stringent now. The DNR is now prioritizing R.S. 2477 while identifying those that have the greatest chance of success. It is collaborative between DNR and DOL.

SENATOR WIELECHOWSKI asked him to discuss the clients he's had and the conflicts he may have as attorney general.

ATTORNEY GENERAL BURNS said his client list is long and diverse. The list is filed in the APOC report. DOL has reviewed the list to determine whether or not there is a conflict. If there is he will effectively be walled off from participation.

CHAIR FRENCH asked if he had done work for oil companies.

ATTORNEY GENERAL BURNS answered no.

CHAIR FRENCH asked about Native corporations

ATTORNEY GENERAL BURNS answered he had represented Tanana Chiefs and Doyon, primarily over business issues.

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SENATOR WIELECHOWSKI mentioned consumer protection and price gouging. He asked if Attorney General Burns had looked at the report filed by a past attorney general and if he had suggestions about the price of gasoline because many legislators believe that there has been price gouging.

ATTORNEY GENERAL BURNS said the reports couldn't find any illegal activity and no action was taken. The consumer protection division of DOL advocates vigorously for consumer rights. He doesn't have a particular recommendation because prices are high but there is nothing tangible that would substantiate that there is price gouging.

SENATOR WIELECHOWSKI asked him to comment on TSA pat downs and if they might be illegal if they started in Alaska, due to the privacy protection in our state constitution.

ATTORNEY GENERAL BURNS said he hadn't looked into the most recent event but the department would do so and he would share the information with the committee.

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SENATOR WIELECHOWSKI asked if he believes that the attorney general should be elected.

ATTORNEY GENERAL BURNS said it wasn't until he was asked to assume the role that he began to look at the issue and he can see benefits for both sides. At the recent NAAG conference he learned about the surprising cost of attorney general elections

and that Alaska is one of four states that appoints rather than elects. He would prefer the attorney general to be impartial to the politics of law, and not susceptible to political pressures.

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CHAIR FRENCH noted that in territorial years the attorney general was elected.

SENATOR COGHILL observed that we agree when it's the attorney general we want.

He said he's always alarmed by the number of cases that are plea bargained. Second, in outlying areas and even in Fairbanks the misdemeanors aren't handled very well. It looks like only felons are subject to the law. He asked if this was accurate.

ATTORNEY GENERAL BURNS responded it's a matter of resources. Matters are prioritized according to urgency and the greatest risk of harm. They prosecute as many misdemeanors and felonies as possible. Also, the department is very interested in addressing sexual assault. Every case is evaluated independently and the facts must be gathered in order to justify prosecution. Some cases are pled down because the facts don't support going forward.

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SENATOR COGHILL said the police have discretion on charging and DOL has discretion on prosecuting and the court has discretion. This means that a lot of cases don't even get a policeman at the front door. He asked Attorney General Burns if he had heard of a disparity regarding what the police are charging and what DOL is taking to court. He asked if we are doing a good enough job of instructing police. It seems like the tougher we get the more resources are required.

ATTORNEY GENERAL BURNS said he has met with rural leaders and some have indicated that they feel that DOL doesn't diligently prosecute. As a result he is convening the Bethel Justice Project to identify the issues. AGs are saying the quality of the police report isn't solid, so they can't take the case to court. He is asking if they are interfacing with the police and following up. Again, it is important to dialogue on these particular issues. Recently an AG was hired in Bethel and that person plays a critical role representing DOL in that community. That person must be the liaison between DOL, police, and rural community leaders. The dialogue needs to be ongoing, especially with regard to the VPSOs and the VSOs.

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CHAIR FRENCH said he appreciates this attention to Western Alaska because the sexual assault rate, while high throughout the state, is epidemic there. He feels that it is upstream of DOL that the greatest gains can be made, in terms of stronger reporting, stronger police work, faster follow up, and more evidence collection.

SENATOR COGHILL said police work comes up during the budget process and it's necessary to keep the dialogue open.

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CHAIR FRENCH said he asked Attorney General Burns to be prepared to discuss the advice he gave to Governor Parnell between the time that Judge Vinson ruled on January 31 that the Affordable Care Act was unconstitutional and March 4 when the judge issued a formal stay of his order. About midway through that time period Attorney General Burns opined that the ruling was binding law whereas a legislative legal memo from Dennis Bailey was contrary to that perspective. He asked Attorney General Burns to comment.

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ATTORNEY GENERAL BURNS said this is another reason that the state benefits in having an appointed attorney general. It is not his role to respond to issues like this; it will be addressed by a court.

He read the following into the record:

On January 31, 2011, Judge Roger Vinson of the United States District Court for the Northern District of Florida granted summary judgment to the 26 state plaintiffs challenging the Patient Protection and Affordable Care Act. Judge Vinson's order found unconstitutional the "individual mandate" provision of the Affordable Care Act, which would require that everyone, with certain limited exceptions, purchase federally-approved health insurance or pay a penalty. Judge Vinson held that the individual mandate is not severable from the rest of the Act, and he therefore declared the entire Act void.

Alaska was a party--a plaintiff--in the case, and parties are bound by the court's judgment that the Act is void. That is black-letter law. As agents of the state, state officials must abide by the decision. For

this reason, Dennis Bailey's point that Judge Vinson's order has precedential or stare decisis effect only "in the limited territory" of the Northern District of Florida is irrelevant. By filing this lawsuit, Alaska submitted to the jurisdiction of the court and must follow the court's decision. Thus, to the extent that the Affordable Care Act requires any action or implementation by the State of Alaska, it is "binding law" as to the State of Alaska. The state could not re-challenge the constitutionality of the Act in either a state or federal court in Alaska or elsewhere.

Of course, the case is stayed pending a decision on appeal, so the parties are relieved of the injunctive effect of the decision until the Eleventh Circuit decides the appeal.

With regards to the three legal principles noted in Dennis Bailey's opinion, that opinion stated that he believed the application of the Florida court has stare decisis or res judicata preclusion. Again, he disagrees with the conclusion of Leg legal that the Federal District Court decision would not have conclusive effect in another lawsuit between the same litigants pending appeal in this case. District court decisions are binding on the parties unless a stay pending appeal is granted. An undecided appeal does not otherwise affect a judgment's finality, which is still binding upon the parties while an appellate court reviews that order. The established rule in the federal court is that a final judgment retains all of its res judicata consequences pending the decision on the appeal.

For this reason, I do not concur with Mr. Bailey's conclusion that the Florida district court decision would not have preclusive effect in another lawsuit between the same litigants pending appeal in this case. And Judge Vinson's clarification order made clear that the parties were legally required to follow the order immediately, and that they did not have discretion to ignore it pending appeal until he issued a stay.

As to the doctrine of full faith and credit and a precedential effect of the decision, which were the

other points, that the Florida decision is not available for enforcement under the full faith and credit clause and would not have precedential effect in a case between the parties--those statements have no relevance to the Affordable Care litigation. It is clear that the Florida district court will not have the final word on the constitutionality of the act, as the United State has appealed the case to the eleventh circuit. It is therefore irrelevant whether another court will give full faith and credit to the decision while it is on appeal. The plaintiff states will not attempt to enforce the judgment in a different court while the Supreme Court reviews the district court decision. It is also irrelevant that a decision by one district court is not binding on another. In fact, several district courts have considered the constitutionality of this Act and have rendered inconsistent decisions. This is one of the reasons why the issue is likely to be decided ultimately by the Supreme Court. The fact that a different court in a different case--brought by different parties--might decide the case differently does not relieve the parties in this case from the force and effect of the judgment made by the Florida court.

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ATTORNEY GENERAL BURNS said with due respect he disagrees with the analysis provided by Legislative Legal Services.

CHAIR FRENCH said he wonders how the State of Alaska wound up in a courtroom in Pensacola, Florida. It struck him as an odd decision. In that five week period only five states, Alaska included, took that position.

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SENATOR PASKVAN said his thought was why that jurisdiction. He asked about the issue of forum shopping.

ATTORNEY GENERAL BURNS said he was not in a position to answer that question; he inherited the office and the decision was already made.

SENATOR WIELECHOWSKI said he was surprised AG Burns was taking the position that there was no mistake made, and said legislative counsel has disagreed with his position; most importantly, the judge in the case disagrees. The decision has

already cost the state \$1 million in lost federal funds, and may cost more in the future.

ATTORNEY GENERAL BURNS responded Judge Vinson said the decision was binding on the parties, and subsequently said it is going to a higher court. He stated, "Conditioned on the Department of Justice expediting its appeal" AG Burns also noted there is a difference between implementation, which is a legal question, and funding, which is a policy question.

SENATOR WIELECHOWSKI said the state is trying to decide about applying for federal funding and the governor relied on your decision not to apply. He questioned why AG Burns wouldn't err on the side of safety and apply for the funds and then return them if need be.

ATTORNEY GENERAL BURNS said the decision was based on the fact that the state was a party to the case. Each branch must give due respect to the other branches. Once Judge Vinson issued the stay, it was binding on all parties. The governor has made it clear that he intends to implement at this juncture. That is his obligation under the law. There is a fundamental difference between funding and policy.

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SENATOR COGHILL said he understands the dilemma and he is grateful that the end is in sight. He is pleased that Alaska joined the case, although it is a slow, messy process.

SENATOR PASKVAN said that brings back the question of whether the Legislature should be involved in the policy decision of whether to join the suit. For a de minimus price, the state has surrendered great policy control to a jurisdiction in Florida.

ATTORNEY GENERAL BURNS said the state is often involved in consumer class actions and Alaska isn't brought in. Joining the suit was a good use of resources. It's a balancing of issues and the issue was that there was an ongoing case. It makes perfect sense in retrospect.

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SENATOR PASKVAN asked where he believes the state can focus on the Endangered Species Act (ESA).

ATTORNEY GENERAL BURNS said other states are interested too but they have more budgetary constraints; they are willing to join with Alaska. Like so many regulations the ESA is good in

concept, but the application has become problematic. DOL is focused on addressing those issues but it will take time and the state has to work through the federal delegation. For example, the Stellar Sea Lion classification requires scientific data to specify that the stocks aren't healthy and the food source is inadequate. National Marine Fisheries Service can't determine the cause of declines in some areas so they say they don't know, so they'll look at human activity and they close fisheries based on that. It's a misapplication of the ESA.

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CHAIR FRENCH asked if there was anything else the committee should know before making this important decision.

ATTORNEY GENERAL BURNS said this is about results and doing a good job in a department that is already excellent. He wants to ensure that it remains excellent, and that they are always held to the highest level of integrity.

[3:00:01 PM](#)

SENATOR WIELECHOWSKI moved to forward the name John Burns to a the full Legislature sitting in joint session for a vote. Without objection the name was forwarded.

[3:00:21 PM](#)

There being no further business to come before the committee, Chair French adjourned the meeting at 3:00 p.m.