

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

February 24, 2021

1:32 p.m.

MEMBERS PRESENT

Senator Lora Reinbold, Chair
Senator Mike Shower, Vice Chair
Senator Shelley Hughes
Senator Jesse Kiehl

MEMBERS ABSENT

Senator Robert Myers

COMMITTEE CALENDAR

PRESENTATION: HISTORY OF PANDEMICS

- HEARD

PRESENTATION: COVID-19 & COURT CASES

- HEARD

SENATE BILL NO. 14

"An Act relating to the selection and retention of judicial officers for the court of appeals and the district court and of magistrates; relating to the duties of the judicial council; relating to the duties of the Commission on Judicial Conduct; and relating to retention or rejection of a judicial officer."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 14

SHORT TITLE: SELECTION AND REVIEW OF JUDGES

SPONSOR(S): SENATOR(S) SHOWER

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| 01/22/21 | (S) | PREFILE RELEASED 1/8/21 |
| 01/22/21 | (S) | READ THE FIRST TIME - REFERRALS |
| 01/22/21 | (S) | JUD |
| 02/03/21 | (S) | JUD AT 1:30 PM BUTROVICH 205 |

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|----------|-----|------------------------------|
| 02/03/21 | (S) | Heard & Held |
| 02/03/21 | (S) | MINUTE(JUD) |
| 02/05/21 | (S) | JUD AT 1:30 PM BUTROVICH 205 |
| 02/05/21 | (S) | Scheduled but Not Heard |
| 02/10/21 | (S) | JUD AT 1:30 PM BUTROVICH 205 |
| 02/10/21 | (S) | Heard & Held |
| 02/10/21 | (S) | MINUTE(JUD) |
| 02/12/21 | (S) | JUD AT 1:30 PM BUTROVICH 205 |
| 02/12/21 | (S) | Heard & Held |
| 02/12/21 | (S) | MINUTE(JUD) |
| 02/15/21 | (S) | JUD AT 1:30 PM BUTROVICH 205 |
| 02/15/21 | (S) | Heard & Held |
| 02/15/21 | (S) | MINUTE(JUD) |
| 02/17/21 | (S) | JUD AT 1:30 PM BUTROVICH 205 |
| 02/17/21 | (S) | Heard & Held |
| 02/17/21 | (S) | MINUTE(JUD) |
| 02/22/21 | (S) | JUD AT 1:30 PM BUTROVICH 205 |
| 02/22/21 | (S) | Heard & Held |
| 02/22/21 | (S) | MINUTE(JUD) |
| 02/24/21 | (S) | JUD AT 1:30 PM BUTROVICH 205 |

WITNESS REGISTER

DAVE BARTON, Historian
Wallbuilders
Joplin, Texas

POSITION STATEMENT: By invitation, presented a PowerPoint on the History of Pandemics.

PHIL KLINE Professor; Director
Amistad Law Project
Liberty University School of Law
Thomas More Society
Amherst, Virginia

POSITION STATEMENT: By invitation, presented a PowerPoint on COVID-19 and Court Cases.

ACTION NARRATIVE

[1:32:21 PM](#)

CHAIR LORA REINBOLD called the Senate Judiciary Standing Committee meeting to order at 1:32 p.m. Present at the call to order were Senators Shower, Kiehl, Hughes, and Chair Reinbold.

PRESENTATION: HISTORY OF PANDEMICS

[1:33:32 PM](#)

CHAIR REINBOLD announced the consideration of a Presentation on the History of Pandemics. She reviewed a brief bio for Mr. Barton.

[1:35:02 PM](#)

DAVE BARTON, Historian, Wallbuilders, Joplin, Texas, via teleconference, stated that Wallbuilders has over 120,000 original documents from prior to 1812 to WWII and beyond. He offered his view that the new trend in education standards calls for removing studies of American wars from the American Revolution through WWII.

[1:36:37 PM](#)

MR. BARTON began his PowerPoint by stating that America has suffered a major pandemic about every 15 years for the last 400 years. He highlighted the low COVID-19 mortality rate of .15 percent as compared to the smallpox epidemic in the 1600s, with a mortality rate of 70 percent.

[1:38:06 PM](#)

At ease

[1:43:39 PM](#)

CHAIR REINBOLD reconvened the meeting.

[1:44:14 PM](#)

MR. BARTON repeated the statistics on slide 2 related to the mortality rate of COVID-19. New York City's COVID-19 mortality rate of 3.5 percent was 20 times higher than the national rate. The world has had many pandemics, including scarlet fever in the 1850s, diphtheria from the 1600s to 1921, measles in the 1980s, polio in the 50s, the Spanish flu of 1918, the Asian flu of 1957, the Hong Kong flu in 1968, and the Swine flu in 2009. Except for the Swine flu, all of these pandemics had a much higher mortality rate than COVID-19.

[1:46:48 PM](#)

MR. BARTON offered his belief that many pandemics have intersected with legal principles. He stated that Federal Practice and Procedures, Volume 30 devotes nearly 25 pages to the history of due process. He offered his belief that the source of many constitutional clauses for due process is the Bible, particularly Proverbs verse 18:17, which read, "One side sounds right until the other side is heard." That provides the basis for the adversarial system in America, he said.

[1:48:07 PM](#)

MR. BARTON referred to the Great Barrington Declaration, which he said provides another viewpoint on COVID-19. Its website has hundreds of thousands of followers, he said. He expressed concern that "big tech" has deemed the Great Barrington Declaration view unsubstantiated. The debate is between public and private sector health approaches.

MR. BARTON stated that the Centers for Disease Control (CDC) by its own admission, has inflated its numbers. He said he was unsure if this was true, but it was worth discussing.

[1:49:50 PM](#)

MR. BARTON reviewed public health history to illustrate that the medical community does not always recommend the right approach. In 1831, fire was the highest cause of death. He said an article on the preservation of human life in cases of fire that cited the benefits of a fireproof suit consisting of a fireproof mesh, gloves, and boots made from asbestos used to rescue people appeared to save lives. The dangers of using asbestos were unknown at the time.

MR. BARTON said a medical journal also recommended people suffering from heatstroke avoid drinking cold water because they might die. Although that advice is not accurate, it is where medicine was at the time.

[1:52:19 PM](#)

MR. BARTON said the same types of problems have occurred with COVID-19. Many other states are taking a different approach from Alaska. Florida's governor stated their schools would not close. Other governors have done the same. Population density is a great contributor to COVID-19. However, Florida is a densely-populated state yet, currently, Florida is 33rd out of 50 states, with its cases plummeting over the last few months. He wondered if that approach might be the right one.

[1:53:13 PM](#)

MR. BARTON highlighted the governmental impact related to COVID-19. He offered his belief that COVID-19 has directly affected the Bill of Rights, which consists of the first ten amendments to the US Constitution. He said the Second and Third Amendments of the US Constitution have also been affected by the government's decisions. He referred to a newspaper article [not cited] that indicated a California church was fined \$2,000 for holding indoor worship services. That church faces \$2 million in

finer for exercising its First Amendment rights. However, the US Supreme Court ruling in a lawsuit brought by South Bay United Pentecostal Church in Chula Vista struck down the governor's rules forbidding indoor services because it violated First Amendment rights. In 1866, the US Supreme Court addressed a question about which constitutional rights could be suspended during a crisis. He read from *ex parte Milligan*:

The Constitution of the United States is a law for rulers and people equally in war and in peace. It covers with a shield all protections and all classes of men at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false

[1:55:11 PM](#)

MR. BARTON referred to a September 14, 2020, ruling by US District Court Pennsylvania Judge William Stickman in *County of Butler v. Wolf* regarding stay-at-home orders. He read a portion of the ruling:

Broad population-wide lockdowns are such a dramatic inversion of the concept of liberty in a free society as to be nearly presumptively unconstitutional unless the government can truly demonstrate that they burden no more liberty than is reasonably necessary to achieve an important government end.

MR. BARTON stated that there have been hundreds of lawsuits related to COVID-19.

[1:56:04 PM](#)

MR. BARTON pointed out that power struggles between branches of government are not new, including debates between governors and secretaries of state or governors and legislatures. He read a quote from the Bill of Rights Institute, founded by the Koch Foundation, about the Federalist Papers, a series of eighty-five essays urging the citizens of New York to ratify the US Constitution, "The Federalist Papers were considered to be the most authoritative constitutional commentary."

[1:57:30 PM](#)

MR. BARTON referred to the Federalist Papers No. 50 and 78, which indicate that in a republican form of government the legislative authority necessarily predominates. He argued that it is hard to think of the three branches of government as co-equal if one predominates.

[1:58:33 PM](#)

MR. BARTON quoted from philosopher, John Locke's Second Treatise of Civil Government: "This legislative is not only the supreme power of the common-wealth, but sacred and unalterable in the hands where the community have once placed it; ..." He said the legislature does not have the right to give this power away.

MR. BARTON went on to say that James Otis, Jr., John Adams, Alexander Hamilton, and James Madison all supported legislative power as being sovereign and supreme over the other branches of government.

MR. BARTON said legislative supremacy had been tested under COVID-19. He said there is no way to know what direction it will take. However, there is pushback from legislatures trying to regain their power. There is more pushback from some states than others.

[2:02:54 PM](#)

CHAIR REINBOLD remarked positively on the presentation.

[2:05:43 PM](#)

SENATOR HUGHES said many states are grappling with COVID-19. Once power is relinquished, it is hard to pull it back. She said the disaster declarations granted broad powers to the executive branch. The legislature can amend the statutes to put in checks and balances. For example, the legislature has the authority to extend disaster declarations. Further, the governor could issue a mandate in an emergency, but the legislature could decide to sunset it. She asked what other states have done with respect to their disaster statutes. She expressed an interest in reviewing other states' statutes.

MR. BARTON responded that Texas represents the worst-case scenario because it has a biennial session. The Texas Constitution does not provide a means for the legislature to call itself back into session, so Texas must determine if it can do so. He reported that the governor spent \$10 billion in unappropriated funds and the legislature must consider how to limit the governor's actions and reappropriate funds.

[2:08:35 PM](#)

MR. BARTON explained that during the Cold War, many states enacted emergency powers. These emergency powers were intended to be in effect until their legislatures were back in session and were not designed for shutdowns lasting eight or nine months or longer. Some states, such as Illinois, require legislative approval every 30 days to continue any emergency declaration. Other states, such as Oklahoma and Arkansas, seek to limit disaster declarations to three days. This raises questions as to whether financial limits can be imposed and whether federal COVID-19 funding needs to go through the legislature for appropriation. He predicted that some governors might veto bills to retain power. However, it will take time for states to go through various processes, including veto overrides. Thus far, states have taken wide-ranging approaches to COVID-19 issues. For example, many legislatures seek to regain power, set time limits on declarations, disperse funding and conduct fund tracing.

[2:12:28 PM](#)

SENATOR KIEHL asked if he was involved in efforts to remove Cesar Chavez or Thurgood Marshall from Texas history books.

MR. BARTON answered no. He said he supported moving this type of history to civics lessons.

[2:13:19 PM](#)

SENATOR KIEHL asked if his book [title not identified] was withdrawn or recalled by the publisher for historical inaccuracies and misstatements.

MR. BARTON answered no. He said his book [not identified] was not pulled for that reason, but rather due to a change of publishers. He said it had stood the test of time.

[2:13:53 PM](#)

SENATOR KIEHL asked if he knew the difference between the mortality rate, which he listed at 0.15, and the case fatality rate, which is 1.8 percent for COVID-19.

MR. BARTON said the figures are still low. He explained that the mortality rate is based on a total of all of the people in the US compared to all of the deaths.

[2:14:33 PM](#)

SENATOR KIEHL noted that it isn't possible to compare mortality rates for pandemics that have ended with rates for pandemics

that are ongoing. He asked the Chair to distribute his questions for Mr. Barton and the source material to be distributed to members and posted to BASIS for the record.

CHAIR REINBOLD responded that she would discuss his request at a future time.

[2:15:02 PM](#)

SENATOR SHOWER asked if any other states were asserting their legislative authority on judicial appointments.

MR. BARTON answered that many states are doing so to some degree. He reported that the Missouri Plan was adopted in whole or in part by 24 states. He said Wallbuilders has posted an extensive report on the Missouri Plan on its website that highlights which elements were adopted by each state. One issue with the Missouri plan is that the courts have become more elite in every state, and the judiciary has become more untouchable and unaccountable. He characterized the modified Missouri plan as "Missouri light." Thus, some states are moving to allow the voters to elect their judges or to involve the legislature in the process. As the founding fathers pointed out in the US Constitution, the judiciary does not exist as a separate branch because its members are chosen by the president and confirmed by the legislature, he said. The justices cannot place themselves on the court, so they depend on the other two branches for their existence.

[2:18:17 PM](#)

SENATOR HUGHES highlighted his concern that some governors might veto the bills passed by legislatures to address checks and balances in their disaster statutes. She said she hopes Governor Dunleavy will work with the legislature and not veto any efforts to address this issue. The governor will recognize the importance of legislative supremacy.

CHAIR REINBOLD echoed Senator Hughes's remarks. She mentioned her relevant bills before the legislature. She expressed concern about the governor's actions taken this summer on disaster declarations. She highlighted the current tension between the executive branch and the legislative branches of government in Alaska.

PRESENTATION: COVID-19 & COURT CASE

[2:22:39 PM](#)

CHAIR REINBOLD announced consideration of the Presentation on COVID-19 and Court Cases by Phil Kline.

[2:23:57 PM](#)

PHIL KLINE Director, Amistad Law Project, Professor, Liberty University School of Law, Thomas More Society, Amherst, Virginia, clarified he is not associated with Liberty Counsel. He said the Amistad Law Project has been involved in litigation for the past 18 months related to the perpetual use of emergency police orders by executives throughout the nation.

[2:24:36 PM](#)

MR. KLINE stated that in 1989 then-Supreme Court Justice Thurgood Marshall wrote in his dissenting opinion in *Skinner v. Railway Labor Executives' Association*, 489 US 602 (1989), "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure." He offered his view that political speeches and gatherings have been silenced and that laws important to elections were sidestepped and undermined. Some governors act as though they are above the law, he said. He stated that liberty not protected in process will become liberty lost.

[2:26:02 PM](#)

MR. KLINE said the Thomas More Society has litigated and prevailed against governors in Pennsylvania and Michigan. He advocated for a transparent and open decision-making process. He characterized science as tools against deadly viruses. Science should inform elected officials about the exercise of freedoms; however, it is not the sole determinant. When one person makes decisions behind closed doors, it disenfranchises the public and elected officials.

MR. KLINE referred to a Pennsylvania case in which US District Court Judge William Stickman IV issued a decision to strike down Governor Wolf's proclamation of a disaster emergency to combat the spread of COVID-19 by imposing limits on gatherings, issuing stay-at-home orders and mandating closure of some businesses that were not essential. He read:

Good intentions toward a laudable end are not alone enough to uphold government action against a constitutional challenge. Indeed, the greatest threat to our system of constitutional liberties may arise when the ends are laudable and the intent is good, especially in times of emergency. In an emergency,

even a vigilant public may let down its guard over constitutional liberties, only to find that liberties, once relinquished, are hard to recoup and that restrictions run expedient in the face of emergency situation may persist long after immediate danger has passed.

[2:29:00 PM](#)

MR. KLINE stated that the separation of powers is provided by the three branches of government to protect individual liberty and ensure that one ruler could not arbitrarily impose his or her position and restrict the rights of individuals. He reminded members that the Declaration of Independence provides core truths. He read:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

MR. KLINE said this means a person's value in society is intrinsic and government cannot take it away.

[2:30:27 PM](#)

MR. KLINE said the US has enshrined protections in the US Constitution, including equal protection under the law and separation of power and due process. The non-delegation doctrine is a principle in administrative law that states that Congress cannot delegate its legislative powers to other entities. In terms of due process, every individual has due process in procedural law, including the right to counsel and the right to a hearing. Every individual is also entitled to substantive due process of law.

[2:31:23 PM](#)

MR. KLINE said most decisions by governors related to COVID-19 rely on the US Supreme Court decision in *Jacobson v. Massachusetts* (1927). The court upheld the authority of the states to enforce compulsory vaccination. Because Mr. Jacobson refused to get the vaccine, he was prosecuted and charged a \$5 fine. The law provided exceptions for people with health conditions which made it harmful for them to get vaccinated. Over the years, this has meant that the US does not quarantine the healthy, he said. He opined that most laws that require quarantining someone require that the individual has been exposed and might be contagious or ill. In all instances, it requires that the person have a right to a hearing, counsel, and

a written order and how that order applies, and that governor should impose the least restrictive measure to protect public health.

[2:33:00 PM](#)

MR. KLINE stated that is not being done today. He listed instances in which people were quarantined.

He referred to a US Supreme Court case, Buck v. Bell (1927), in which the court upheld sterilization of the mentally disabled. He said the defense used this case in the Nuremberg trials. These cases illustrate instances of quarantine and restriction of rights of healthy individuals. It represents a dark stain in our nation's history. He elaborated on these injustices.

[2:35:43 PM](#)

CHAIR REINBOLD said the committee was experiencing some audio problems that might be related to his bandwidth.

[2:36:20 PM](#)

MR. KLINE offered his view that emergency orders are so broad in many states that they control virtually every action of human relationships. For example, they control whether family members can visit a loved one dying, attend a graduation or a wedding. They control whether people are subject to mandated mask or social distancing policies. When laws are so restrictive, he said it is impossible to police them. He related some cases where people have been discriminated against because they dared to speak up. He related that when a barber in Michigan spoke out against a mandatory mask order, the government tried to revoke the barber's professional license and prosecute him. He said the government must have more faith in its citizenry to allow freedom to flourish. He said wisdom does not always reside in the executive branch. He urged Americans to exercise their freedom because these infringements have gone on for too long.

[2:38:52 PM](#)

CHAIR REINBOLD related the COVID-19 restrictions in her district, such that church services were canceled. She said the governor's Mandate 16 was used as a guide for restrictions, including how far apart parishioners must park their cars, mask requirements they must adhere to, and their interactions with clergy.

[2:40:24 PM](#)

SENATOR KIEHL stated that the US Supreme Court recently ruled in South Bay United Pentecostal Church v. Newsom that reasonable

restrictions applied to places of worship were constitutional, including density, singing and chanting. It allowed limiting the length of time for services. He asked where the courts erred in interpreting the US Constitution.

MR. KLINE suggested that his interpretation is wrong. The US Supreme Court struck down some of the orders. He related cases that his organization had won. The primary concern relates to orders that appear arbitrary. In those instances, the court has consistently struck them down. He offered his belief that due to emergency orders issued, wealth has shifted from the mom and pop businesses to big technology companies. He said those companies have political alliances. The US Supreme Court might be concerned about the duration and may decide these restrictions should not be in place when the legislature is in session.

[2:43:25 PM](#)

SENATOR KIEHL asked if he had a license to practice law.

MR. KLINE responded that his license was suspended.

SENATOR KIEHL said he submitted two articles to the committee and asked that they be posted to BASIS about Mr. Kline's license suspension, which was issued, in part, for giving false and misleading statements to the Kansas courts.

CHAIR REINBOLD offered to hold this discussion offline.

MR. KLINE responded that he disagreed with the Kansas court. He offered his views on the ways that dissenters are silenced and his concern that Americans are losing special protections granted to them in the Bill of Rights. He suggested members should debate the issues and not the people.

CHAIR REINBOLD said she was currently being attacked politically by the governor because of her strong opposition to the governor's disaster declarations. She acknowledged that the US Constitution provides the rights of debate and due process.

[2:46:44 PM](#)

SENATOR SHOWER echoed the concern about the impacts to small businesses and the disparity in enforcing COVID-19 mandates on small businesses, many of whom have not survived due to COVID-19. Further, Alaska's cruise ship industry shut down their sailings to Alaska due to COVID-19, which has impacted Southeast Alaska. He asked how the legislature can assert its authority as the representative voice of the people.

[2:49:37 PM](#)

MR. KLINE responded that the legislature could begin by examining the purpose of government. He said if the primary aim is to keep people safe, that goal is different from one built on liberty and freedom. He characterized these actions as government overreach to keep people safe. He offered his view that the courts generally will find that legislatures can delegate their authority to the executive branch. He highlighted the importance of requiring findings and a reasonable timeframe for review. Otherwise, the courts will rule that the legislative action taken was an unconstitutional delegation of legislative authority.

MR. KLINE asked members to keep in mind the aggregate harm to the economy by imposing restrictions on businesses. He said it was excessive for people to lose the opportunity to provide services or products for over a year. People must assert the rights of others or their freedoms will be lost, he said. He predicted that in time the courts or legislatures will rule on COVID-19 actions.

MR. KLINE said the legislature holding public hearings to challenge and debate the disaster declarations was an appropriate response. Some scholars reported three years ago that lockdowns do not help and are largely unenforceable. In his experience, he has found that the dominant emotion in the US is fear, including that small business owners are afraid to challenge or criticize the government for fear of reprisal.

[2:53:08 PM](#)

SENATOR HUGHES said the committee has discussed ways to improve Alaska's disaster statutes to provide legislative oversight and additional checks and balances. She asked if he had any suggested statutory language that could help prevent lawsuits.

MR. KLINE responded that the legislature should provide transparency, assert legislative authority, and treat people equally. He highlighted the importance of being accountable to the public.

CHAIR REINBOLD expressed concern at the vast number of suspended regulations due to COVID-19, noting that the legislature did not appropriate the COVID-19 funding or impose its authority on the mandates and health orders or disaster order extensions issued by the administration.

SB 14-SELECTION AND REVIEW OF JUDGES

[2:58:04 PM](#)

CHAIR REINBOLD announced the consideration of SENATE BILL NO. 14, "An Act relating to the selection and retention of judicial officers for the court of appeals and the district court and of magistrates; relating to the duties of the judicial council; relating to the duties of the Commission on Judicial Conduct; and relating to retention or rejection of a judicial officer."

[This was the seventh hearing on SB 14 and public testimony was opened on 2/10/21 and closed on 2/15/21.]

[2:58:12 PM](#)

SENATOR SHOWER moved to adopt a proposed committee substitute for SB 14, work order 32-LS0171\B.

CHAIR REINBOLD objected for discussion purposes.

[2:58:29 PM](#)

CHAIR REINBOLD explained that Version B incorporated the amendments previously adopted by the committee.

[2:59:32 PM](#)

At ease

[2:59:46 PM](#)

CHAIR REINBOLD reconvened the meeting and removed her objection. SB 14, Version B was before the committee.

[SB 14 was held in committee].

[3:00:04 PM](#)

There being no further business to come before the committee, Chair Reinbold adjourned the Senate Judiciary Standing Committee meeting at 3:00 p.m.