

INTERIM JOINT COMMITTEE ON JUDICIARY

Minutes of the 1st Meeting of the 2020 Interim

June 4, 2020

Call to Order and Roll Call

The 1st meeting of the Interim Joint Committee on Judiciary was held on Thursday, June 4, 2020, at 10:30 AM, in Room 171 of the Capitol Annex. Senator Whitney Westerfield, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Whitney Westerfield, Co-Chair; Representative Jason Petrie, Co-Chair; Senators Danny Carroll, Alice Forgy Kerr, Gerald A. Neal, Michael J. Nemes, John Schickel, Wil Schroder, Robert Stivers II, Robin L. Webb, Stephen West, and Phillip Wheeler; Representatives Kim Banta, John Blanton, Charles Booker, Kevin D. Bratcher, McKenzie Cantrell, Daniel Elliott, Joseph M. Fischer, Chris Harris, Samara Heavrin, Nima Kulkarni, Stan Lee, Derek Lewis, Savannah Maddox, C. Ed Massey, Chad McCoy, Reginald Meeks, Patti Minter, Kimberly Poore Moser, Jason Nemes, Brandon Reed, Maria Sorolis, and Rob Wiederstein.

Guests: David James, Keturah Herron, Chief Justice John D. Minton, Jr., Attorney General Daniel Cameron, Victor Maddox, Amy Burke, and Josh Crawford.

LRC Staff: Katie Comstock and Yvonne Beghtol.

Presentation by David James and Keturah Herron

David James, President of the Louisville Metro Council, reviewed incidents pertaining to Breonna Taylor, Ahmaud Arbery, and George Floyd as references as to why public policies need to be reviewed. Mr. James stated that a peaceful protest on Jefferson Square resulted in seven people being shot, along with the use of tear gas and pepper balls. The following day another rally was held and officers were only allowed to arrest protestors who attacked them, and were not allowed to protect the property of others. There was over \$1,000,000 in damage. On May 31, 2020, officers were told to tear gas protestors before curfew due to some protestors having weapons, although Kentucky allows open and concealed carry. Mr. James stated that an individual was shot and killed. Credibility in the police departments, and trust between the community and the police needs to be improved. Mr. James asked for legislators to consider ways to give subpoena power to Civilian Review Boards. The Louisville Metro Council passed legislation to severely limit No Knock Warrants in Louisville and would like legislators to seriously consider this for the

entire state. The council is also looking at equality and inclusion within policies, and asked that legislators do the same when making legislation.

Keturah Herron, Member of Black Lives Matter and a Policy Strategist with ACLU of Kentucky, stated it is up to white leadership to speak out against racism. Ms. Herron gave testimony as to protestors she saw who sat down in front of a tanker truck in Louisville during a protest on Friday, May 29, 2020, which released tear gas on the protestors. Louisville's investment in the property near 9th Street and not in the individuals is not helpful. Ms. Herron would like Churchill Downs to pay taxes to invest in the property where they make billions of dollars. Ms. Herron mentioned that money in Louisville needs to be invested in the youth. Race demographics need to be included in data points when making legislation, and that black senators' and representatives' bills need to be heard.

Supreme Court's Reopening Task Forces

Chief Justice John D. Minton, Jr. spoke in regards to the COVID-19 emergency and court room proceedings. The Supreme Court required telecommunication between attorneys and all necessary parties, eviction filings were put on hold, clerk office staffing was limited, parenting time orders were limited, continuing legal education deadlines were extended, appellate filing deadlines were extended, and emergency release of certain individuals was limited. In mid-April, the Supreme Court extended the orders to be effective through May. Order 2020-44 suspends all jury trials until at least August 1, 2020. Chief Justice Minton stated that the grand opening for in-person court services began June 1, 2020. The pandemic has led to the need to focus on electronic filing as the standard, rather than the exception. One unintended beneficial consequence has been the decrease in pretrial populations incarcerated in county jails. Before the pandemic the pretrial population in county jails averaged 7,000 inmates. This number reached a low of 4,400 on May 5, 2020 and a high of 5,100 on May 25, 2020. The daily arrest rate averaged 500-700 before the pandemic; with April now showing an average of 193 arrests per day, statewide. The Family and Juvenile Services Department has been successful in linking youth to resources during this pandemic. Court Designated Workers have kept children out of detention during the pandemic by connecting youth and their families to housing benefits for food and shelter. Citizen Foster Care Review Boards completed almost 5,500 remote interviews. Group meetings and counseling attendance increased with the availability of tele-health resources. Urine drug screening has been switched to oral screenings. In regards to the Judiciary Branch Budget, a \$7,500,000 fund transfer combined with the requested 4% contribution from the Governor's budget reduction plan will be returning \$12,100,000 to the General Fund this fiscal year. A decrease in Restricted Funds is anticipated for the 2021 fiscal year due to the impact of the pandemic. A hiring freeze also went into effect on May 15, 2020. Chief Justice Minton hopes the decrease and hiring freeze will offset any deficit. Chief Justice Minton ended by commending those who work in the court system by adapting so quickly to the necessary procedures caused by the pandemic.

In response to Senator Webb, Chief Justice Minton stated that an attempt to set broad guidelines to allow in-person conferences with clients, as well as allowing a judge to determine on a case-by-case basis are being considered.

In response to Senator Schickel, Chief Justice Minton stated that courts are not a place where individuals have a choice as to whether or not they want to go there. Therefore, the health restrictions for appearing in court may be more detailed than businesses, where individuals have a choice as to whether or not they want to go inside.

In response to Representative McCoy, Chief Justice Minton stated that, because we are a unified court system all courts throughout Kentucky, need to observe all public health requirements.

In response to Chairman Westerfield, Chief Justice Minton stated that the delay in payments of fines and fees until November 2020 is to allow judges to prioritize more critical business.

Executive Powers Under KRS Chapter 39A

Attorney General Daniel Cameron reviewed KRS Chapter 39A, which spells out the governor's powers (and procedures to be followed) during a statewide emergency. Attorney General Cameron stated that KRS Chapter 39A became law in 1938 with the intent to establish and support a statewide comprehensive management program for the Commonwealth. During the COVID-19 pandemic, Governor Beshear declared a state of emergency unprecedented in scope, suspended statutes and regulations without legislative oversight, closed "non-essential" businesses indefinitely without due process, banned faith-based gatherings, banned out-of-state travel, and limited public assembly at the Capitol. It is the duty of the elected General Assembly to see to it that the executive power is not granted that may be applied arbitrarily. Businesses were divided into essential and non-essential categories without their input or due process, being forced to close, laying off workers; leading the Commonwealth to have the highest unemployment rate in the nation. Churches were forced to close their doors while liquor stores remained open. Kentuckians were prohibited from traveling outside of the state. These actions were ruled unconstitutional in court. Attorney General Cameron showed a map of Kentucky with the number of COVID-19 cases per county. Regardless of the number of cases, each county was held to the same restrictions by the Governor. Attorney General Cameron listed topics of concern received from individual residents which included reopening Kentucky, liberty concerns, unemployment, masks, absentee voting, faith-based gatherings, and more. Attorney General Cameron suggested limiting principles on executive power during a state of emergency to include specifying exceptions and protections for constitutional rights, creating time limits on orders, limiting authority to suspend existing statutes, requiring comment and appeal process for emergency orders, provide for improved public notice, revise statutory scheme for public health emergencies, and establish effective oversight by the General Assembly.

In response to Senator Neal, Attorney General Cameron stated that the Attorney General's Office reached out to the Governor's Office to ask if there was any way they could be helpful in crafting these orders, but they did not receive a response. Since KRS Chapter 39A was passed by the legislative body, Attorney General Cameron sees it as their duty to differentiate between the immediate intense emergencies listed in 39A and a prolonged pandemic. Assistant Deputy Attorney General Victor Maddox added that the separation of powers issue is always one that should be at the forefront of any legislation that might limit executive power. Mr. Maddox gave an example of Kansas legislation that requires the governor to meet with the Financial Council for an affirmative vote when the governor's orders last beyond a specific period of time.

In response to Representative Minter, Attorney General Cameron stated that his job is to maintain the public's safety interest and lookout for the constitutional rights of the citizens.

In response to Representative Sorolis, Attorney General Cameron stated two district court judges in the Sixth Circuit found the ban on religious gatherings applied in Kentucky was unconstitutional.

In response to Representative Cantrell, Attorney General Cameron stated that the legislative body has the ability to change existing law or to put topics on ballots for voters to determine without constitutional harm to the separation of powers.

In response to Representative Nemes, Attorney General Cameron agreed that the Kentucky Constitution does not grant the governor power to declare an emergency. Since it is a statutory right, the General Assembly can restrict that right without considering separation of powers.

Declaring an Emergency: State Cross Comparisons and Recommendations for Reform

Josh Crawford, Interim Executive Director of the Pegasus Institute, stated that the nature of the declaration of emergency was unprecedented across the nation. By mid-March 2020, 48 states had declared a state of emergency. The Pegasus Institute used this as a time to examine how states utilized those powers to deal with some of the separation of powers concerns and to deal with reform recommendations.

Dating back to the Fletcher administration, there have been 57 different declarations of emergency that dealt with part of Kentucky, and all but 11 dealt with weather. A 2019 Health Security article stated that 35 states have expressed authority to suspend or amend regulations during a time of emergency. Seven states allow for the suspension of regulations but not of statutes. Eight states were unclear whether a governor could suspend or amend statutes and regulations. Kentucky was included in the last category.

There are seven states in which, if an emergency lasts beyond a certain point, the legislature must ratify/extend that emergency. More than 20 states allow legislature the ability to end a declared emergency. This would be complicated since Kentucky is a part-time legislature with both a days limit and a date limit. The state of Georgia has a number of reserved days, so if they so choose to end an emergency they can convene and do so. The non-profit Ballotpedia maintains a database of all COVID-19 related lawsuits.

In response to Senator West, Mr. Crawford stated that seven states have emergency time limitations ranging from 15 to 60 days. At the end of that time period, the legislature must ratify the declaration of emergency for a set period of time. To the best of his knowledge, there is no state that has a part-time legislature where the governor is mandated to call them back into session during a state of emergency.

There being no further business, the meeting adjourned at 12:40 PM.