

**MINUTES OF THE  
SENATE COMMITTEE ON JUDICIARY**

**Seventy-fifth Session  
March 20, 2009**

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:40 a.m. on Friday, March 20, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

**COMMITTEE MEMBERS PRESENT:**

Senator Terry Care, Chair  
Senator Valerie Wiener, Vice Chair  
Senator David R. Parks  
Senator Allison Copening  
Senator Mike McGinness  
Senator Maurice E. Washington  
Senator Mark E. Amodei

**GUEST LEGISLATORS PRESENT:**

Assemblyman Joe Hardy, Assembly District No. 20  
Assemblyman William Horne, Assembly District No. 34

**STAFF MEMBERS PRESENT:**

Linda J. Eissmann, Committee Policy Analyst  
Bradley A. Wilkinson, Chief Deputy Legislative Counsel  
Judith Anker-Nissen, Committee Secretary

**OTHERS PRESENT:**

David A. Huff, District Judge, Department 1, Third Judicial District  
Victor Trujillo, Senior Judge, Child Protective Service Master, Fifth Judicial District  
John R. McCormick, Rural Courts Coordinator, Administrative Office of the Courts

Senate Committee on Judiciary  
March 20, 2009  
Page 2

James Essenpreis, Board of Commissioners, Mineral County  
David Schumann, Chair, Nevada Committee for Full Statehood  
Lee Rowland, American Civil Liberties Union of Nevada

CHAIR CARE:

The Real Property Section of the State Bar of Nevada requested Bill Draft Request (BDR) 10-1152 that relates to abandoned property under *Nevada Revised Statutes* (NRS) 118.

**BILL DRAFT REQUEST 10-1152:** Enacts provisions relating to disposal of abandoned personal property of nonresidential tenants. (Later introduced as [Senate Bill 338](#).)

SENATOR WIENER MOVED TO INTRODUCE BDR 10-1152.

SENATOR AMODEI SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARE:

I will open the hearing on Senate Bill (S.B.) 225.

**SENATE BILL 225:** Provides for the realignment of certain judicial districts. (BDR 1-767)

SENATOR MIKE MCGINNESS (Central Nevada Senatorial District):

We addressed S.B. 225 last Session, but there are some changes. Please remove the first two pages of the exhibit ([Exhibit C](#)). The two maps in [Exhibit C](#) are good. Senate Bill 225 reconfigures the districts. Lyon County would be alone. Churchill and Mineral Counties would be together. Nye and Esmeralda Counties would be together. There would be no additional judges and no need for new courtrooms. We will answer questions before we proceed with S.B. 225.

John McCormick, Rural Courts Coordinator of the Administrative Office of the Courts, has a problem with S.B. 225 and an amendment ([Exhibit D](#)).

DAVID A. HUFF (District Judge, Department 1, Third Judicial District):

I support S.B. 225. Senate Bill 225 will eliminate the commute for two judges in Lyon County and reduce my commute. I will travel further to Hawthorne but less frequently. It will eliminate the 100-mile commute from Tonopah to Hawthorne for Fifth Judicial District Judge John P. Davis. I spend approximately two days a week in Yerington, which is a 120-mile commute. The other judges in the district do the same. Lyon County is big and has a workload sufficient for two full-time judges rather than three part-time judges. My workload would increase, but I could effectively handle that reduction in the commute time.

This bill has no fiscal impact on the State. The only impact is Churchill County would be impacted by splitting costs of personnel and law clerks. Lyon County would be impacted because it would pay for its own law clerk rather than splitting the salary with Churchill County. Mineral County expressed concerns this morning I was not aware of. Mineral County, Nye County and Esmeralda County jointly use the juvenile probation officer, juvenile detention facility and juvenile master. Mineral County officials are concerned this might change. Those counties could continue to do that under S.B. 225.

SENATOR AMODEI:

Based on S.B. 225, do you know what Judge Davis's concerns are?

DISTRICT JUDGE HUFF:

I do not. I do not know how the workload has been divided. District Judge Davis has been in the northern part of the county. Nye County has district court in both Tonopah and Pahrump. The workload is in Pahrump because of the population.

SENATOR MCGINNESS:

Mr. McCormick has information on caseloads that might help the Committee on the determination.

VICTOR TRUJILLO (Senior Judge, Child Protective Service Master, Fifth Judicial District):

I preside in Mineral County, Nye County and Esmeralda County. My position and the chief juvenile probation officer are paid by Nye County, Esmeralda County and Mineral County. What will the impact be?

Senate Committee on Judiciary  
March 20, 2009  
Page 4

We are concerned about our detention facility in Mineral County. Sixteen people work at that facility. We are concerned about whether the facility will stay open. Will Churchill County or Mineral County operate it? Will we still get children from Pahrump and the Fifth Judicial District? We do not know what is happening or what to expect. Will it cost more money, or is the State going to help us?

CHAIR CARE:

Senate Bill 225 says there is no fiscal impact on the State; the fiscal note on local government says there may be a fiscal impact. I do not have the answers to your questions. We can have Staff look into this and solicit additional information. What Mr. McCormick has is probably confined to caseload.

SENATOR AMODEI:

The papers before us state the Mineral County Commissioners voted favorably on this. Have you had any discussions with the County Commissioners about any changes?

SENATOR MCGINNESS:

You need to toss the two sheets from the 2007 bill.

SENATOR AMODEI:

Have you had any discussions with your County Commissioners indicating these concerns since they would be the frontline people for Mineral County on budget issues?

JUDGE TRUJILLO:

I talked to them two weeks ago. In a Commissioner meeting on Tuesday, they were as uninformed as I am about what is going to happen. I did bring it to their attention. They had a few concerns but were unaware of what is happening.

CHAIR CARE:

Mr. McCormick, do you have additional materials and information that would help with the caseload, fiscal impact?

JOHN R. MCCORMICK, (Rural Courts Coordinator, Administrative Office of the Courts):

I will address the amendment, [Exhibit D](#), first. This came up because two Lyon County judges were concerned that S.B. 225 was not clear on what would

happen to the three judicial offices if this became law. The new green language would correct that. Section 5 that was eliminated in this amendment, [Exhibit D](#), should stay in the bill. I will get Staff a clean copy with section 5 retained.

I will address the fiscal impact on Mineral County. If [S.B. 225](#) passed, nothing would preclude the counties from continuing to operate juvenile probation status quo. Juvenile master functions are controlled by the district judges, and those judges could continue to operate as they do now.

I have given you two handouts regarding caseloads. One shows the fiscal year (FY) 2008 Caseloads ([Exhibit E](#)). It also shows the cases-per-judge breakdown. The bottom of the page shows case filings in Nye County based on population distribution. The majority of cases filed in Nye County come from the southern part, which includes Pahrump.

The Total Nontraffic Cases Filed ([Exhibit F](#)) shows FY 2005 through FY 2008. The projected caseloads give you an idea of how they would proceed. Lyon County would maintain a substantial workload for the two judges. Churchill County would be a significant workload for the one judge; however, that would be a wash with the reduced commute. If [S.B. 225](#) passes, the Nevada Supreme Court is committed to help with senior judges and any other assistance if the caseload becomes cumbersome in Churchill County.

JAMES ESSENPREIS (Board of Commissioners, Mineral County):

Our concern for Mineral County is the continuation of the juvenile facility and the 16 positions the facility supports. My job as a Commissioner is primarily budget and policy. If it is financially beneficial to Mineral County, we would support it. If it is not financially beneficial to Mineral County, we will probably oppose it.

We would appreciate it if Senator McGinness could prevail upon the Churchill County Commissioners to invite the Mineral County Commissioners to a meeting and advise us what they have in mind regarding a change in the judicial district.

CHAIR CARE:

Our deadline to get bills out of the Committee is April 10. I do not know if that will be sufficient time to get the fiscal impact. Maybe the Commissioners would have some idea.

Senate Committee on Judiciary  
March 20, 2009  
Page 6

I will talk to the sponsor of S.B. 225 and see if we can get additional information from the affected counties. We will need that for our work session on this bill.

SENATOR MCGINNESS:

I will do whatever I can. We want to address all the concerns before we proceed.

SENATOR AMODEI:

Mr. McCormick said the big issue is the juvenile detention center and the employment it provides. If the affected district court judges could indicate their intent to keep the matter status quo, that would take care of the biggest fiscal piece.

DISTRICT JUDGE HUFF:

The decision regarding the juvenile master, juvenile probation officer and juvenile detention facility is not made by the Commissioners. If S.B. 225 passes, I am willing to work with the judges in the Fifth Judicial District to keep the matter status quo. That would mean the juvenile detention facility will remain the same, with the same employees. The counties would split the funding.

CHAIR CARE:

I will close the hearing on S.B. 225.

I have BDR 2-1149. This is a request from Peter Krueger to shorten the period of statutes of repose for latent defects and patent defects under NRS 11.

**BILL DRAFT REQUEST 2-1149:** Revises provisions relating to statutes of repose in actions involving construction of improvements to real property. (Later introduced as [Senate Bill 337](#).)

SENATOR WIENER MOVED TO INTRODUCE BDR 2-1149.

SENATOR AMODEI SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARE:

I will open the hearing on Assembly Joint Resolution (A.J.R.) 3 of the 74th Session. In 2003, Assemblyman William Horne had a bill to rein in the abuses of eminent domain. In 2005, he and I had bills introduced prior to the *Kelo v. City of New London*, 125 S.Ct. 2655 (2005) decision. What former Supreme Court Justice Sandra Day O'Connor said would happen did happen. Legislatures all over the country engaged in a similar exercise.

Assemblyman Joe Hardy's name, Mr. Horne's name and my name are on A.J.R. 3 of the 74th Session. The Property Owners' Bill of Rights is now the law of the land in the Nevada Constitution. But there were discussions between Kermitt Waters and those who wanted A.J.R. 3 of the 74th Session as a way of modifying what was contained in the People's Initiative to Stop the Taking of Our Land (PISTOL).

**ASSEMBLY JOINT RESOLUTION 3 OF THE 74TH SESSION:** Proposes to amend the Nevada Constitution to revise provisions relating to the taking of private property by eminent domain. (BDR C-529)

ASSEMBLYMAN JOE HARDY (Assembly District No. 20):

We have a working relationship with all of the parties involved in eminent domain. I appreciate the proponents of PISTOL bringing that forward. It allowed us protection when we looked at A.J.R. 3 of the 74th Session, recognizing that PISTOL could be refined for a more practical PISTOL.

We recognized we needed to put it into statute before PISTOL came into effect, so we had A.B. No. 102 of the 74th Session that Assemblyman Horne shepherded. That protected private property owners more immediately than PISTOL. Then PISTOL superseded in a constitutional way.

When we looked at the language for PISTOL, we recognized challenges with that particular implementation. A meeting occurred where I had a handshake with Kermitt Waters to work together on a dual track that included a statute and constitutional improvement of PISTOL.

Assembly Joint Resolution 3 of the 74th Session is what resulted in trying to get the components and people in the process to a consensus. Because A.J.R. 3 of the 74th Session came through a refining process, it is imperative to

pass A.J.R. 3 of the 74th Session unamended if we choose to pass it. Otherwise, it goes back to PISTOL which has problems for local governments.

ASSEMBLYMAN WILLIAM HORNE (Assembly District No. 34):

Mr. Hardy explained the process well. To clarify, it is imperative that A.J.R. 3 of the 74th Session pass unamended; it has to in order for it to be effective. If it does not pass, PISTOL will remain in effect. As Mr. Hardy stated, the reason for the compromise and dual tracks is we wanted a more workable PISTOL. Provisions in the original bill make some government functions much more difficult, and that was not my intention. In fact, other jurisdictions—one that comes to mind is Colorado—with PISTOL in place have moved to repeal it because of onerous provisions that hamstring local government.

All parties came up with A.J.R. 3 of the 74th Session and A.B. No. 102 of the 74th Session in order to make PISTOL a more workable framework for eminent domain.

CHAIR CARE:

If this is going to happen, it has to be passed word for word as in the 2007 Session. Then it would go on the ballot in 2010. There were 12 statewide ballot questions in 2008, and the eminent domain one passed by a two-thirds vote. The only ballot question that received a greater margin for or against was the measure wherein Legislators should not be paid for every day they work. Approximately 70 percent of the voters voted no on that. That also means if A.J.R. 3 of the 74th Session goes on the ballot, it will only take a majority, but it would supersede PISTOL. It has nothing to do with the percentage of the votes acquired.

There are some differences between PISTOL and A.J.R. 3 of the 74th Session. A handout was prepared for Assemblyman Harry Mortenson, Assembly District No. 42, approximately two years ago.

Everybody understands it has to be one way or the other, we cannot change any words. Does anyone want to get into the distinctions between the two measures?



DAVID SCHUMANN (Chair, Nevada Committee for Full Statehood):

I handed out the comparative memorandum from Kermitt Waters ([Exhibit G](#)). Assembly Joint Resolution 3 of the 74th Session is deficient; it does not afford the same level of protection as PISTOL.

The PISTOL creates an onerous condition when the government takes property from private citizens. That is right, it is supposed to. Taking property from private individuals by the government should be onerous, not easy and simple.

In the original *Kelo* decision, the City of New London, Connecticut, took land from Susette Kelo and gave it to somebody who was building an apartment house or housing development, something that would pay higher taxes. They defined paying higher taxes as a public use; A.J.R 3 of the 74th Session does exactly the same thing, it redefines certain uses as public uses. They are trying to get around PISTOL and they failed.

The PISTOL provision prevents the government from taxing a landowner—when you are in a lawsuit that is involved, the landowner has to pay not only his lawyer but the government's lawyer. The PISTOL provision prevents the government from "taxing" a landowner in an eminent domain proceeding with government attorney fees. Given the unlimited resources of the government to retain any counsel of its choosing, and the tactic often used by condemners to force a landowner to take less than just compensation under the threat of forcing the landowner to pay its attorney fees, this provision is only fair. The PISTOL provisions say, no, you pay your own taxes. You will have to read this because it is full of instances where the government is redefining what is clearly a private entity and the fact they leased property to a private entity. They are defining that as a public use.

That is what City of New London did, and the U.S. Supreme Court caught them. When you bring this up and tell people, few people know this goes on. The reaction is how we can stop them from doing that. The obvious response is whether we need a new constitutional proposition to stop the Legislature from watering down enacted constitutional propositions.

This does not afford the same level of protection, according to Kermitt Waters. Mr. Waters has explained this better than I can because I am not an attorney. The PISTOL provides an absolute ban on private-to-private transfers. That is the point. When you take the land for a police station, school or something of that

nature, nobody is going to fight. That is in the Constitution. The government has an absolute right to do that as long as they pay just compensation. But say you take it from me and give it to you to use for something they have defined is public use as a railroad. No, I am sorry it is not, that is the railroad. This is an attempt to get around the *Kelo* decision, and it is a failure. If you do this, I guarantee you somebody will have another PISTOL proposition the Legislature is forbidden to mess with.

CHAIR CARE:

Somewhere along the way the Constitution says public use, and then you started seeing the phrase public purpose, which was not quite the same thing, in case law.

MR. SCHUMANN:

You are absolutely right. They use the term public purpose the same as public use.

CHAIR CARE:

I remember the debate quite well. Mr. Schumann, you testified on the measure Mr. Horne and I had. It was quite a discussion.

On the issue of taking from a private party and conveying to another private party, some provisions in A.J.R. 3 of the 74th Session discuss that. Do you want to talk about that Mr. Wilkinson?

BRADLEY A. WILKINSON (Chief Deputy Legislative Counsel):

One thing to make clear: It is referred to as the People's Initiative to Stop the Taking of Our Land in the last resolve clause in A.J.R. 3 of the 74th Session. However, the actual question that was placed on the ballot referred to Property Owners' Bill Of Rights, but we are talking about the same thing.

With respect to the issue of public use, subsection 7 of A.J.R. 3 of the 74th Session sets forth five specific circumstances in which a transfer of property to another private person or entity would be allowed.

As Mr. Schumann stated, and as indicated in the materials from Mr. Waters, PISTOL prohibits that type of direct or indirect transfer to another private person or entity, where as A.J.R. 3 of the 74th Session sets out those specific circumstances under which such a transfer would be allowed. That is a half

page long, so I will not read those to you. The circumstances are set forth there.

SENATOR WASHINGTON:

Mr. Wilkinson, does subsection 7 address a situation where you may have a property owned by a private individual who is removed from the property because of geographical distance? The local government cannot get into contact with them or refuses to contact them. The property either needs to be deemed blighted or sold to another private entity for development. Then they can claim eminent domain?

MR. WILKINSON:

Subsection 7 defines the circumstances considered a public use. It does not get into any situation you are describing. It would have to be under the circumstances you were describing. One of the purposes is set forth in paragraph (a), (b), (c), (d) or (e). I am not clear how that would apply to your question.

LEE ROWLAND (American Civil Liberties Union of Nevada):

I am well aware that amendments are not possible on A.J.R. 3 of the 74th Session, which is why I have not provided any. We are in an awkward position of having to choose between an existing regime and comment on A.J.R. 3 of the 74th Session.

The American Civil Liberties Union (ACLU) is not traditionally a property rights organization. Our concerns stem from the constitutional protection of due process when that property is taken. We are concerned about making sure the rules are clear, and when somebody goes through the system, they know what to expect and how to get recompensed if their property is taken.

Our concern in A.J.R. 3 of the 74th Session stems from two areas, the one mentioned by the last testifier and the second you were just discussing—the ability to transfer to a private entity.

The ACLU does not oppose the ability of the government to transfer to a private entity. In light of the history and *Ke/o*, this critical area needs tight language, so you do not end up in another two years with lawsuits of people trying to determine what constitutes public service.

Our concern is with the ability to transfer to a private person or entity in subsection 7, paragraph (a) of A.J.R. 3 of the 74th Session on page 3, lines 27 to 32. The only requirement is the private person or entity uses the property primarily to benefit a public service.

That is a loophole. Public service is not defined. There is a list, but it says without limitation. This is likely to put people back in the position of not knowing precisely when their property might be taken. That started the unrest that led to PISTOL. This might be putting us back in the position we were.

This is just a due process issue. When you do something as invasive as take someone's property, everybody has the right to know the rules of the game. As an attorney, I could not tell you what that rule meant. You could go to court and argue about it, and that is hopefully what we are all trying to avoid.

Our second concern is the lack of ability to get attorney fees in these actions. That is a due process concern, the ability to be made whole by your government. Page 5, subsection 11 of A.J.R. 3 of the 74th Session specifically exempts attorney fees for anyone who is entitled to receive full compensation for their property. Attorney fees can be substantial, especially if you are in a long battle with the government about your property.

This is only talking about someone who has won their eminent domain action against the government and is supposed to be made whole. They cannot truly be made whole because they are out the attorney fees paid to fight with the government to get compensation.

From those two points of view, unfortunately, we are in the position of opposing A.J.R. 3 of the 74th Session. The existing law, while not something necessary to the ACLU, is more restrictive. It does not present those due process issues because it is more a black-and-white process, which is no transfer to private property. Though that position is not required by any ACLU policy, it gets rid of vagueness in due process problems of A.J.R. 3 of the 74th Session with respect to the transfer of private property.

SENATOR PARKS:

Ms. Rowland, could these due process issues be addressed by a bill and placed in statute?

MS. ROWLAND:

That is a tricky question. We are talking about setting a constitutional rule of the game and then trying to amend it statutorily. Frankly, I am not an expert in statutory interpretation. It might be a better question for the Legislative Counsel Bureau. Someone could easily litigate against those statutory rules, get them knocked out or lose the deference if they were seen to conflict.

The Legislature could further define public service. If there is an appetite for that, we are certainly willing to look at the language and assist to the degree we can. This is not directly an ACLU priority. The priority is it be clearly stated. An effort could be made, and it would help with legislative intent. The problem is you are putting the rules of the game in the Constitution. You open the possibility for courts to say, we can knock these statutory rules out and go back to the broad definition. It would still have concerns, but it would be helpful.

ASSEMBLYMAN HORNE:

For clarification and on the record,

I have been involved with the eminent domain legislation since becoming a member of this legislative body. So I think it would be a stretch to think, to characterize me as trying to weaken eminent domain laws in our State.

I'll remind the Committee that what you have before you is as been agreed upon by Mr. Kermitt Waters. And there have been many discussions between him, and then [former Clark] County Commissioner Bruce Woodbury, ... Assemblyman Hardy and others.

But to answer some questions on particularly in [sub]section 7, [paragraph] (a). When you talk about private-to-private transfer, many Committee members will remember that ... part of the discussion ... there are many ... government properties, facilities such as city halls and et cetera, are becoming mixed use as well as private.

And they can ... for instance, there has been this discussion about redoing City Hall in Las Vegas. Part of that property can be used by private individuals who lease various shops or whatever. But in a taking, if you made it so strict where you couldn't transfer part of

that property to use for that, it would be a violation as in that the old definition is when we used to use public use as opposed to public purpose, would be violated. But, you know, the debate was, but is this still a government property entity is being used for the benefit of the people as a mixed use. And so this allows that type of project to go forward.

As for the attorneys' fees, that was my first bill in 2003. It was offered as a judgment dealing with attorneys' fees. And we went around and around about that even in '05 when Senator Amodei was the Chair. And part of this was—there was ... even discussion about ... you know, ... these offers of judgment going both ways and both sides depending on ... And it came down to, let the parties pay for their own attorneys. That's how we got there. But there were instances where these private individuals ... were paying for the privilege of having their property taken from them after, you know, losing ... and having to pay the government's, you know, attorneys' costs and fees. So that was a compromise there, doing that, trying to get some reasonableness in this area of eminent domain, which you will never get out ... get out of the courts. You will always have litigation of some sort when it comes to the government taking property, regardless on its use.

CHAIR CARE:

I was leaning toward moving this bill today, but we will put this on the work session for Thursday. It is going to be all or nothing.

SENATOR WASHINGTON:

Is it possible that Staff could give us a copy of Mr. Water's testimony?

LINDA J. EISSMANN (Committee Policy Analyst):

Mr. Chair, you will recall that A.J.R. 3 of the 74th Session was amended in the Assembly and in the Senate last Session. Perhaps that could have been written before the amendments?

CHAIR CARE:

I do not know, but legislative history will bear that out.

Senate Committee on Judiciary  
March 20, 2009  
Page 15

We will close the hearing on A.J.R. 3 of the 74th Session. The Committee is adjourned at 9:32 a.m.

RESPECTFULLY SUBMITTED:

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Judith Anker-Nissen,  
Committee Secretary

APPROVED BY:

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Senator Terry Care, Chair

DATE: \_\_\_\_\_