



Episode 1,795: California Legislator Defeats Newsom in Court

Guest: Kevin Kiley

WOODS: All right, look, you are one of the most important, if not with one of your colleagues, the most important state legislators in the United States for what you've been doing and for, frankly, the difficulties that you face. It's not like you're trying to fight the governor of Idaho or something. You are fighting the worst of the worst. And you actually have some success to show for it. It's very inspiring to people who, frankly, have been quite demoralized.

I had an opportunity about three weeks ago to speak to a group called the Hazlitt Coalition. It's a project of Young Americans for Liberty. And it was 100 state legislators, and I told them that it's their responsibility to be the voice of the voiceless. And by the *voiceless*, I don't mean people panicked about the virus. They have Hollywood, they have the political class, they have the media. I'm talking about the people whose lives have been ruined, who lost somebody to suicide because of this, who lost somebody because they didn't get a procedure they should have had, who have seen everything they've poured their heart and soul into taken away from them, have had their life savings decimated. These people have nobody to speak for them, because they've been shamed into silence. And you are filling that role. I mean, maybe you don't even realize how important it is what you're doing, so let me start by saying thank you.

KILEY: Well, that's very kind of you. I appreciate it. That's exactly what I'm trying to do.

WOODS: Well, let me start with some basics. What part of California do you represent?

KILEY: So I represent the Sixth Assembly District, which is a little bit east of Sacramento.

WOODS: Oh, okay. All right, now, tell me, going back to March — we're not going to judge you, because everybody in March was a little disoriented. Nobody quite knew what the right thing to do was. What were your thoughts in March when Dr. Fauci was saying we need 15 days to stop the spread or flatten the curve or whatever? What were you thinking back then?

KILEY: Well, I took it very seriously. This was a virus that we didn't know a lot about. There were some pretty troubling signs, and I thought that it was appropriate that we take aggressive action to try to stop it in its tracks. But what I did not support or even possibly fathom is that we would have a governor who would use this to create an unprecedented, endless, interminable state of emergency that has taken away our most basic liberties, that has turned our constitutional form of government upside down, and has wreaked havoc on our economy and on the lives of millions of people in a way that we haven't seen in a long, long

time. So that was kind of how my thinking evolved. We all recognized at first that, okay, yeah, the governor probably gets a little more power to execute the emergency response, as we immediately confront this thread. But what Gavin Newsom has done is he has converted that sort of temporary enhancement in executive power into a permanent seizure of legislative power and, indeed, all powers of the government. And so that's what we're trying to stop.

WOODS: Right. Yeah, so I want to talk about that, of course, in just a minute. I want, though, people to begin to fathom the scope of what's happened in California, because in the rest of the country, I can tell you, when people want to give an example of a hard lockdown, they always give the example of California. And at least with some of these blue states, they've at least tried to have a pretense that they're "following the science," which is a phrase I can't believe anybody with an IQ above 70 credits any longer after what we've just been through. But in California, it seems like there's not even a pretense of it. It just generally seems to be anything that sustains life and brings people joy, probably we should just abolish that or curtail it drastically. And anything that would cause pain or extreme inconvenience, we should mandate that. That seems like the science in California. Am I overstating it?

KILEY: No, I think that puts it perfectly. I mean, why else would you close playgrounds? Why else would the state shut down indoor dining when Dr. Ghaly admitted that they don't have any evidence that outdoor dining actually leads to transmission of the virus? Why else would be keeping millions of kids out of school, when all of the evidence shows that school closures don't actually help reduce the spread of the virus, but have just enormous incalculable harms for the kids? In fact, if you're someone who pays attention to like things like data analytics, your high priest is Nate Silver, right? You know Nate Silver? He does the Five Thirty Eight blog. He just referred to California as an "irrational and not very science-driven regime of COVID policies."

WOODS: Wow, good.

KILEY: Yeah.

WOODS: So I want to talk about the suit, the case you want against the governor. But I want to know, was there a last straw for you, or was it just an accumulation of annoyances and outrages?

KILEY: I guess it was kind of both. I mean, James Gallagher and I had been watching as the governor initially took these actions that were directed at public health, and then decided that the state of emergency allowed him to simply make any policies of any kind that he wants, with the most tenuous of connections to public health. And so he was introducing new policy across various California codes. I think 16 or 17 different types of California codes — elections, corporations, businesses, and professions, education, harbors and navigation — and he had consolidated the entire apparatus of our state government into a one-man rule. He was ruling the state by decree and was treating us as legislators as some sort of optional appendage. And so it was really the elections order was the one that we sued on, because that one was just so outrageously unrelated to the present emergency. It was five months away at the time.

WOODS: Tell us, yeah, what was the order?

KILEY: Well, the order, it made it so every voter received an absentee ballot, every active voter. It closed a lot of polling places so that people couldn't vote in person wherever they used to. It shut out people with disabilities and non-English-proficient people from the election planning process. It mandated a new mode of ballot tracking and outlawed certain verified methods of making sure your vote was counted. So it overhauled the entire election with the stroke of the governor's pen without any legislative process at all. And the election was more than five months away at that point. So at that point, James and I just said, enough is enough. We're going to challenge this particular order, but more importantly, we're going to challenge the premise that a state of emergency collapses California's government into an autocracy.

WOODS: All right, so you did that. Now, be honest with me. Now that it's more or less in the past, you can be frank about what your expectations were at the time. Did you think this was a quixotic, hopeless cause, or did you think you had a real chance of winning?

KILEY: No, we thought we had a real chance, because there's never been a California court that has said that a governor has the power to legislate, that an emergency confers that sort of authority on the governor of California. And so we thought from the beginning that the law was extremely solid. And in fact, if there was such a law that said a governor can exercise legislative powers, it would be unconstitutional, because the California constitution explicitly has a separation of powers provision, which of course is foundational to our entire system of government. James Madison in the Federalist Papers said that to concentrate all of the powers of judicial, legislative, and executive in one hands is the very definition of tyranny. So it was quite jarring to see Gavin Newsom actually argue in court on multiple occasions that a state of emergency "centralizes" all of the state's powers in his hands. When I say that he's become kind of a Roman-style dictator or an autocrat, that's not rhetoric. That's his own argument. That's literally what he's argued in court.

WOODS: So it came out in your favor. What did the court say exactly?

KILEY: Well, the court said pretty much what I just said, that we have separation of powers in California, and that even when there's an emergency, the governor cannot just create new policy. His role is to respond to the emergency using executive powers to implement the law, but he cannot become an autocrat and simply rule the state by decree and reorder and rearrange the totality of social and economic life in the state. And the judge in that case, the Superior Court, ended up issuing a restraining order or a permanent injunction that restrains the governor from further amending or creating new statutes or legislative policy, which is I believe the appropriate outcome and could also have implications for things like the lockdown scheme and some of these other more far-reaching policies the governor has unilaterally imposed.

WOODS: And of course, that's what the rest of the country is deeply interested in. As observers, outside observers of California, we want to know what's happening in the future. Now, the thing is with these vaccines on the horizon, I think it's not just the case count going up that it has emboldened the governors, but now they feel like they can get away with saying one final lockdown is a bridge to the vaccine. So surely, you won't begrudge us this one final lockdown to save some extra lives? I suppose maybe you're hearing some of that? I mean, of course, it stayed pretty locked down all along in California.

KILEY: Right, exactly. And you're exactly right. That's what the governor and I've heard others say, is that, oh, it's right around the corner. We just need to really hunker down. And yeah, something like you just said, it's a bridge. But what we know is, number one, the governor has put up barriers to the distribution of the vaccine in California. He said we basically can't trust the FDA, so we need to get our own approval committee, our own separate committee on top of FDA approval before the vaccine can be distributed. And everything he says about the vaccine is it's going to take a long time. It probably won't be until the summer that most people are able to get it. And then who knows what's going to come up at that point? So you're absolutely right. It's just another way to try to maintain a degree of control over people's lives that is utterly incompatible with a free society.

WOODS: You must have your share of critics. Is it safe for me to say that, that you have some critics?

KILEY: I think that's fair. Among those who are in the governor's circles, certainly.

WOODS: I'm sure they're extremely civil, though, in the way they carry themselves, as they're known to be. I guess what I want to know is: you must have come up against the objection that, yeah, yeah, yeah, your constitutional niceties are all well and good, but for heaven's sake, what kind of crazy priorities do you have in the midst of a pandemic, to be worried about whether the separation of powers is being meticulously observed, right?

KILEY: Yeah, well, we have heard that, absolutely. And I'd say, number one, actually, it's during an emergency when maintaining the structure and boundaries of our Constitution is most important. It's during those times when the rule of law is most apt to slip away. And the founders were not strangers to emergencies. They had just emerged from a war that killed a significant percentage of the American population. They just lived through chaos under the Articles of Confederation. And yet, they insisted in our founding documents on a separation of powers. And the founders of the state of California put in our constitution that sort of explicit provision.

But I would make the additional argument, which is to say that the separation of powers is not some nicety, but rather is the system that is most conducive with effective policymaking. When you look at California's performance during the COVID-19 era, where we have the third highest unemployment in the country, when our kids have suffered more learning loss and lower life expectancy and mental health problems than anywhere, when you have a pretty middling public health performance as well, when you have the most incompetent unemployment department in the entire country, I think that if we had had our own institution, the legislature, as flawed as the California legislature is, but if we had had people from different parts of the state, legislators who were accountable to the people that they represent, if we had had a representative process where we could look at the evidence for these policies that are being imposed and we could give the public an opportunity to weigh in, where we can balance competing values, then I think our response to COVID-19 would have had tremendously better outcomes as well.

WOODS: Let's step back for a minute, because I want to know a little something about your background. How long have you been a legislator?

KILEY: So I was elected in 2016, so it's been four years. I just began my third term on Monday.

WOODS: Okay, what's your background?

KILEY: Well, I actually started my career as a high school teacher in South Central LA. And that was one of my main motivations for running for the legislature, is just how badly our state is failing kids when it comes to education. But I eventually went to law school. I was in private practice for a while. I was a prosecutor. And then I ran for the legislature. But I haven't practiced law for a few years. But in this court case, James Gallagher, a fellow legislator, and I decided to represent ourselves, so we haven't hired any attorneys or anything like that. We've been doing all the briefs and all the arguments against various lawyers at the attorney general's office ourselves.

WOODS: All right, that's unbelievable. So in other words, you've taken — I didn't know that part of it. So you've taken on yourself what must have been, frankly, backbreaking work, just for the sheer principle of the matter?

KILEY: Yeah, I mean, it's been more than a full-time job in addition to our sort of day jobs as legislators, and especially when we have filings due. We had this massive brief due last Friday that the appeals court only gave us ten days for. So it's been pretty frenetic at times, but we've viewed this as important, because we think that we're kind of defending our entire branch of government, and we're defending the people that we represent. And so given that we have legal training, we thought that it's important that we ourselves be the ones who are in court and actually taking the stand.

WOODS: Now, believe me, I understand and very much appreciate the principle you've been fighting for here, in terms of the powers of the legislature. But now stepping back a bit from that, if I'm focused in my mind primarily on good outcomes, I want to see California be a free society at some point, I wonder if the legislators are going to be all that much better than the governor? Like, yes, I get the principle. Right, they should have powers. But are they going to exercise them any better than the governor has, do you think?

KILEY: Well, it's a fair question, because frankly, California has probably the worst-performing legislature in the entire country. And as much as Gavin Newsom is to blame for seizing powers that are not his under our constitution, the legislature shares that blame for letting it happen. I mean, the leaders of the California legislature have essentially taken the year off, and it's fallen to me and James Gallagher, members of the super minority, to try to actually do something about it. And we've been calling on the legislature to step up and try to actually play some role in getting California through this, and they have just refused to do so.

So I mean, yes, it's a fair question: is the legislature capable of improving on the abysmal performance of Gavin Newsom? I think at the very least, if you have a legislative process, number one, things cannot be done with a stroke of a pen. There are various hurdles that a measure has to go through before it can be inactive. And that as well is part of our constitutional design, that we want to have a deliberative process. And the public at least has some modicum of access to that process. We have public hearings. There's a limited opportunity for public testimony. I as a legislator can ask questions of witnesses and say, okay, where is the data that shows shutting down outdoor dining or shutting down schools is actually going to help fight the coronavirus? We can do all of those things. But when you have orders that simply pop out of the black box of the governor's office, you don't have any of

that. And that's why he's gotten away with being able to rule the state by fiat, without providing any evidence or even arguments to justify his policies.

WOODS: Well, let's raise another factor that's at work that helps explain how he's been able to get away with it. And frankly, to my astonishment, this is an area where I have been totally wrong: public opinion. I thought for sure, eventually, public opinion would turn on governors like this. And yet to the contrary, they still are under the delusion that this has to do with science and this is helping them, and then we have to pretend that there are no side effects to lockdowns, even though they've been a public health catastrophe. It's astonishing to me that public opinion is not more on your side. That must be unbelievably frustrating.

KILEY: Well, it is.

WOODS: They're cheering the destruction of their own lives, some of these people.

KILEY: That's right. I think that public opinion has started to turn, though, and there was a very clear effort as sort of the opportunity, as Gavin Newsom called it, became evident to some of these leaders. He actually said that on April 1st. He said that the coronavirus is an opportunity for a new Progressive Era, an opportunity — these are his words — to reshape the way we do business and the way we govern. But consistent with that, there was this messaging that really got it into the minds of people that the only thing consistent with science, consistent with the data, consistent with a concern for safety was going full throttle on lockdowns and viewing the COVID-19 as a nail to keep hammering with the hammer of lockdowns.

And so I think it's been hard to sort of cut through that messaging in some ways, but when you look at what people are actually dealing with and look beyond what you see in some of these polls, I think there is a sense that this is not right, that this is not the way a free society should address any emergency, including a pandemic, and that the damage being done — I mean, you talk to parents whose kids are just withering in these totally inadequate distance learning arrangements. I mean, there is a sense that this has been completely mishandled. And I think that it's actually giving a lot of people across California some real insight into the way our state government works, because a lot of the problems that have beleaguered California's COVID response are really just the usual deficiencies of our state government on steroids.

WOODS: Now, in Florida where I live, the legislature has some kind of — there's some kind of a pandemic committee or something, and they call witnesses and stuff. I know that just because I was talking to one of the legislators, and he was saying I should come testify. But I presume, given the way your governor has handled things, there isn't anything comparable there?

KILEY: No. I mean, the legislature took 12 weeks off starting back in March. We were going to come back, and then one person tested positive, and they said, oh, cancel the legislative branch for another —

WOODS: Ugh.

KILEY: You know? And then I gave a speech on Monday to the whole assembly, saying the legislature took COVID-19 very seriously for itself, but did not take it at all seriously in terms of actually doing something to help 40 million people in the state. But so yeah, there was 12 weeks off. The legislature still indulged in its regularly scheduled summer recess. Even when we were back, things were in a very limited form. There was basically one hearing for every committee. Hundreds of bills were thrown out. And then the legislature decided to just adjourn for the last four months of the year and leave everything in Gavin Newsom's hands. It's been utterly pathetic the way the legislature's responded to this.

WOODS: Well, I asked only because you have in California itself a couple people who would be great to consult with, if it would do any good. And I'm sure you know the names already. I mean, for example, just at Stanford you have Jay Bhattacharya. I just had him on episode 1792 of this show a few days ago, and he's absolutely fantastic, and he has just the temperament for this. He's not a hothead. He's not a firebrand. He's cool and calm and scholarly and reserved, and he's perfect and he's brilliant. And he has an MD and a PhD, so he's 5 million times smarter than anybody in the room no matter who they bring in. And then John Ioannidis, who's been a very important epidemiologist in all this, and his work has even been published by the WHO. I mean, he's as mainstream as it gets. But he's not bought into the hysteria about it. But yet, I don't know what you could do with these expert witnesses in this situation.

KILEY: Well, if we actually had hearings, yeah, that'd be great to be able to bring them in and get another perspective, or to be able to question the governor's office. We've had one hearing where I've had a chance to question witnesses this entire time. What usually happens is the governor will do some announcement, like the latest stay-at-home order, where he gerrymandered the state into five regions to assure that they all fall below the ICU threshold that triggers a stay-at-home order. And they'll tell us as legislators after he's made the announcement, they'll say, okay, in 30 minutes, we're going to do a call with some lower-level people with the public health department. And that's his idea of engaging with the legislature. And so we have no opportunity to ask these questions or to bring in the sort of folks that you're talking about, who could provide a different perspective and actually try to bring some science into all of this.

WOODS: It's very strange that there's almost no curiosity about how it's possible that California — like for example, in my email newsletter, I recently reproduced a chart going from September 25th to the present. And September 25th is a very important date. That is the day on which Florida officially reopened fully. Now, it had been 80% opening before that, so even that is misleading, but we start from September 25th when Florida open completely, and we track hospitalizations from COVID since that time. But we track it against hospitalizations in California. They track each other almost identically, except now, California, like New York, Wisconsin, Michigan, Illinois, and a bunch of other blue states, New Mexico, have higher hospitalizations per million than Florida does. It is astonishing to me that there is no curiosity about how it is that a state where, this is a state where I went to a play last month. I'm going to another one this weekend. I'm going to a concert in a couple of months. All these things are going on that, according to the mainstream, we should all be dead at this point. We're not dead, and no one's curious about maybe we're just ruining our lives for nothing.

KILEY: Yeah, no, you're 100% correct about that. And the overwhelming weight of the evidence now suggests that the collateral damage or the direct damage, I should say, from

government policies are outweighing even the very tragic harm being done by the virus. I mean, if you just look at the schools issue, I don't know if you saw the study from the *Journal of the American Medical Association*, saying that the effect of school closures just for elementary kids has been to collectively reduce life expectancy by 5.5 million years because of the link between learning loss and diminished life outcomes, which would be more cumulatively, at least for California, than the loss of life caused by COVID-19.

WOODS: Yeah.

KILEY: And the other point I'd make about it is that we're nine months into this. People have more knowledge about sort of the risks associated with COVID, with how it's transmitted, with who's vulnerable to it, than for any virus that we've ever known, probably. And yet, still, our state government thinks that it needs to tell people and order people what sort of activities they can engage in, rather than allowing people to make their own choices. I don't know if you've seen the billboards the governor's putting up. He just announced on Monday he's spending \$80 million with what he calls Smash Mouth, billboards, instructing people to social distance and wear masks and that sort of thing.

WOODS: Oh, my gosh, like we haven't — everyone's doing that at this point. And there was a very revealing article in *The LA Times*, again, maybe three to four weeks ago, in which the mayor of Los Angeles even admitted that there hasn't been much change in people's behavior. It's not like they suddenly were misbehaving. People aren't going to restaurants or bars or any of these other places more than they were before. Bars are probably not even open. But he was listing all the things that people might have been doing, and he says, but they're really not, and yet cases are growing anyway. And that was I thought a glimpse of reality, because normally, the usual pattern is to blame the people. *You've been bad*. It's been hard to keep that up as governor after governor has gotten the virus themselves. In Pennsylvania, Nevada, and elsewhere, they all get it, and presumably they're all following the various guidelines.

KILEY: Well, you know, our governor isn't.

WOODS: [laughing] Yeah, well, that's true. Yeah, that's true. It's important to keep an eye on these people. It's absolutely true. But just to hear all these sorts of stories coming out of California about, well, let's see, all these lockdowns don't seem to be doing anything, and people are basically complying. And then he wants to put up billboards telling them to comply harder? Even the mayor of Los Angeles, and Los Angeles has been like the among the worst places, and yet even they admit, well, it's not really that people aren't complying. It's that, kind of, we're not really sure what's happening. There was a glimpse of honesty there, a tiny little hint of it.

KILEY: Right, and what they never do is provide the data showing, okay, the businesses that were shutting down, those are really the places where —

WOODS: Right, they definitely are not doing that. Right, yeah, they definitely are not doing that. It's just whatever gives people pleasure. Yeah, the virus likes pleasure, so we're just going to — it's unbelievable. Here in Florida, there's a county, the county I think where Gainesville is, and they had a rule early on that you could have one person in your business per thousand square feet. And so they somebody at a public hearing or public meeting and asked them: how did you arrive at that figure? Like, what science were you using? And the answer, I'm not kidding, was, well, we thought that a thousand, being around number, would

be easy math for everybody. So the answer was there was no — it's all voodoo. Like there's no science behind it at all.

All right, let me leave you with this question. Having done very important work in the courts now, and now maybe having restored some authority to the legislature, what would you in your fantasy scenario like to see the legislature do? And then realistically speaking, what do you hope it might do?

KILEY: Well, I mean, what I'd like to see is the legislature immediately vote to reverse this latest stay-at-home order, to open businesses, to get every single little school back open or at least offering the option of in-person instruction to families that want that, and to also, by the way, focus on expanding our health care capacity, because that's what the governor is using now as his reason for imposing further lockdowns. He hasn't been doing anything, really, to improve our capacity or our health care workforce. There's tens of thousands of people who signed up to help out and they got to volunteer basically for this new health care task force, but the governor has not utilized their services. So that's what I think needs to happen, is that we should end the hammer of lockdowns as our one tool. We should focus on expanding health care capacity where it's needed, and then we should leave it in the hands of Californians to make their own decisions.

What's realistically going to happen? None of that's going to happen, because the legislature isn't even in session for the next month. We were there for one day on Monday to be sworn in, and then everyone went home again. And when we come back, I'm sure there's going to be very little done, certainly not anything to stand up to the governor and cause him to do anything differently. And I think that's just really unfortunate, is that even now that — I think James Gallagher and I, my fellow legislator, if we are ultimately successful in getting our victory at trial upheld on appeal, it will rein in what the governor can do, but we're still going to have a legislature that I feel like — it just reinstalled the same speaker of the assembly — doesn't really have a capacity to provide the leadership that's needed.

WOODS: Well, one important thing you're also doing is keeping people informed about what's happening in California. You're doing that on your blog and via your mailing list that informs people about your writing, so that's at Blog.ElectKevinKiley.com, which is a bit of a mouthful, so I'm going to post it at TomWoods.com/1795, our show notes page. And then also to make it easier for people to get there, I created a redirect link, TomWoods.com/Kiley. TomWoods.com/Kiley will redirect to your blog, so people can find out what you're up to and what's really going on in California.

Well, best of luck. I mean, you really are fighting an important but really, really difficult uphill struggle. And realize that for all the negative feedback you may get, you are being cheered across the country by people you'll never even meet. So thank you for that and for your time today.

KILEY: That's great to hear. Thanks for having me on. By the way, the blog I call it Capitol Quagmire, and you can get to it from that name as well, so CapitolQuagmire.com.

WOODS: Oh, I see. I see that too. Okay, very good. All right, well, thanks again. I appreciate it.

KILEY: Thanks for having me on. Take care.