



March 15, 2011

**AMERICAN CIVIL
LIBERTIES UNION OF
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The Honorable Wes Keller, Vice-Chair
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[Representative Wes Keller@legis.state.ak.us](mailto:Representative_Wes_Keller@legis.state.ak.us)

Re: House Bill 88
ACLU Review of Legal Issues

Chair Lynn, Vice-Chair Keller:

Thank you for the opportunity to submit written testimony regarding House Bill 88, relating to the application of international law.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. We have several concerns with the proposed legislation, outlined in greater detail below, **and urge a DO NOT PASS vote by Members of the Committee.**

Attack on Separation of Powers and Judicial Independence

Fundamentally, HB 88 is counterproductive legislation. This bill represents an attack on the separation of powers, an unwarranted mistrust of the state judiciary and an unnecessary interference in the function of Alaska's legal system.

It is a core function of both state and federal courts to determine what law is at issue in a given matter. The Alaska Legislature should not seek to legislate what law the courts can and cannot consider when deciding cases. By doing so, the Legislature violates the fundamental principle of judicial independence and the constitutional principle of separation of powers.

Negative Impacts on Alaska Citizens and Businesses

Passage of HB 88 would harm the rights of Alaska citizens and businesses who travel and transact across international borders, and would also negatively impact the United States' standing in the global community.

In the normal course of business, organizations may voluntarily choose to waive certain constitutional rights. For instance, an individual generally retains the constitutional right to say what she thinks without restraint. U.S. Const., Amdt. I; Alaska Const., Art. I, Sec. 5. However, individuals regularly contract away their constitutional right to speak freely, for instance, by engaging in nondisclosure agreements. While the ACLU of Alaska strongly values constitutional rights, there are certainly legitimate and appropriate reasons why an informed, non-coerced waiver of such rights should be permitted and legally respected.

Contrary to these principles, the language of HB 88 presumes to disregard **all** waivers of constitutional rights, in any contract that contains a choice of law clause preferring the law of a foreign jurisdiction. For instance, proposed AS 09.68.140(b) states that if a contract contains a choice of law clause preferring foreign law and “if the interpretation or enforcement of the agreement would violate an individual’s [constitutional] right,” the contract **must** be read to preserve the constitutional right, not to waive it. The effect of the statute – by its literal terms – appears to be to nullify ***any waiver*** of constitutional right where made in conjunction with a foreign choice of law provision.

Other examples of commonly waived constitutional rights include the right of medical privacy permitting medical records to be shared with a foreign medical provider, or a due process right to an official hearing or trial, such as a provision mandating that disputes go to an arbitrator. The Alaska Legislature risks sweeping up a wide variety of commonplace waivers of constitutional rights in the bill as currently drafted.

HB 88 is structurally flawed in that it is not narrowly tailored to prevent coerced or uninformed waiver of rights. Its only *caveat* is that the contract must have a foreign choice of law provision. This overbreadth would result – should the bill pass – in exposing foreign partners to the potential that Alaska businesses may unilaterally ***and improperly*** evade their contractual obligations by using the Bill’s provisions. This obvious legal flaw would make it highly problematic for Alaskans to conduct business with foreign individuals or organizations.

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Choice of Forum Provision

A similar problem attends subsections (c) and (d), which prohibit the application of choice of forum or venue contractual provisions, and the granting of motions to dismiss on the grounds of *forum non conveniens*, where a constitutional right could be impaired.

In the case of subsection (c), a business or person may have a valid, legally appropriate and commercially necessary reason to waive certain constitutional rights. But, the extremely broad language of the legislation would invalidate the contractual provisions.

An example of a problem with this language is presented by the Seventh Amendment to the United States Constitution, which guarantees the right to trial by jury in any civil case addressing a matter in value of at least twenty dollars. U.S. Const., Amdt. VII.

The United States jury system does not necessarily have a corollary in judicial proceedings in other countries. Not all countries apply a common law system, and fewer still have regular jury trials. HB 88 could thus be used to prevent the enforcement of any choice of venue or forum clause *in any contract with a foreign company*, or any *forum non conveniens* action, if the foreign court at issue does not guarantee a jury trial for civil action where \$20 or more was at stake. This would seriously deter foreign individuals or corporations from doing business in Alaska.

U.S. and Alaska Standing in Foreign Relations

HB 88 would generally strain our relations and standing with other nations. Opportunistic businesses and individuals could thwart efficient judicial enforcement by filing suit in Alaska and then demanding that the defendant respond in Alaska.

For example, a person with a contractual dispute with a Spanish oil services company¹ could (assuming that the matter had sufficient minimal Alaska contacts to establish personal and subject matter jurisdiction), file a suit for declaratory relief in Anchorage, even where all the evidence, witnesses, and items at issue were in Spain.

Even where such a suit would normally be dismissed as *forum non conveniens* and then re-filed in Spain, an Alaska court could be obliged to hear the case in Alaska, since the plaintiff would be deprived of her Seventh Amendment right to a jury trial if the case were heard in Spain.

While there may be foreign jurisdictions whose legal systems are so deeply unfair as to offend fundamental American values of fairness, there are many – such as Spain’s – that do not. One should also note that the doctrine of *forum non conveniens* is **one of mutual respect**, which may

¹ <http://www.businessweek.com/ap/financialnews/D9LRQDGO0.htm>.

be undermined where one nation flouts the respect owed to other nations. Passage of HB 88, along with similar bills in sister states, could result in many American litigants finding themselves sued in foreign jurisdictions and unable to remove their cases to Alaska or other US state courts.

HB 88 signals to the rest of the world that Alaska believes that our judges have “little to learn from their counterparts in other nations This wholesale rejection of the value of consulting international law or foreign decisions in certain circumstances evokes years of ‘American exceptionalism,’ during which the U.S. was internationally criticized for exempting itself from human rights standards that were otherwise universal.”²

A vote for HB 88 would have the effect of alienating U.S. allies and the commercial partners of Alaska companies, putting at risk U.S. interests at home and abroad. Indeed, the simple perception that the United States is ignoring its legal obligations puts Alaskan citizens and Alaskan companies seeking to do business internationally at risk. If potential foreign business partners believe that Alaska’s courts will not enforce foreign judgments or adhere to the businesses’ choice of law in their contracts, international companies may simply be unwilling to contract with Alaska businesses or establish commercial ties to our state. Given the ambiguity surrounding which laws Alaskan courts may consider, foreign investors may be wary of ever consenting to jurisdiction in our state courts.

Conclusion

In sum, HB 88 is unnecessary, and its passage would cause real harm to Alaska’s citizens, businesses, and judicial system. **We urge you to oppose HB 88.**

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² Martha Davis & Johanna Kalb, *Oklahoma State Question 755 and an Analysis of Anti-International Law Initiatives*, American Constitution Society Issue Brief, 5 (2011).

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions which Members of the Committee may have.

Thank you again for the opportunity to share our concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "J. A. Mittman", with a long horizontal flourish extending to the right.

Jeffrey Mittman
Executive Director
ACLU of Alaska

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