

ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE

February 9, 2011

1:06 p.m.

MEMBERS PRESENT

Representative Carl Gatto, Chair
Representative Steve Thompson, Vice Chair
Representative Wes Keller
Representative Bob Lynn
Representative Lance Pruitt
Representative Max Gruenberg
Representative Lindsey Holmes

MEMBERS ABSENT

Representative Mike Chenault (alternate)

COMMITTEE CALENDAR

HOUSE BILL NO. 80

"An Act relating to self defense in any place where a person has a right to be."

- HEARD & HELD

HOUSE BILL NO. 127

"An Act relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering the welfare of a child, sending an explicit image of a minor, harassment, distribution of indecent material to minors, and misconduct involving confidential information; relating to probation; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 80

SHORT TITLE: SELF DEFENSE

SPONSOR(S): REPRESENTATIVE(S) NEUMAN, FEIGE, LYNN, COSTELLO

01/18/11	(H)	PREFILE RELEASED 1/14/11
01/18/11	(H)	READ THE FIRST TIME - REFERRALS
01/18/11	(H)	JUD, FIN
02/09/11	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 127

SHORT TITLE: CRIMES INVOLVING MINORS/STALKING/INFO

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

01/26/11	(H)	READ THE FIRST TIME - REFERRALS
01/26/11	(H)	JUD, FIN
02/07/11	(H)	JUD AT 1:00 PM CAPITOL 120
02/07/11	(H)	Heard & Held
02/07/11	(H)	MINUTE(JUD)
02/09/11	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE MARK NEUMAN

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Presented HB 80 as one of the joint prime sponsors.

BRIAN JUDY, Senior State Liaison

National Rifle Association - Institute for Legislative Action
(NRA-ILA)

Sacramento, California

POSITION STATEMENT: Testified in support of HB 80.

DOUGLAS MOODY, Deputy Director

Criminal Division

Central Office

Public Defender Agency (PDA)

Department of Administration (DOA)

Anchorage, Alaska

POSITION STATEMENT: Answered questions during the hearing on HB 80.

RICHARD SVOBODNY, Deputy Attorney General

Central Office

Criminal Division

Department of Law (DOL)

Juneau, Alaska

POSITION STATEMENT: Responded to questions during the hearing on HB 80.

RODNEY DIAL, Lieutenant

Deputy Commander

A Detachment

Division of Alaska State Troopers

Department of Public Safety (DPS)
Ketchikan, Alaska

POSITION STATEMENT: Answered a question during the hearing on HB 80.

DOUGLAS MOODY, Deputy Director
Criminal Division
Central Office
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska

POSITION STATEMENT: Testified during the hearing on HB 127.

JESSICA LUIKEN, Participant
Alaska Close-Up program
No address provided

POSITION STATEMENT: Testified during the hearing on HB 127.

TIFFANY BOITNOTT, Participant
Alaska Close-up program
No address provided

POSITION STATEMENT: Testified during the hearing on HB 127.

ACTION NARRATIVE

[1:06:42 PM](#)

CHAIR CARL GATTO called the House Judiciary Standing Committee meeting to order at 1:06 p.m. Representatives Keller, Pruitt, Thompson, Lynn, and Gatto were present at the call to order. Representatives Gruenberg and Holmes arrived as the meeting was in progress.

HB 80 - SELF DEFENSE

[1:07:07 PM](#)

CHAIR GATTO announced that the first order of business would be HOUSE BILL NO. 80, "An Act relating to self defense in any place where a person has a right to be."

[1:08:11 PM](#)

REPRESENTATIVE MARK NEUMAN, Alaska State Legislature, speaking as one of the joint prime sponsors for HB 80, relayed that the proposed legislation would change AS 11.81.335(b) to reflect that a person doesn't have a duty to retreat and can instead

apply deadly force if he/she is anywhere he/she has a right to be.

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BRIAN JUDY, Senior State Liaison, National Rifle Association - Institute for Legislative Action (NRA-ILA), testifying in support of HB 80, characterized the proposed bill as important self-defense legislation. He offered his belief that the bill would apply to only those who are justified in using deadly force. He then offered his understanding that the use of deadly force is justified when a person reasonably believes that he/she or a person he/she is protecting is in danger of being killed, sustaining serious bodily injury, being a victim of sexual assault, being kidnapped, or being robbed; it is not justified if the person is engaged in mutual combat, is provoking another person to violence, is the initial aggressor, or "possesses a weapon in furtherance of a felonious activity." Mr. Judy posited that although it is not explicitly expressed in statute, gang activity would be included under possessing a weapon in furtherance of a felonious activity. Mr. Judy said the proposed bill would remove the need for someone to have to ask him/herself if retreat is possible.

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CHAIR GATTO, using an example wherein a person comes upon someone attacking another person, asked how that situation would be treated under HB 80 in terms of the duty to retreat.

MR. JUDY ventured that statutes outline that a person is justified protecting his/her life and the life of another; therefore, under the provisions of the proposed bill, the person in Chair Gatto's example would be allowed to defend the victim. In response to a follow-up question, he said the first option is to call 911. He said his experience has shown that people who carried a concealed weapon do everything possible to avoid confrontation, because when a person - good or bad - pulls a trigger, he/she will be arrested.

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REPRESENTATIVE NEUMAN noted that AS 11.81.330 speaks about situations involving mutual combat, and opined that the bill wouldn't apply in such situations.

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MR. JUDY added his belief that under existing law, even when a person's use of force was justified, he/she risks a finding by court that he/she overestimated the difficulty of retreating. He opined that in the split second available, once a person judges him/herself to be justified in taking action, he/she should not have to then stop and consider whether it is possible to retreat. He urged the committee support of HB 80.

[1:20:40 PM](#)

REPRESENTATIVE HOLMES said she agrees that a person in danger should have the right to defend him/herself, and she relayed that in those examples she has heard, the person is already covered by existing law. Therefore, she asked for examples of when, under existing law, people are being prosecuted that should not be.

MR. JUDY acknowledged that current statute is good, but that HB 80 would "take it the rest of the way." He indicated that there are 16 states that currently have statutes similar to HB 80. He said the bill would ensure that a person has the ability to act on justification. He said the intent of the proposed legislation is to alleviate the need for a person to justify before a court that he/she was justified in killing someone, and he suggested criminals would be taking a bigger risk once they know about this new law.

REPRESENTATIVE HOLMES expressed concern that the change proposed by HB 80 will simply make it easier for criminals to get acquitted of murdering someone, particularly given that there are not a lot of people going to trial having to defend their justified actions.

MR. JUDY argued that a person would still have to be justified in killing another person, and that the criteria for what constitutes justification are sufficient to prevent such from happening.

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REPRESENTATIVE NEUMAN ventured that HB 80 is simply adding a clarification with regard to whom Alaska's self defense statute applies; it simply would allow the person to be "in any place where the person has a right to be." He said he wants to ensure that a person has a right to defend him/herself before harm is inflicted.

CHAIR GATTO referred to language in Section 1, subsection (b), which read as follows:

Section 1. AS 11.81.335(b) is amended to read:

(b) A person may not use deadly force under this section if the person knows that, with complete personal safety and with complete safety as to others being defended, the person can avoid the necessity of using deadly force by leaving the area of the encounter, except there is no duty to leave the area if the person is

CHAIR GATTO said the words "knows" and "complete" are absolutes, and he opined that a person needs better protection than that because "it will never happen." He said if the words "suspects" and "reasonable" safety had been used, it would completely change the meaning.

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REPRESENTATIVE GRUENBERG pointed out that [AS 11.81.335(b)] requires that a person has an absolute necessity to kill another person, which is a very high standard.

MR. JUDY concurred.

CHAIR GATTO asked if the words "reasonably believes" trump the word "necessity".

MR. JUDY offered his understanding that those words work together.

REPRESENTATIVE GRUENBERG said he does not see the words "reasonably believes" in the aforementioned statute.

REPRESENTATIVE NEUMAN explained that "reasonably believes" appears in another portion of AS 11.81.334, [subsection (a)], which read as follows:

(a) Except as provided in (b) of this section, a person who is justified in using nondeadly force in self-defense under AS 11.81.330 may use deadly force in self-defense upon another person when and to the extent the person reasonably believes the use of deadly force is necessary for self-defense against

- (1) death;
 - (2) serious physical injury;
 - (3) kidnapping, except for what is described as custodial interference in the first degree in AS 11.41.320;
 - (4) sexual assault in the first degree;
 - (5) sexual assault in the second degree;
 - (6) sexual abuse of a minor in the first degree;
- or
- (7) robbery in any degree.

REPRESENTATIVE GRUENBERG, regarding the language, "in any place where the person has a right to be", which would be added to AS 11.81.335 under HB 80, said there is language currently in that statute that would become incongruous. For example, he noted that current statute says that there is no duty to leave the area if the person is on premises "that the person owns or leases" or "where the person resides", or is "in a building where the person works in the ordinary course of the person's employment". He pointed out that a landlord cannot go into a tenant's apartment without giving 24 hours notice, that a person may not have a right to be at his/her residence if he/she is the subject of a domestic violence order, and that a person may not have a right to be in a particular office within a building in which he/she works.

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CHAIR GATTO questioned whether not being prohibited from being somewhere means the same thing as having a right to be there.

REPRESENTATIVE GRUENBERG offered an example that although he is not prohibited from entering the home of someone he knows, he would wait to be invited into that home.

REPRESENTATIVE GRUENBERG directed attention to language on page 2, line 2, "protecting a child or a member of the person's household", and said he thinks there may be reason to need to protect someone else, for example, a parent or disabled adult.

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REPRESENTATIVE NEUMAN offered that other statutes would apply in such circumstances, but acknowledged that perhaps some of the language that Representative Gruenberg highlighted could be removed.

REPRESENTATIVE GRUENBERG expressed concern that the language in paragraph (4), regarding the protection of a child or member of the person's household, may be too narrow.

CHAIR GATTO said many people consider their pets to be members of their household.

REPRESENTATIVE GRUENBERG said traditionally a member is a person.

The committee took an at-ease from 1:39 p.m. to 1:40 p.m.

[1:40:36 PM](#)

REPRESENTATIVE GRUENBERG noted that AS 11.81.340 [addresses use of force "in defense of a third person"]. He then pointed out that Perkins Law addresses the issue of "castle" rule; "castle" is a term of art that has been around for many years. In response to Chair Gatto, he gave examples of cases from the '40s and '50s in which that term was used.

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REPRESENTATIVE THOMPSON expressed support for HB 80.

[1:45:08 PM](#)

DOUGLAS MOODY, Deputy Director, Criminal Division, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), said, for example, when a person is out hunting and gets involved in an altercation and has a duty to retreat, the question becomes when that person should make that decision. He said when a person "knows" "with complete personal safety" [that he/she could avoid using deadly force by leaving the area] is something that is decided by a jury, and the jury could infer from conduct whether or not the person had that knowledge. Under HB 80, he said, the question would become whether the person is justified in defending him/herself in a situation that he/she did not bring about, rather than questioning if the person waited too long to leave because he/she had a right to be there.

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CHAIR GATTO offered an example wherein one hunter encounters another hunter who tells the first to get out of his territory, to which the first says he has a right to be there, at which

point the hunter tells the first hunter he has to the count of three to leave. He asked Mr. Moody how he would interpret that scenario with regard to self defense.

MR. MOODY responded that that scenario could be interpreted in more than one way. The first possibility, he said, is that the jury could decide that the first hunter had a duty to walk away the minute the other hunter said the territory was his and ordered him to do so, because the first hunter was aware that both people involved were armed, which could result in a shooting. The second possibility, he related, is that the jury could decide that the first hunter's duty to walk away began the moment the other hunter gave him to the count of three to do so, because the hunter giving the ultimatum had escalated the situation. The third possibility, Mr. Moody, ventured, is that if the aggressive hunter raised his gun after giving the first hunter to the count of three and the first hunter shot him; the jury may be sympathetic and decide that the first hunter had the right to defend himself because he did not create the situation and had the right to be there. He emphasized that the proposed law changes the focus from whether a person is engaged in misconduct to whether someone else is forcing the person into a situation in which he/she has to defend himself.

CHAIR GATTO asked Mr. Moody how he would defend the first hunter if that hunter said he did not trust the aggressive hunter, did not want to turn his back to him, did not want to walk backwards through the woods, and did not want to leave. He asked if a threat is sufficient reason for acting in self defense, and he added to his hypothetical situation that the first hunter intended to shoot the aggressor in the knee, but missed and shot him in the heart.

MR. MOODY said he would argue for the first hunter that he was dealing with someone who was unreasonably aggressive and that his only option was to shoot first in this instance. However, he said he would warn his client that the outcome would depend on the jury.

CHAIR GATTO stated that when a person takes action based on his/her right to be somewhere, then he/she has a greater measure of credibility. He opined that that is the crux of the proposed legislation. He then relayed that public testimony would remain open at this time.

[1:53:42 PM](#)

RICHARD SVOBODNY, Deputy Attorney General, Central Office, Criminal Division, Department of Law (DOL), noted that AS 11.81.340 addresses the issue of defending those who are not members of one's household. He stated, "What that provision is in there for is you don't have an obligation to remove yourself from a situation where you're using self defense and it's your child or a member of the household. ... That's only dealing with ... an obligation to remove yourself from the area."

REPRESENTATIVE GRUENBERG characterized language in statute regarding retreating as confusing, and asked for the general rule regarding the duty to retreat.

MR. SVOBODNY said in 1935 it was indicated that there was not, in the Territory of Alaska, the obligation to retreat. He said in 1978, with the revision of the criminal code, the legislature made the determination that under some circumstances, if a person could remove him/herself from a situation of danger in complete safety, then he/she would be required to do so. In 2006, he noted, there was a revision in this language through Senate Bill 200.

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CHAIR GATTO opined that using a standard of "complete" is setting a bar that can't be reached.

MR. SVOBODNY related that a person does not need to retreat unless he/she can do so in complete safety. So, in the example previously given by Chair Gatto, the first hunter would not have a duty to retreat because it would not have been safe to turn his back on the other hunter. Furthermore it is the State of Alaska that has to prove beyond a reasonable doubt that there was no danger to the person in retreating.

CHAIR GATTO opined that it would be too difficult for a person to have to keep all the factors in mind before taking action in the moment.

REPRESENTATIVE THOMPSON questioned why the fiscal note doesn't reflect a decrease in spending, given that the department would not have to prosecute as many people.

MR. SVOBODNY pointed out, though, that in situations involving the death of a person, the Department of Law still has to make some determinations. He mentioned the number of cases and the need for extra personnel.

REPRESENTATIVE THOMPSON asked Mr. Svobodny if he is saying that the number of cases DOL has will increase from the 1,155 cases the department had last year.

MR. SVOBODNY explained that the number of cases for review will not increase, but the number of cases that go to trial likely will, as indicated by Mr. Moody's response to Chair Gatto's hypothetical case.

2:03:39 PM

REPRESENTATIVE HOLMES surmised that the broadening of statute under HB 80 would make it easier for criminals to claim self defense, which would make it more difficult for the department to prove a case is one of murder rather than self defense.

MR. SVOBODNY concurred. He stated that true cases of self defense should not have to go to trial. He said the department agrees with the bill sponsor that victims of crimes should be protected and those who use self defense are victims of crimes. He related a case in which two men were each driving a vehicle, got into an argument, pulled over into a parking lot, where both had a right be, and one shot the other. He said that case settled with a plea, but "now it will be litigated." He said the department anticipates that cases like that would [under HB 80] go to trial more often. He said the door would be open to arguing that cases now not considered self defense would be self defense under the proposed legislation.

2:07:59 PM

REPRESENTATIVE HOLMES directed attention to a letter in the committee packet dated March 15, 2010, from the Department of law to then chair of the House Judiciary Standing Committee, Representative Jay Ramras. She offered her understanding that the letter referred to a prior version of the bill [House Bill 381], and she ventured that some of the concerns stated therein may pertain to HB 80. She cited a portion of the letter, which read as follows:

Every experienced prosecutor with whom I have spoken about this bill uniformly agrees that it would promote violence and be a bad idea for our state. We believe that as drafted this bill will encourage unnecessary violence in our state.

REPRESENTATIVE HOLMES said she would like Mr. Svobodny's opinion regarding that letter written in 2010.

CHAIR GATTO offered his belief that HB 80 will reduce violence, and cautioned against making a decision about the bill based on fears of what might happen. He asked Lieutenant Rodney Dial if he thinks there would be more or less violence resulting from having people more willing to protect themselves.

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RODNEY DIAL, Lieutenant, Deputy Commander, A Detachment, Division of Alaska State Troopers, Department of Public Safety (DPS), said he doesn't see HB 80 affecting DPS at all or at least not dramatically affecting the number of purported self defense cases. He said most cases of self defense are clear, and when they are not, the Alaska State Troopers contacts the district attorney prior to making the arrest. He concluded, "It's just not something that I've seen a lot of over the years, so, it's really hard for me to comment on what may happen if this legislation is passed."

[2:13:13 PM](#)

MR. SVOBODNY, in response to a question, said he doesn't believe that [passage of HB 80] would result in an increase in violence. He reiterated that the number of cases will remain the same, but the State of Alaska will have to spend more time on them. He added that he does not know of any cases where a purported self-defense case was not screened out before going to trial.

REPRESENTATIVE HOLMES asked Lieutenant Dial if an increase in the number of cases going to trial would mean an increase in workload for the Department of Public Safety.

LIEUTENANT DIAL reiterated that the department does not believe that HB 80 would have a significant impact on its activities.

[2:15:45 PM](#)

CHAIR GATTO noted that members' packets include 22 letters of support for HB 80 and none in opposition. He then relayed that HB 80 would be held over.

[2:16:32 PM](#)

The committee took an at-ease from 2:16 p.m. to 2:25 p.m.

2:25:38 PM

HB 127 - CRIMES INVOLVING MINORS/STALKING/INFO

2:25:42 PM

CHAIR GATTO announced that the final order of business would be HOUSE BILL NO. 127, "An Act relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering the welfare of a child, sending an explicit image of a minor, harassment, distribution of indecent material to minors, and misconduct involving confidential information; relating to probation; and providing for an effective date."

2:26:01 PM

DOUGLAS MOODY, Deputy Director, Criminal Division, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), referred to Section 7 of the bill, which pertains to sending an explicit image of a minor, and he opined that as currently written it is too broad and will apply to people that the legislature does not intend. He noted that the language in subsection (b) exempts a minor who "publishes or distributes an electronic or printed photograph, picture, or film that depicts the minor's own genitals, anus, or female breast", but it does not exempt a minor who, for example, takes of photo of his minor girlfriend's breast, with her consent, and sends it to her alone. He offered his understanding that the bill is really meant to address those that are engaging in wide distribution or those promoting child pornography. Another example, he said, is four girls at Mardi Gras, where one of the girls takes a photo of the other three flashing their breasts, sends the photo to one of the girls in the photo, who then sends the photo to the other two. Even though all those receiving the photo were involved, under HB 127 the two girls who distributed the photo would be liable. He said he does not think that those are the kind people that the legislature is trying to target.

MR. MOODY offered a third example wherein he takes a photo of his four-year-old child at a birthday party attended by four-year-olds, and a two-year-old has stripped off his clothes and is shown running around naked in the background of the photo. He then sends the photo to his mother so that she can see her grandson at the party. He said he would be liable for sending that photo because the naked two-year-old is in it, and furthermore, would be charged with a felony if he sent the photo

to his mother via the Internet. He said high school children send photos as attachments to text messages, by instant messaging (IM), and via e-mail, and the data gets sent over the same fiber optics path. He expressed concern that young people or innocent adults who are not predators are going to be convicted, and perhaps a young person thus convicted would subsequently find barriers to applying for college in another state or for military service.

[2:32:43 PM](#)

CHAIR GATTO noted that a generation ago, children may have wished they had a camera to show their parents when someone was being a sexual deviant, but now it seems that everyone has a camera and "we can overdo it." He characterized [Section 7] as very difficult. He surmised that receiving input from teenagers regarding the effects of how harmful "something like this" is or is not would be beneficial. He remarked that teenagers often think adults overreact. He indicated that [sexual deviance] is easy to recognize but hard to legislate.

[2:35:54 PM](#)

JESSICA LUIKEN, Participant, Alaska Close-Up program, related that she is 17 and a junior in high school. She said she understands Mr. Moody's comments regarding the transmittal of a photo to his mother. However, with regard to the comment about teenagers sending photos to teenagers and other minors, she expressed concern that those photos could be sent to an adult and to so many other people. She offered her belief that part of society is attempting to remove such pictures from the Internet so as to protect youth, which she said may help others stand their moral ground. She said she has never taken part in sharing such photos, because she does not socialize with those who do. In response to Representative Holmes, she offered her belief that punishment may be extreme, because it may conflict with a person's right to his/her own belief. Notwithstanding that, she said she does not like the degradation of young women or when some women exhibit low self-esteem. She said the text messages and images do not show respect for women. In response to Chair Gatto, she said although she abhors such behavior and does not believe that it should happen, she sees that society has become somewhat immune to it.

CHAIR GATTO opined that everyone has a vested interest in ensuring that all children are protected, and he reiterated how

difficult a task it is to stop others from having a negative effect on a child's future.

[2:44:05 PM](#)

REPRESENTATIVE PRUITT offered his belief that the bill is meant to address those with malicious intentions towards children. He asked Ms. Luiken if she could relate what kind of activity seems more prevalent in high school.

MS. LUIKEN answered that she is not familiar with the actions of other teens in high school, because she has been home schooled and has standards different from some other teenagers. She said she is still formulating her thoughts on this issue. In response to a question, she said she does have a Facebook account but does not accept "friend" requests from people she does not know.

CHAIR GATTO acknowledged that addressing this issue could be difficult.

[2:48:28 PM](#)

TIFFANY BOITNOTT, Participant, Alaska Close-up program, noted that she is 15 and is home schooled. She said she has a Facebook account, and after giving her e-mail address when signing up began receiving e-mails with graphic links to the Internet. She said it would be nice if that did not happen. In response to the chair, she said she deletes those e-mails without opening them.

[2:54:00 PM](#)

MS. LUIKEN, in response to comments, relayed that there are teenagers that do not support the sending of graphic material. She opined that the younger a person is when he/she takes part in sending graphic images, the harder it will be for him/her to disengage from such behavior.

[2:54:58 PM](#)

MS. BOITNOTT added that she has a 12-year-old cousin who has received disturbing e-mails, but he has taken her advice to delete them.

[HB 127 was held over.]

3:00:14 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:00 p.m.