

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

March 30, 2011

1:07 p.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

Representative Wes Keller
Representative Mike Chenault (alternate)

COMMITTEE CALENDAR

HOUSE BILL NO. 88

"An Act prohibiting a court, arbitrator, mediator, administrative agency, or enforcement authority from applying a law, rule, or provision of an agreement that violates an individual's right under the Constitution of the State of Alaska or the United States Constitution."

- HEARD & HELD

HOUSE BILL NO. 168

"An Act requiring the amount of the security given by a party seeking an injunction or order vacating or staying the operation of a permit affecting an industrial operation to include an amount for the payment of wages and benefits for employees and payments to contractors and subcontractors that may be lost if the industrial operation is wrongfully enjoined."

- SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: HB 88

SHORT TITLE: USE OF FOREIGN LAW

SPONSOR(S): REPRESENTATIVE(S) GATTO

01/18/11 (H) PREFILE RELEASED 1/14/11

01/18/11 (H) READ THE FIRST TIME - REFERRALS
01/18/11 (H) STA, JUD
03/17/11 (H) STA AT 8:00 AM CAPITOL 106
03/17/11 (H) Heard & Held
03/17/11 (H) MINUTE(STA)
03/22/11 (H) STA AT 8:00 AM CAPITOL 106
03/22/11 (H) <Bill Hearing Rescheduled to 3/24/11>
03/24/11 (H) STA AT 8:00 AM CAPITOL 106
03/24/11 (H) Moved CSHB 88(STA) Out of Committee
03/24/11 (H) MINUTE(STA)
03/25/11 (H) STA RPT CS(STA) 3DP 2DNP 2NR
03/25/11 (H) DP: P.WILSON, KELLER, LYNN
03/25/11 (H) DNP: GRUENBERG, SEATON
03/25/11 (H) NR: JOHANSEN, PETERSEN
03/25/11 (H) FIN REFERRAL ADDED AFTER JUD
03/30/11 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

KAREN SAWYER, Staff
Representative Carl Gatto
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented HB 88 on behalf of the sponsor,
Representative Gatto.

JEFFREY A. MITTMAN, Executive Director
American Civil Liberties Union of Alaska (ACLU of Alaska)
Anchorage, Alaska

POSITION STATEMENT: Expressed concerns regarding HB 88.

ROBERT SPENCER
American Freedom Defense Initiative (AFDI)
(No address provided)

POSITION STATEMENT: Provided comments during discussion of
HB 88.

NONIE DARWISH, Director
Former Muslims United
(No address provided)

POSITION STATEMENT: During the discussion of HB 88, provided
comments.

SAM OBEIDI
Islamic Community Center of Anchorage Alaska, Inc. (ICCAA)
Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of HB 88.

MARY ELLEN BEARDSLEY, Assistant Attorney General
Commercial/Fair Business Section
Civil Division (Anchorage)
Department of Law (DOL)
Anchorage, Alaska

POSITION STATEMENT: Responded to questions during discussion of HB 88.

PAMELA GELLER
American Freedom Defense Initiative (AFDI)
(No address provided)

POSITION STATEMENT: Provided comments during discussion of HB 88.

JANET LEVY
(No address provided)

POSITION STATEMENT: During discussion of HB 88, provided comments.

PATRICK J. TRAVERS, Reverend, J.D., J.C.L.
Vicar General and Judicial Vicar
Diocese of Juneau;
Alaska Catholic Conference of Bishops
Anchorage, Alaska

POSITION STATEMENT: On behalf of the Alaska Catholic Conference of Bishops, expressed a concern regarding HB 88 and suggested that the bill be altered.

MARIA RENSEL
Fairbanks, Alaska

POSITION STATEMENT: Testified in favor of HB 88.

DAVID E. HECKERT
Fairbanks, Alaska

POSITION STATEMENT: Provided comments during discussion of HB 88.

ACTION NARRATIVE

[1:07:45 PM](#)

CHAIR CARL GATTO called the House Judiciary Standing Committee meeting to order at 1:07 p.m. Representatives Gatto, Lynn, Pruitt, and Thompson were present at the call to order.

Representatives Holmes and Gruenberg arrived as the meeting was in progress.

HB 88 - USE OF FOREIGN LAW

1:08:08 PM

CHAIR GATTO announced that the [only] order of business would be HOUSE BILL NO. 88, "An Act prohibiting a court, arbitrator, mediator, administrative agency, or enforcement authority from applying a law, rule, or provision of an agreement that violates an individual's right under the Constitution of the State of Alaska or the United States Constitution." [Before the committee was CSHB 88(STA); included in members' packets was a proposed committee substitute (CS) for HB 88, Version 27-LS0333\D, Bailey, 3/30/11.]

1:08:55 PM

KAREN SAWYER, Staff, Representative Carl Gatto, Alaska State Legislature, on behalf of the sponsor, Representative Gatto, explained that HB 88 would stipulate that in Alaska's courts, application of a foreign law in violation of an individual's constitutional rights shall not be permitted.

1:09:43 PM

REPRESENTATIVE THOMPSON moved to adopt the proposed committee substitute (CS) for HB 88, Version 27-LS0333\D, Bailey, 3/30/11, as the working document. There being no objection, Version D was before the committee.

MS. SAWYER went on to explain that [both CSHB 88(STA) and Version D] specify that proposed AS 09.68.140 isn't addressing tribal law and would not apply to corporations, partnerships, or other forms of business associations. She also relayed that a legal opinion by the Department of Law (DOL) dated March 21, 2011, indicates that under the Supremacy Clause of the U.S. Constitution, HB 88 would be preempted in situations where it conflicts with a federal law or with a treaty that the United States is a party to. She offered her understanding that two states have passed, and sixteen other states are considering passing, legislation similar to HB 88, which is intended to statutorily emphasize that both the Constitution of Alaska and the U.S. Constitution provide the fundamental basis for civil law [in Alaska]. She offered her belief that HB 88 is not intended to address the issue of religion or First Amendment

rights, and that nothing in HB 88 would prevent a person from exercising his/her right to freedom of religion. In conclusion, she noted that Section 2 of Version D [in part] read:

LEGISLATIVE INTENT. It is the intent of the legislature that AS 09.68.140, enacted by sec. 3 of this Act, does not address, directly or indirectly, any question of tribal law or the application of tribal law or otherwise address the intersection between state law and tribal law.

[1:14:07 PM](#)

JEFFREY A. MITTMAN, Executive Director, American Civil Liberties Union of Alaska (ACLU of Alaska), after mentioning that he'd submitted written testimony, offered his understanding that under both the Alaska State Constitution and the U.S. Constitution, the courts are already required to look to those documents for clear statements of public policy. So to the extent that HB 88 seeks to address the issue of public policy and constitutional rights, it simply reiterates the existing state of the law, and therefore would not accomplish anything legally. Given that, the question then becomes what negative impacts would HB 88 have, and this issue is addressed in the aforementioned written testimony. For example, even though Version D exempts business entities, it is unclear whether the bill would still apply in situations wherein a business entity has a contract with an individual, and such lack of clarity would only serve to entangle business contracts in uncertainty, which both businesses and courts dislike.

MR. MITTMAN went on to say:

What you're beginning to do is, you're negatively impacting business relationships and the standing of the state of Alaska. If an individual can disavow a contract unilaterally without, potentially, a reasonable basis, or, more importantly, if an individual can raise uncertainty as to the validity of a contract, that's a negative impact for business relations even if businesses are excluded. Moreover, we have significant concerns - ... which we've raised in our written testimony - as to the intent of the bill. We note - ... as has been noted in the [written] testimony - that the language of the legislation itself references ... international law; however, the initial sponsor statement and some of the

supporting documentation and testimony, which would be reviewed by courts to determine legislative intent, do reference shari'a law. If we are not intending it to apply to, for example, shari'a law, the question is raised, "What does it apply to?" And on that basis we would have some concerns as to whether the courts would find that this is constitutionally valid. Again, whether or not courts would view [it] that way, it raises uncertainty, it could interfere with arbitration rights, it could interfere with contractual rights. So ... without solving any problems, it simply ... [raises] negative impacts.

MR. MITTMAN said that for those reasons and the reasons set forth in the aforementioned written testimony, the ACLU of Alaska urges the committee not to support HB 88.

[1:17:33 PM](#)

ROBERT SPENCER, American Freedom Defense Initiative (AFDI), offered his belief that HB 88 would restrict the political aspects of Islamic law that are at variance with constitutional freedoms but would not restrict a person's right to practice the religion of his/her choice. After providing comments regarding hate crimes, shari'a, and freedom of speech, he predicted that if HB 88 is not adopted, that "shari'a provisions would be introduced into the United States," and characterized HB 88 as being necessary.

[1:22:20 PM](#)

NONIE DARWISH, Director, Former Muslims United, mentioned that she is an author and that she lived under Islamic law - shari'a - for 30 years [before moving to the United States], and described her experiences and treatment and the treatment of women and girls under shari'a. She pointed out that a law, regardless of what it is called, is not a religion - a law affects everyone in a society regardless of his/her religious beliefs - and opined that as a legal system, shari'a should never be practiced in the United States and should instead be defended against. In conclusion, she asked the committee to "do the right thing," and prevent shari'a from being used as the law, offering her belief that true freedom and true democracy cannot exist under shari'a, which, she opined, has nothing to do with religion. In responding to a hypothetical question, and citing England as an example, she predicted that once any

provision of shari'a gains a foothold in U.S. courts, it will be very difficult to remove.

1:37:40 PM

SAM OBEIDI, Islamic Community Center of Anchorage Alaska, Inc. (ICCAA), offered his belief that the Muslims who've chosen to live in America have already chosen to live under the U.S. Constitution and have adopted it as the basis of their civil law, and opined that there is nothing, therefore, to fear from shari'a. In response to a question, he pointed out that as long as he is living in the United States, he is obliged to abide by the laws of the United States and the U.S. Constitution, and understands that if he were to commit a wrongdoing while living here, that he would be judged accordingly under those laws and Constitution. He added his understanding that it would be the same in other countries: if a person commits a wrongdoing while in a foreign country, he/she could not be tried under the laws of his/her homeland.

REPRESENTATIVE PRUITT observed that HB 88 doesn't contain any reference to shari'a.

MR. MITTMAN, in response to a question, indicated that under the bill, the validity/applicability of any contractual choice-of-law provisions would have to be reviewed by the court on a case-by-case basis. Under existing U.S. and Alaska law, he explained, there are already exceptions to choice-of-law provisions, with one exception being that such provisions must not be applied in unconstitutional ways or in ways that deny due process.

CHAIR GATTO indicated that HB 88, by providing guidelines to the courts, is intended to address situations in which a person in Alaska wishes to follow laws that are in conflict with those of the United States and Alaska, clarifying that any such person would be precluded from doing so. Operating under dual legal systems can be complicated, and therefore those who wish to avoid such complications in Alaska's courts should support HB 88, he suggested.

1:51:03 PM

MARY ELLEN BEARDSLEY, Assistant Attorney General, Commercial/Fair Business Section, Civil Division (Anchorage), Department of Law (DOL), in response to a hypothetical question involving a polygamous family visiting Alaska from another

country, indicated that under the bill, if one of the family members sought redress in an Alaska court regarding his/her marriage, the court would first have to determine whether there were any constitutional issues involved, whether they were fundamental, and whether any constitutional rights were being violated. In response to another question, she said her interpretation of HB 88 is that it would only pertain to civil law, not criminal law.

REPRESENTATIVE GRUENBERG concurred, noting that HB 88 is proposing to alter Title 9 - Code of Civil Procedure - rather than Title 11 - Criminal Law; therefore, the bill wouldn't have any effect on criminal litigation. He then offered his interpretation that because proposed AS 09.68.140(f) would exempt corporations, partnerships, and other forms of business associations, the bill would perhaps only be applicable in situations involving [noncommercial] property rights or ownership in real estate.

MS. BEARDSLEY pointed out that even then an Alaska court might not have jurisdiction over the matter if the initial action between the parties took place in the foreign country and that's where the property was located. Furthermore, under the bill, the courts would still have to determine whether any fundamental constitutional rights had been violated.

CHAIR GATTO surmised that the bill wouldn't apply in situations where someone from Alaska did something illegal under the laws of a foreign country while in that country.

REPRESENTATIVE GRUENBERG questioned, then, whether the bill would have any effect on anything at all.

REPRESENTATIVE HOLMES referred to HB 88's proposed AS 09.68.140(b), which addresses contractual choice-of-law provisions, and proposed AS 09.68.140(c), which addresses contractual choice-of-venue/forum provisions. Noting that she's a contract attorney, Representative Holmes pointed out that parties to contracts generally don't want to leave it up to the courts to decide what laws shall apply or where any litigation shall occur. Instead, parties want such issues addressed beforehand, and so commonly include choice-of-law and/or choice-of-venue/forum provisions in the contract itself. She expressed concern that the language in the bill pertaining to such contractual provisions would require additional court involvement.

2:02:46 PM

MS. BEARDSLEY concurred that proposed subsections (b) and (c) would require additional court involvement because an Alaska court would first have to determine whether the laws of the country in question were in essence almost equal to what the United States and Alaska provide to individuals, whether the right that the individual claims is being violated is similar to one that the other country provides, and, if not, then whether that right under the U.S. Constitution or Alaska State Constitution really is being violated. She referred to this type of court involvement as a bench trial, where the determinations would be made exclusively by the judge, and predicted that such court involvement would be fairly protracted and result in a lot of extra work for the parties.

REPRESENTATIVE HOLMES expressed concern that HB 88 would have very detrimental effects on international contracts between individuals, particularly given the importance of choice-of-law and choice-of-venue/forum provisions in such contracts. For example, an unscrupulous party could use the language of the bill to call heretofore agreed-upon contractual provisions into question.

MS. BEARDSLEY relayed that she'd addressed this issue in her March 21, 2011, legal opinion. Foreign entities might look at legislation such as HB 88 and decide not to do business in Alaska because of the bill's proposed stipulations regarding contractual choice-of-law and choice-of-venue/forum provisions. The potential for these stipulations to be a problem resulted in the inclusion of proposed subsection (f)'s exemption for corporations, partnerships, and other forms of business associations.

REPRESENTATIVE HOLMES pointed out that that exemption doesn't include sole proprietorships.

MS. BEARDSLEY concurred that such individuals - sole proprietorships - would not be exempt from the bill.

2:07:18 PM

REPRESENTATIVE HOLMES offered her understanding that HB 88 is still unclear with regard to whether it would apply in instances involving a contract between an individual and a corporation, partnership, or other form of business association, such as a nondisclosure agreement or an employment contract.

MS. BEARDSLEY said that according to her interpretation, the bill as currently written would apply exclusively to individuals. For example, under the bill, if an individual enters into a contract with a foreign entity, he/she could use HB 88 if he/she felt that his/her constitutional rights were being violated.

REPRESENTATIVE HOLMES reiterated that contracts generally do contain choice-of-law and choice-of-venue/forum provisions, and she is therefore still concerned about the bill's potential negative impacts on commerce in Alaska, such as an increase in court involvement and litigation, and the likelihood that businesses will simply start choosing not to enter into contracts with Alaskans.

MS. BEARDSLEY, in response to a question, said she has difficulty envisioning how HB 88 would ever be applied, particularly given that the courts already have the ability to reform and modify contracts.

MR. MITTMAN added that under existing court public-policy rules, the only situations in which HB 88 would be applicable are those in which the court can already apply [stipulations such as those included in the bill]. Again, the ACLU of Alaska's concern is that HB 88 would have a negative impact on business in Alaska because it raises uncertainty and could increase litigation costs.

[2:11:50 PM](#)

PAMELA GELLER, American Freedom Defense Initiative (AFDI), characterized HB 88 as simple, clear-cut legislation that would prohibit the violation of an individual's rights under the Alaska State Constitution or the U.S. Constitution, offering her belief that opposition to HB 88 merely illustrates the need for such legislation. Why would anyone oppose a law that seeks to prevent foreign law from undermining fundamental constitutional liberties, she queried, and indicated her belief that HB 88 wouldn't affect contractual choice-of-law or choice-of-venue/forum provisions because the constitutions already permit parties in civil cases to waive their constitutional right to a jury trial. However, there is nothing in either constitution that allows a person to waive his/her constitutional right to equal protection under the law, and thus HB 88 is necessary to ensure that no foreign law would be used to force a person to waive that constitutional right. Citing some examples, she

asserted that there are cases of what she called shari'a jurisprudence occurring in the United States, and pointed out that regardless that the initial rulings in some of those cases were later overturned, the fact that there were even such rulings that had to be overturned raises the questions of why such [mistaken] rulings were allowed to occur in the first place and why the courts weren't recognizing the threat from shari'a. In conclusion, and citing situations occurring in Europe, she opined that there is a need to stand against shari'a and anyone who defies American law while living in this country, and that it is time to stand up for the American rule of law and individual rights for all.

[2:20:51 PM](#)

JANET LEVY, after mentioning that she is a freelance writer and political activist, pointed out that although some might argue that [courts should provide for] shari'a because they provide for Jewish law and Catholic canon law, there isn't really absolute freedom of religion in the United States, since pluralistic marriages, human sacrifice, and religious cults, for example, aren't allowed despite that the practice of such things are advanced by some religions. She offered her understanding that thus far 20 states have felt it necessary to "reaffirm American constitutional law - state and federal - due to a perceived increased-threat from other, outside legal systems." She then offered her understanding of how shari'a differs from both Jewish law and Catholic canon law, and how it conflicts with the laws of the United States and its constitutionally-guaranteed freedoms, and - citing England as an example - cautioned against allowing such a law to become a replacement for constitutional law - the law of the land in the United States.

[2:28:22 PM](#)

PATRICK J. TRAVERS, Reverend, J.D., J.C.L., Vicar General and Judicial Vicar, Diocese of Juneau; Alaska Catholic Conference of Bishops, noting that he was speaking on behalf of the Alaska Catholic Conference of Bishops, and then outlining aspects of Catholic canon law, indicated that the Alaska Catholic Conference of Bishops' concern with HB 88, as expressed in its letter dated March 30, 2011, is that the term, "foreign law" as used in the bill as currently written could be construed to be referring to Catholic canon law, thereby upsetting the coexistence of secular courts and canon tribunals, which often rely upon contractual provisions - including choice-of-law and

choice-of-venue/forum provisions - to address interactions with secular courts and law. He indicated that the Alaska Catholic Conference of Bishops, while not taking a position on the issue of whether legislation such as HB 88 might be necessary, is simply suggesting that changes be made to HB 88 to address the organization's concerns, perhaps, for example, by adopting the more general language used in similar proposed legislation in Arizona that reads [original punctuation, though with capitalization changes, provided]:

A court, arbitrator, administrative agency or other adjudicative, mediation or enforcement authority shall not enforce a foreign law if doing so would violate a right guaranteed by the constitution of this state or of the United States or conflict with the laws of the United States or of this state.

[2:43:56 PM](#)

MARIA RENSEL expressed appreciation for HB 88, and said she would be speaking in favor of it, now believing that its adoption is necessary in order to address such things as un-ratified international conventions, for example, that could nonetheless be used to inform court decisions in Alaska.

[2:48:21 PM](#)

DAVID E. HECKERT, mentioning that he has provided written comments to the committee, and referring to a hypothetical example, opined that HB 88 would be of great benefit to people in Alaska - whether they be citizens, visitors, or immigrants - providing them a tool with which to seek redress from oppressive foreign laws. In conclusion, he expressed his discomfort that people would even question whether the Constitution should be the supreme law of the land in America.

CHAIR GATTO announced that HB 88 [Version D] would be held over.

[2:51:06 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:51 p.m.