

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

March 13, 2015

1:04 p.m.

MEMBERS PRESENT

Representative Gabrielle LeDoux, Chair
Representative Wes Keller, Vice Chair
Representative Bob Lynn
Representative Matt Claman
Representative Neal Foster
Representative Max Gruenberg

MEMBERS ABSENT

Representative Charisse Millett

COMMITTEE CALENDAR

CONFIRMATION HEARING(S):

Lieutenant Governor Successor

Craig Fleener - Anchorage

- CONFIRMATION(S) ADVANCED

PRESENTATION - EXPANDING ALASKA NATIVE CRIMINAL JURISDICTION TO
COMBAT DOMESTIC VIOLENCE, ALCOHOL ABUSE, AND
SEXUAL ASSAULT

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

SAMUEL GOTTSTEIN, Academic Law Fellow
Clough Center for the Study of Constitutional Democracy
Boston, Massachusetts

POSITION STATEMENT: Presented his published article in the
Boston Law Review.

REPRESENTATIVE BRYCE EDGMON

Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: During the presentation offered testimony.

CRAIG FLEENER

Anchorage, Alaska

POSITION STATEMENT: As appointee to the position of Lieutenant Governor Successor, discussed his qualifications and answered questions.

ACTION NARRATIVE

[1:04:47 PM](#)

CHAIR GABRIELLE LEDOUX called the House Judiciary Standing Committee meeting to order at 1:04 p.m. Representative Keller, Lynn, Claman, and LeDoux were present at the call to order. Representative Gruenberg and Foster arrived as the meeting was in progress.

CHAIR LEDOUX announced that the first order of business would be a presentation from Samuel Gottstein regarding expanding Alaska Native criminal jurisdiction to combat domestic violence, alcohol abuse, and sexual assault.

PRESENTATION - EXPANDING ALASKA NATIVE CRIMINAL JURISDICTION TO COMBAT DOMESTIC VIOLENCE, ALCOHOL ABUSE, AND SEXUAL ASSAULT

[1:05:21 PM](#)

SAMUEL GOTTSTEIN, Academic Law Fellow, Clough Center for the Study of Constitutional Democracy, paraphrased his testimony as follows [original punctuation provided]:

Good afternoon Chair LeDoux, members of the committee. I'd like to thank you all, especially the Chair, for inviting me to testify in person this afternoon.

My name is Samuel Gottstein, and I am in my last semester at Boston College Law School, where I'm on the editorial board of the Boston College Law Review. I am also an Academic Law Fellow of the Clough Center for the Study of Constitutional Democracy. I'm here to talk about my recent publication in the Boston College Law Review, which examines Alaska Native tribal jurisdiction, and illuminates ways the Alaska

State Legislature can, and should, expand that jurisdiction over certain criminal cases in rural Alaska Native communities. I realize my time today is short, so I will do my best to summarize the salient points as quickly and as thoroughly as I can, to allow time for questions.

To set the stage, I'd like to highlight some depressing statistics which underscore the importance of this topic. Although Alaska Natives comprise approximately 15% of Alaska's population, Alaska Natives make up 37% of the prison population. 47% of reported rape victims in Alaska are Alaska Native. More than half of women in the Nome Census Area have experienced intimate partner violence, and that is a conservative estimate. Finally, Alaska Native suicide rates are 400% higher than the national average. What we have here is an epidemic. As I will discuss further, you have a chance to address this problem.

Before presenting some options to help solve these problems, I'd like to offer a bit of background. American Indian law is known in the legal field for being particularly complicated, and the legal status of Alaska Natives, even more so. It is also an area where, if you put two lawyers together in a room, they will have five different opinions. And I say this knowing that there are three attorneys on this committee [wait for the laugh]

To start with, Congress has plenary power over the legal status of Alaska Natives. For non-lawyers, this means that Congress has the ultimate say. However, Alaska is a PL-280 state, which means that Congress has also given the State of Alaska criminal jurisdiction over Alaska Native issues, a role otherwise reserved for the federal government. Along with that, the Alaska Native Claims Settlement Act in 1971 is widely viewed as the most important congressional act in Alaska Native law. ANCSA granted Alaska Natives 44 million acres of land and the equivalent of over \$5 billion, in today's dollars, in exchange for extinguishing all other Alaska Native land claims and sovereignty. This was the foundation of the 1998 U.S. Supreme Court decision *Alaska v. Native Village of Venetie*, where the Court unanimously

held that there is no "Indian country" in Alaska. Indeed, in that opinion, the U.S. Supreme Court said that "Congress stated explicitly that ANCSA's settlement provisions were intended to avoid a 'lengthy wardship or trusteeship.'" However, the very next year, in John v. Baker, the Alaska Supreme Court ruled that Alaska Natives still retained the ability to regulate "domestic relations among members." This decision, which has been unanimously affirmed, gives Alaska Natives jurisdiction over child custody and family law cases related to their members. That, however, is about as far as Alaska Native tribal jurisdiction goes today. Recent congressional legislation, like the Tribal Law and Order Act of 2010 and the Reauthorization of the Violence Against Women Act of 2013, is in line with the powers provided to Alaska as a PL-280 state. Even though the Alaska exemption to the Violence Against Women Act was recently repealed, because there is no Indian country in Alaska, further state or federal action is still required for that legislation to become a meaningful tool in Alaska for addressing domestic violence and sexual assault.

Charged by Congress with assessing American Indian criminal justice systems, the Indian Law and Order Commission published its report in November of 2013, and spent a whole chapter on the status of Alaska Native tribal jurisdiction. I believe the Chair of that Commission (Troy Eid) testified before the Legislature last session. That report strongly urges Congress to solve some of the problems with what it sees as Alaska's overly centralized administration of justice. Then, this past December, the Bureau of Indian Affairs added to the mix by adopting a final rule allowing Alaska Native tribes to petition the Secretary of the Interior to put land into trust. This may give Alaska Natives the ability to assert some level of sovereignty, although any laws, regulations, or contracts would be subject to the Secretary's approval. Although it is possible that the federal government could step in to take meaningful action to address this epidemic in rural Alaska, there are two general problems with waiting for the federal government to act. As a practical matter, it is unlikely that Congress will act. In a

post-ANCSA world, on the heels of the repeal of Alaska's exemption from the Violence Against Women Act, I would be surprised if Congress has the will to change the status quo in the near future.

Secondly, if the federal government did step in, either through congressional action or through taking lands into trust, those actions would be unappealing to Alaskans. A trust designation or extension of American Indian policy from the Lower 48 would not only create a jurisdictional maze that would likely complicate matters, it would fail to tailor a solution to the needs of Alaska, and also lack necessary guarantees of constitutional protections for all Alaskans in tribal courts. In short, federal action would be like using a hammer to kill a mosquito. It might get the job done, but in the process, it will likely also cause a great deal of collateral damage.

Rather than wait for the federal government to come up with an imperfect solution, the Alaska State Legislature should act preemptively to grant limited criminal jurisdiction to rural Alaska Native communities to allow them to combat domestic violence, alcohol abuse, and sexual assault. Doing so would not only avoid federal overreach, but would offer a cost-effective way to make rural Alaska Native people and communities safer by more directly involving people who live in those communities.

In addition to increasing public safety in rural Alaska and giving the Feds less reason to meddle in our affairs, State legislative action would bring the benefit of preserving the State's sovereignty. The details would naturally need to be worked out, but the Legislature could, for example, mandate that such an expansion of tribal jurisdiction is subject to Legislative approval which could be revoked or cut back at any time. Under such a scenario, the State would call the shots as to what crimes and who could be prosecuted in Alaska Native tribal courts. To ensure that Alaskan's constitutional rights are protected, the State could require that all tribal court decisions are appealable to State courts. The State could also dictate exactly where such tribal authority would apply and define the specific

geographic scope of each of tribal court. Most importantly, this decentralization could be done at minimal cost, and lead to substantial additional benefits in the form of lower recidivism rates, decreased court costs, and safer, healthier communities.

In her State of the Judiciary address this year, Chief Justice Dana Fabe underscored both the importance and the benefits a limited expansion of criminal jurisdiction for tribal courts could bring. "[S]olutions we impose from afar will continue to miss the mark if they fail to take local [communities] . . . into account." "[S]olutions to the problems of rural Alaska lie in collaborative efforts that bring local people . . . to the table." "[A]s the state system endeavors to do more with less, . . . [expanding the role of tribal courts] presents an opportunity for significant cost savings. . . ."

From an academic perspective, what is most interesting to me is just how ripe this issue is for Legislative action. The current administration here in Alaska is actively examining the issue as we speak, and with recent rule changes by the Feds, we are presented with an unusual opportunity to help solve a serious, longstanding systemic public safety problem in rural Alaska Native communities. And, again, of crucial importance during this time of tight budgetary constraints, this can all be done while actually saving money.

In short, you are presented with a unique opportunity to take action now that will have a real impact on the lives of Alaska Natives at a time when there are life-threatening problems that "'cry out' for meaningful solutions." I strongly believe that expanding limited tribal jurisdiction over selected criminal matters in rural Alaska Native communities is a practical, common-sense idea whose time has come.

This concludes my presentation. I am happy to try to answer any questions the Committee may have.

[1:15:34 PM](#)

REPRESENTATIVE LYNN asked if Metlakatla [m tɫ kætɫ (Tsimshian: Maaxłakxaałə "Saltwater pass")] was considered Indian country.

MR. GOTTSTEIN responded that it is the one exception to rule, that it is a reservation and is considered Indian country.

REPRESENTATIVE LYNN confirmed that the presentation would not apply to Metlakatla.

MR. GOTTSTEIN answered in the affirmative.

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REPRESENTATIVE LYNN offered a scenario of a non-native committing a crime under Mr. Gottstein's plan and asked if they would be subject to tribal law or only Natives.

MR. GOTTSTEIN answered that it would be up to the legislature to decide. He opined it would make sense for it to apply to non-members as well as members. He opined that the key under this idea is that the state can ensure the constitutional rights of all Alaskans are protected. He explained it could be accomplished by saying that everyone has a right to an attorney, and abides by the United States Constitutional rights. In the case of a violation, it could be appealed in state court to make sure there are no problems, he said.

MR. GOTTSTEIN responded to Representative Lynn's question in the affirmative in that people would be covered under the United States Constitution and the Alaska State Constitution.

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CHAIR LEDOUX referred to Mr. Gottstein's appeal response and stated that sometimes things can be appealed and the appeals court does not consider facts, yet other times they do consider facts within an appeal, but actually it is another trial. She asked if he envisioned it as another trial or where deference is given to the decision of the tribal court.

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MR. GOTTSTEIN said the legislature could decide what level of deference to give. He opined that it made sense not to have a de novo trial right away, and not to give it much deference.

CHAIR LEDOUX opined that in legal parlance there is a middle ground, but she was not certain.

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REPRESENTATIVE KELLER offered that philosophically he moves toward local control whether judicial, enforcement, or educational, and there is a fascinating element of what you bring forward. He said the link was not clear between tribal sovereignty increase and reduction of recidivism rates in prison, suicide rate, and rape, and assumed there was information as to whether Metlakatla is doing better than others. The United States of America jurisdiction, and by default Alaska, is based on equality of all human beings, inherent rights, and natural law, and ultimately, he pointed out, that is the foundation of who Americans and Alaskans are. Sovereignty of the United States and Alaska is "we the people" based on "we the people." He said he struggles with how tribal sovereignty would improve, how it would collaborate, and how it would maintain those values under which we all have, and opined are ultimate rights for everyone no matter what tribe or race. He asked how tribal sovereignty will maintain those things rather than become a divisive issue.

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MR. GOTTSTEIN agreed with Representative Keller and advised it was Governor Hickel who gave an administrative order that Alaska is one nation and one people. He expressed that the beauty of this plan is that the state would not give up any sovereignty as it would be a delegation of limited criminal jurisdictions, depending on what the legislature and limits as to how far the tribal courts could go. He related that part of the problem with finding a study that says "this" will absolutely going to solve problems is the small number of times people have gone to tribal court. He explained that Kake has been doing circle sentencing for approximately 10 years and there have been under 50 cases. It is hard in the sense of minor consuming cases to take that data and say this is definitely the projection going forward, he said. Conceptually, he related that he agrees with Representative Keller in giving more power back to the community as it would be helpful, rather than the community deciding it can't do anything about the problem and wait for the Village Public Safety Officer (VPSO) or the Alaska State Troopers to take care of the problem. Therefore, he remarked, giving the

communities the power and ability to determine different solutions to help solve these problems, it is worth a shot and if nothing else have a pilot program.

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REPRESENTATIVE KELLER stated he felt a little uncomfortable with the idea that pilot programs and government proposed operations would actually save money. He related that he is all for circle justice and reform justice and believes it is a fantastic idea, but he has been told they are expensive. Even though the legislature does not put money into it, the principles are free to be applied in any community in the State of Alaska right now and that a community could do this without legislation and changing its structure, he offered.

MR. GOTTSTEIN responded that in terms of the money aspect he agrees with Representative Keller and noted that in Arizona one tribe has a \$21 million court building and Alaska doesn't have anything like that. In terms of funding a pilot program, it could just be legislation allowing it to happen and allowing the tribal courts to prove that they could take it on. Yes, he stated, the community can come together and attempt to stop having these problems, but on the other side they would not have the ability to say a person has to be incarcerated.

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REPRESENTATIVE FOSTER related that he could envision this in many of his communities like Wales where most of the people living there are part of the tribe. He questioned how Mr. Gottstein envisioned this working in a town like Nome, Kotzebue, Bethel, or Barrow, where most people living there are probably not part of the local tribe, and have a local court there already. He continued that there is the issue of the Kawerak, Inc., non-profit in Nome which helps to represent a lot of the tribes in the region in terms of collectively bringing resources together to administer different programs. He opined they might be the obvious choice in terms of a tribal court that would be part of their program, but then there is also the Nome Eskimo community which is the actual tribe in Nome. It gets complicated and he asked Mr. Gottstein's thoughts in terms of what it would look like in a place that is more mixed, like a hub.

MR. GOTTSTEIN responded that it does get more complicated when there is a hub and it is the same reason why some sort of circle

sentencing would not work in Anchorage. In Anchorage, for example, there is not the same kind of tight-knit community bond between everyone. He noted that as the community expands it gets harder to have something like what is existing in Kake. Yet, on the flip side there are more people to have a base and create more infrastructure. He commented for something like this, it depends upon the various communities and mindful of the different players and stakeholders.

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REPRESENTATIVE CLAMAN surmised that joint jurisdiction means that someone could be considered both within the existing state courts, or by agreement or designation have their case heard in a tribal court or tribal entity. He questioned if that is what has been going on in Kake as his general understanding is that when all parties agree it will go to circle sentencing. He surmised that the community is much more engaged in the defendant's follow up and aftercare. He asked whether Mr. Gottstein was looking at broader jurisdiction than just voluntary jurisdiction where the parties agree to circle sentencing.

MR. GOTTSTEIN responded that he is looking at something more broadly than what currently exists. He noted there was a recent rule change for the Criminal Rules of Procedure that gives a trial judge discretion to send a case down to a tribal court as long as all parties agree. He further noted the tribal court would have the authority to impose a fine of up to \$250, which is the current status quo. He reiterated that it is all voluntary, but his plan would change it a bit and move the needle toward allowing more tribal jurisdiction.

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REPRESENTATIVE CLAMAN noted that in the scheme of things a \$250 fine is not a lot of authority to impose a penalty. He asked if the idea is a hybrid of the state allowing municipalities to take on some misdemeanor crimes, but no felony jurisdiction. He questioned whether the tribal courts would receive some lower level jurisdiction, but possibly not as great a jurisdiction depending upon what the legislature decides.

MR. GOTTSTEIN answered that right now it is in the lower level misdemeanor category of up to a \$250 fine and the legislature could determine which crimes it would be. He opined it would have to start off at a low level with caps, for example, in the

lower-48 states within Indian country, the caps are three years of incarceration per offense which was recently increased from one year. He further opined that is a good starting point in looking at the issue in terms of maximum penalties.

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REPRESENTATIVE CLAMAN quiered how the tribal circle sentencing experiment in Kake is working.

CHAIR LEDOUX asked Mr. Gottstein to describe circle sentencing.

MR. GOTTSTEIN explained that circle sentencing is when all of the stakeholders meet together including interested community members who sit in a circle and have one turn to talk each and talk through what the problems are with the specific offense. It is not so much of a focus on whether the defendant is a bad person, but that the person did something bad. The goal is to show the community cares about the person and wants the person to know they are cared for, but their behavior was not acceptable, he explained. In terms of how well it is going, he reiterated that there is limited data and it is hard to draw any conclusions based off of 10 years of data and less than 50 cases. Although, he related, it has shown that 1 year out, recidivism rates are much lower than they would be in the traditional setting.

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REPRESENTATIVE KELLER said an element of circle sentencing is that it gets the victim and the perpetrator together in the circle so instead of a crime against the state, what is emphasized is a crime against a person. He described the process as refreshing and labor intensive, although a perpetrator of a violent crime would not be put together with the victim. In the event significant others from both parties are able to work it out reduces recidivism because there is a chance for the perpetrator to pay his/her debt on a personal basis. He stated he would like to go in the direction of borough courts, and borough law enforcement, as it would bring the level of sovereignty and jurisdiction down to the local level and remove some of the red flags. He asked Mr. Gottstein to consider proposing legislation on that issue and to look him up.

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REPRESENTATIVE CLAMAN followed up on Representative Keller's comments in that sentencing factors, AS 12.55.005, are community condemnation of the offender and reformation of the offender so there is less re-offending. He opined that the experiment in Kake has been successful on both counts because the offender is integrated into the community and recognizes they have more accountability with other people in the community.

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REPRESENTATIVE GRUENBERG said he was somewhat following along with the comments of Representative Claman, as it follows the phrase in the Alaska State Constitution, Article I, Section 12 concerning community condemnation where the community becomes more involved which brings the community standards. He opined that when the result is less recidivism by bringing more involvement into the community, then the process is more meaningful to the defendant.

MR. GOTTSTEIN agreed with Representative Gruenberg that there have been studies as to how well the tribal court process has been perceived and it appears there is a strong preference from the community, victims, and defendant, that the tribal court process was a better process and had more legitimacy to a certain extent.

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REPRESENTATIVE GRUENBERG said the sociological makeup of the smaller rural Native American communities may vary as there could be a small community that doesn't have one particular tribe. He opined it would be interesting to see how models like this could be carried out in various sizes and sociological mixes where it would and wouldn't work. He asked where this works and why.

[1:37:56 PM](#)

CHAIR LEDOUX said the more local control the better, but she was concerned about cases wherein a tribal court is involved, but not everyone is a member of that tribe, or they belong to another smaller tribe from Southeast and living in Nome. She said her concern is that these folks do not get a chance to vote in the local elections. The country has a long history of no taxation without representation and, she stated, finds it applicable. She questioned how this could be crafted so people could vote in circumstances in tribal government whether or not

they are not part of the tribe. They couldn't vote on financial issues, but possibly people could vote on criminal issues. In that manner, she remarked, everyone under the jurisdiction of this tribal justice has some representation in how it is formed.

MR. GOTTSTEIN responded that it goes back to the duty of the state solution which is that the state can determine who would be subject to the tribal courts and what protections would be in place. In terms of voting on some of the criminal aspects, it is more a question of traveling to a jurisdiction and accepting whatever the rules and laws are of the land there.

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CHAIR LEDOUX expressed that if a person travels to Virginia and stays in Virginia that person can obtain Virginia residency and vote.

MR. GOTTSTEIN responded that in this case the state would determine all of the criminal jurisdictional questions. As a resident of Alaska, in a sense, a person has a say in his/her representative who then has a say in how the laws would work.

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REPRESENTATIVE BRYCE EDGMON, Alaska State Legislature, said the committee should take a "go slower" approach as there are still outstanding jurisdictional issues, issues with authority, and relationships with the 100 or so active tribes in the state that vary from one end of the spectrum to the other. The opportunity is significant in that the criminal justice system in Bush Alaska is already overburdened and it is at the cusp of cutting back corrections, public safety, courts, Department of Law (DOL). He used the scenario of the "broken window syndrome" in that people going to jail from Bush villages initially go to jail for small and insignificant items tied to substance abuse or alcohol, and over a period of events end up being hard core felons. He argued that there is a better way of doing it through education, working with various agencies, and building a stronger understanding of what is out there and what legally can be done at this point.

CONFIRMATION HEARING(S):
LIEUTENANT GOVERNOR SUCCESSOR

[1:44:17 PM](#)

CHAIR LEDOUX brought before the committee the appointment of Craig Fleener to the position of Lieutenant Governor Successor. [Packets contain biographical information on Mr. Fleener.]

CHAIR LEDOUX advised the committee that it would be hearing the qualifications of Mr. Fleener today and recommending his name be referred to the Joint House and Senate for consideration. Chair LeDoux reminded the committee that its job is only to review the history and qualifications of Mr. Fleener. She stated there will be no vote for or against his confirmation in this committee. She highlighted that committee members should feel free to ask questions as they arrive, but to bear in mind that the committee is not voting on his qualifications, merely reviewing them.

CONFIRMATION(S) :
LIEUTENANT GOVERNOR SUCCESSOR

[1:45:06 PM](#)

CRAIG FLEENER said he is originally from Ft. Yukon and currently resides in Anchorage. He explained that he has had two parallel career paths, in the military and as a civilian. He stated he has served a total of 27 years in the military with the majority being in the National Guard. He is currently a Major and is Chief of Wing Intelligence for the 176th Wing out of Joint Base Elmendorf-Richardson (JBER). On the civilian side he has been a diesel mechanic, janitor, fur buyer, involved in natural resources tribal work, and has a wildlife degree. He said he has completed substantial work towards a master's degree at the University of Calgary in Alberta but did not graduate as he was activated by the National Guard a couple of times. Although, he does have a master's degree in International Intelligence and his focus has been on Arctic Sovereignty and Alaska's place in the Arctic. Most recently he was Deputy Commissioner at the Department of Fish & Game, prior to that he was the Director of the Division of Subsistence, served on the Alaska Board of Game and the Eastern Interior Federal Regional Advisory Council, including a wide array of boards and committees, served on his tribal council in Ft. Yukon, and was on the Ft. Yukon City Council.

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REPRESENTATIVE FOSTER remarked that Mr. Fleener has a diverse background and that in rural Alaska it is called being a Renaissance person who can do a bit of everything.

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REPRESENTATIVE CLAMAN said he recognizes that the position Mr. Fleener is being considered is one in which he is able to carry on with his regular job, and hopefully is never called upon to perform.

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REPRESENTATIVE LYNN asked if he had any "off the cuff" comments regarding anything he may have heard in the previous discussion on tribal courts.

MR. FLEENER responded that he has thought about this issue for most of his life because there are communities in peril. One of the big issues in helping communities do a better job is localize discipline on how these things are handled or meted out. He noted that the farther away a person has to travel outside of their community to receive their fine or attend court becomes is not being tried by a jury of your peers. When a defendant travels far from the community he/she doesn't have the community looking at them as part of their place and loses responsibility to their own community. If it was me, he said, and I did something crazy and had to look across the room at my grandmother I would be ashamed. He opined that shaming in a community is a powerful thing so he has always supported localizing or staying as close to the individual as possible for justice or many things. He further opined that Alaskans try to do things at too high of a level. He likes the idea of pushing it down to the local level and local people holding a local person responsible for their actions, and then paying back to the community because it will last.

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CHAIR LEDOUX opened public testimony, and after ascertaining no one wished to testify closed public testimony.

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REPRESENTATIVE KELLER moved to forward the name of Craig Fleener to the joint session of the House and Senate for confirmation. There being no objection, the confirmation of Craig Fleener is advanced from the House Judiciary Standing Committee.

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ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 1:53 p.m.