

**2017 HOUSE JUDICIARY**

**HB 1304**

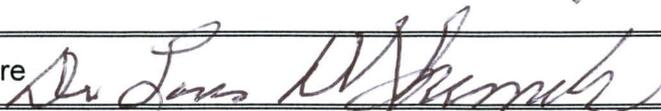
# 2017 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee  
Prairie Room, State Capitol

HB 1304  
1/24/2017  
27295

- Subcommittee  
 Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Relating to prohibiting the wearing of masks, hoods, and face coverings at certain functions; and to provide a penalty.

## Minutes:

1,2,3

**Chairman K. Koppelman:** Opened the hearing on HB 1304.

**Rep. Carlson:** Introduced the bill. (1:00- 7:07) Went over the bill. We are attempting This isn't only about the protestors down south. Handing out photo's (#1) When you look at these photo's they may or may not have been doing criminal activities. I am always concerned when there is a reason to hide your identity when you are creating some kind of disturbance or an act. Our statue is silent about masks. I am sure there are going to be concerns raised about the first amendment rights, but I am convinced when you look at these photos you will see that some of these may or may not have been for honorable reasons that they were hiding their faces.

**Representative Klemin:** This bill is a heavy burden on the prosecutor to prove that wearing of the mask was done with the intent to conceal that individual's identity and not for some other reason.

**Rep. Carlson:** Yes there should be a burden of proof. If there is better language, please change it. If it is too heavy of a burden, what is the solution?

**Representative Klemin:** I thought you said this was to take care of minors?

**Rep. Carlson:** I am not sure of the 17 number. It was used in other states.

**Representative Klemin:** Under the age of 18 would that be acceptable?

**Rep. Carlson:** That is fine with me because that also puts them in the category of an adult.

**Chairman K. Koppelman:** Would that be the only intent; or the intent of terrorizing?

**Rep. Carlson:** The burden of proof is always the hard part. Why do you need a mask on? In every town in last weekend they were arresting people were masked. I don't believe the level of punishment is very severe in here. I think it is a public safety issue for the safety of the public that it out there. I am speaking of the DAPL protest. They have every right to protest, but they do not have a right to hid their identity. When you have a statue that is silent on this I believe it handicaps police officers.

**Representative Hanson:** I have a question about the penalty aspect? If a person commits a crime, there is a penalty associated with that crime. So if they wear a mask in the process of committing that crime this bill would actually increase the penalty by adding a Class A misdemeanor which carries up to a \$3000 fine or a 1 year in prison so they could be subject to two penalties and then also with a penalty associated with wearing a mask. And also a penalty relating to the mask wearing.

**Rep. Carlson:** That is a good point. If it legal and why was it done. Were they hiding an illegal activity of terrorizing? I am trying to give law enforcement assistance so they can protect their safety.

**Representative Hanson:** You mentioned other states that have laws in place for the wearing of masks. Can you provide a list of the other states?

**Rep. Carlson:** Legislative Counsel can provide that. I will have them do that.

**Rep. Porter:** It is our job and responsibility to bring forth measures and laws that have been directly identified as an issue. Related to the incidents going on by the protestors. (17:00-21:10) We need to look at this bill as another tool.

**Representative Hanson:** It seems we already have laws on terrorizing and throwing a molotov cocktail at our law enforcement officers. So this would be increasing the penalty because of adding the mask. Are the current laws we have not adequate?

**Rep. Porter:** I would say they aren't because isn't a reason to stop a person from masking prior to the commission of that crime. By making yourself and making it impossible to identify who did the crime you can be a complete repeat offender as we have seen inside of this protest since August 10<sup>th</sup>. They mask themselves so law enforcement can't get their picture and run them through their data bases to find out who they are and what they are doing here. There is a problem with an individual standing at a riot or terrorizing event.

**Chairman K. Koppelman:** I am not seeing this bill calls for an enhancement of another crime. I am seeing it creating a new offense while doing somethings that are not criminal.

**Representative Hanson:** If they have the intention of committing a crime while wearing a mask? How would law enforcement know this?

**Rep. Porter:** That falls back into the expertise of this committee to word it correctly.

**Representative Jones:** I see this protest starting out as a peaceful protest and with honorable goals and then I see as being hijacked. I question the funding and activates that

have gotten behind it. I think we need to be proactive on this. Have you seen the definition of protest set side by side with a terrorist?

**Rep. Porter:** I have not. I think there are some that think they are intertwined.

**Representative Jones:** My research has shown this is in a realm of terrorism.

**Representative Klemin:** The way this bill is written it would take effect August 1; Is there some reason you did not put an emergency clause on it?

**Rep. Porter:** No there is not. It should have the emergency clause on it.

**Dr. Gaylynn Becker, Bismarck, ND:** (28:30) I have dealt with a lot of people relating to stress with regards to the DAPL protest. It is a safety thing. Relating to an issue where his vehicle was vandalized and they could not identify the vandals because they were wearing masks. We all need to support this bill. In support of the bill.

**Representative Simons:** If we had this bill in place they would still been wearing hoody's. they would take the hoody's off if they were a dumb criminal.

**Gaylynn Becker:** What right do they have to wear masks? I don't see people walking around Bismarck with masks on. Otherwise if they are it is for a reason.

**Representative Simons:** Stating occasions where they were masked and one was Boston Tea Party. Making a crime that is I am not sure about.

**Gaylynn Becker:** I can see that. Discussed the Boston Tea Party. In ND is the government so bad. Where is the fine line? To many people are paying a heavy price when law enforcement out here is paid a heavy price for their injuries and the PTSD some of them are suffering.

Opposition:

**Jennifer Cook, Policy Director for the American Civil Liberties Union of ND:** (37:06-48:00) (#2 & #3) Went over the testimony and handouts. We urge a do not pass on this bill. Otherwise we urge the bill be amendment on first amendment that is attached. If you pass the bill as amended, we are concerned that there would be selected or arbitrary use of this law on protestors. Concerned if this bill would do what the sponsors intended to do. This bill would persuade persons from wearing masked to conceal their identity for criminal purposes. The further crimination of an individual who is already committed a crime and has the previous committee member asked whether this is enhancing a penalty? In a sense if you mirror this bill to only when someone is committing a crime you have already got them if you catch them on the crime they are committing. So adding another penalty on concerns us greatly. We would prefer the bill would get a do not pass.

**Representative Hanson:** Rep. Porter called this a probable cause to talk to a person based on tell me what the current law enforcement officer and they would see them later they could see that this person was potentially involved in this crime so they would have probable cause

to talk to that person. Can you tell me more about the current capabilities of a law enforcement officer? Could a law enforcement officer already have probable cause to talk to a person based on video capture or a still camera capture based on a person's height or hair color or built?

**Jennifer Cook:** Yes. There are already mechanisms in place in law. This could lead to profiling. That is what we are concerned about. Wearing a mask alone in public without anything more shouldn't allow officers to stop an individual.

**Representative Hanson:** My second question relates to intention to commit a crime? Tell me how law enforcement looks at the word intent?

**Jennifer Cook:** We try to figure out whether a mask alone will signify an intent to commit a crime and the ACLU and many others would say no. We are going to get into a very gray area.

**Representative Vetter:** When you included some pictures; why did you include hoodies in them because they are not covering their face?

**Jennifer Cook:** The bill does say under Section 1 paragraph 1 may not wear a mask hood and what a hood is not defined in the bill.

**Representative Vetter:** You are saying that covering your face is an act of free speech; maybe if you have stuff printed on there. In reality you are covering your mouth yet that is an act of free speech.

**Jennifer Cook:** These pictures could be a form of expressive conduct because you may be protesting a rule or law that you speak it in a certain area and covering your mouth even with a bandana or tape also wearing a hood while you are doing it conceals most of your identity so that would be considered an expressive form of conduct just like the arm bands or a pin.

**Representative Klemin:** What if you are wearing this mask on private property while engaging in a demonstration as defined on this bill.

**Jennifer Cook:** First amendment rights on private property are not necessarily the same as public property. Enforcement would be a concern.

**Representative Simons:** In Dickinson the mall has no hoodies. It is looked at as a mask and the new cameras are low at Walmart because they are wearing hoodies.

**Representative Vetter:** Covering your face with a bandana; wouldn't that as far as the speech you are trying to promote a typical bank robber look? Is it used in a peaceful look?

**Jennifer Cook:** There may be instances where someone maybe committing a crime; however expressive conduct is on the part of the wearer.

**Representative Satrom:** What is your perspective on how do you protect the rights of innocent neighbors?

**Chairman K. Koppelman:** In Michigan it sounds like those folks were protesting and they wore face covering in order to demonstrate their concern about the lack of air quality. This bill talks about what has to be proven before any of these charges would be found. You have to prove the intent to conceal identity.

**Jennifer Cook:** It does have the intent portion here. The concern is the rights of anonymity. In the Michigan case it was left to the prosecutor or law enforcement officer whether there is any type of expressive message there other than to conceal their identity and the mask did and would under this bill here. We should not be criminalizing protesting. They should not have to go through the courts to do this.

**Representative Vetter:** You are saying that covering your face is an act of free speech. In reality you are covering your mouth up, but that is an act of free speech.

**Jennifer Cook:** These pictures do not cover the whole realm of

**Representative Klemin:** What about if you are wearing this mask on private property while engaging on a demonstration?

**Jennifer Cook:** There is less concern on private property and wearing a mask. If they have no right

**Chairman K. Koppelman:** It would be the court.

**Representative Jones:** Do these amendments bring closer together the freedom of protestors and the rights of the people to travel the roads of ND uninhibited by terrorisms.

**Jennifer Cook:** I think the amendment would bring us closer, but I am still concerned if we passed an emergency measure to this that law enforcement will be put into a position to decide if an individual is indeed expressing first amendment rights or whether they are trying to escape or evade or commit a crime with a mask on.

**Chairman K. Koppelman:** Suppose this bill were law and there was a protest going on and law enforcement has reasonable suspect someone is wearing a mask for the propose of concealing them identify. We respect your right to wear a mask because your mask has a message on it, but we need to see your face and if the person were to do that and then put the mask back on would that satisfy your concern about how this might be applied?

**Jennifer Cook:** I don't think it alleviates the intent. Just the contact with the law enforcement officer because of the mask and only because of the mask would give us concern.

**Chairman K. Koppelman:** The prime sponsor said they researched this carefully and this appears to mirror those statues who have. You obviously disagree with the Attorneys of the Legislative Counsel.

**Jennifer Cook:** Yes I do respectfully disagree. The second circuit court's decision regarding the Klu Klux Klan case was the message of the hoof and robe was redundant. The cases that have been upheld have been directly related to Klu Klux Klan challenges so there is differences here.

**Chairman K. Koppelman:** I thought you said not drawing distinctions between types of protests or message or the people bringing the message.

**Ann Knutson, Bismarck, ND** (Mike not on) From October to April I have now laid myself open to criminal charges since I do dress for the cold winter weather.

**Chairman K. Koppelman:** The bill says it does not say winter covering.

**Ann Knutson:** It does not specify clothing.

**Susan Beehler, Morton County Resident** (mike not on) I hold the first amendment very dear. I have been targeted by having my opinions. Bills like this can have unintended consequences. Let's go after people breaking the law, but don't make it an offense.

Neutral: None

Hearing closed.

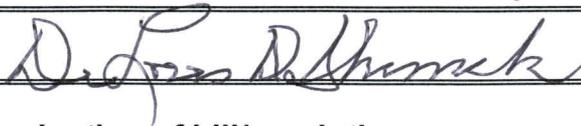
# 2017 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee  
Prairie Room, State Capitol

HB 1304  
2/1/2017  
27771

- Subcommittee  
 Conference Committee

Committee Clerk Signature



**Explanation or reason for introduction of bill/resolution:**

**Relating to prohibiting the wearing of masks, hoods, and face coverings at certain functions; and to provide a penalty.**

**Minutes:**

1, 2, 3

**Chairman K. Koppelman:** Reopened the meeting on HB 1304.

**Representative Vetter:** Could we fix this whole bill by making it a hog house. How do we prove intent? It may have some constitutional issues.

**Chairman K. Koppelman:** (#1) Proposed amendment. Went over it. (2:02-4:00)

**Representative Paur:** (#2) (4:08) Went over his proposed amendment. (#3) handed out Christopher Joseph testimony.

**Representative Roers Jones:** I am concerned about the constitutionality of this bill even with your amendment.

**Motion made to move your amendment 17.0311.01001 with the emergency clause by Representative Roers Jones: Seconded by Rep. Satrom.**

Discussion:

**Voice vote carried.**

**Do Pass as Amended Motion Made by Rep. Roers Jones; Seconded by Rep. Blum.**

Discussion:

**Representative Vetter:** I think we have a real problem since we are creating a Class A misdemeanor for wearing a mask just by itself. I am going to oppose this bill.

**Representative Simons:** I am with Mr. Vetter. We have a prison that is filling up and we are going to enact this bill. That is a huge deal to put this kind of label on them for wearing a mask.

**Chairman K. Koppelman:** A Class A misdemeanor carries a maximum penalty of one year; a fine of \$3000 or both. With the amendment it makes it a crime to wear a mask in committing a crime. Remember this is the first half.

**Representative Paur:** This is not the wearing of a mask. This is wearing a mask in the commission of a crime.

Roll Call Vote: 9 Yes 5 No 1 Absent Carrier: Rep. Paur

Closed.

February 1, 2017

2/1/17 DA

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1304

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 12.1-31 of the North Dakota Century Code, relating to prohibiting the wearing of masks, hoods, and face coverings during the commission of a criminal offense; to provide a penalty; and to declare an emergency.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1.** A new section to chapter 12.1-31 of the North Dakota Century Code is created and enacted as follows:

**Wearing of masks during commission of criminal offense prohibited.**

1. An individual may not wear a mask, hood, or other device that covers, hides, or conceals any portion of that individual's face for the purpose of:
  - a. Evading or escaping discovery, recognition, or identification during the commission of a criminal offense; or
  - b. Concealment, flight, or escape when the individual has been charged with, arrested for, or convicted of a criminal offense.
2. A violation of this section is a class A misdemeanor.

**SECTION 2. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly

**2017 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO 1304**

House Judiciary Committee

Subcommittee

Amendment LC# or Description: 17.0311.01001 with Em Clause

- Recommendation:  Adopt Amendment  
 Do Pass     Do Not Pass     Without Committee Recommendation  
 As Amended     Rerefer to Appropriations  
 Place on Consent Calendar  
 Other Actions:  Reconsider     \_\_\_\_\_

Motion Made By Rep Roers Jones Seconded By Rep. Satrom

Representatives	Yes	No	Representatives	Yes	No
Chairman K. Koppelman			Rep. Hanson		
Vice Chairman Karls			Rep. Nelson		
Rep. Blum					
Rep. Johnston					
Rep. Jones					
Rep. Klemin					
Rep. Magrum					
Rep. Maragos					
Rep. Paur					
Rep. Roers-Jones					
Rep. Satrom					
Rep. Simons					
Rep. Vetter					

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

**2017 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO 1304**

House Judiciary Committee

Subcommittee

Amendment LC# or Description: 17.0311.01002

- Recommendation:  Adopt Amendment  
 Do Pass  Do Not Pass  Without Committee Recommendation  
 As Amended  Rerefer to Appropriations  
 Place on Consent Calendar  
 Other Actions:  Reconsider  \_\_\_\_\_

Motion Made By Rep. Roers-Jones Seconded By Rep. Blum

Representatives	Yes	No	Representatives	Yes	No
Chairman K. Koppelman	✓		Rep. Hanson		✓
Vice Chairman Karls	✓		Rep. Nelson		✓
Rep. Blum	✓				
Rep. Johnston		✓			
Rep. Jones	✓				
Rep. Klemin	✓				
Rep. Magrum	✓				
Rep. Maragos	✓				
Rep. Paur	✓				
Rep. Roers-Jones	✓				
Rep. Satrom	✓				
Rep. Simons		✓			
Rep. Vetter		✓			

Total (Yes) 9 No 5

Absent 1

Floor Assignment : Rep. Paur

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1304: Judiciary Committee (Rep. K. Koppelman, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (9 YEAS, 5 NAYS, 1 ABSENT AND NOT VOTING). HB 1304 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 12.1-31 of the North Dakota Century Code, relating to prohibiting the wearing of masks, hoods, and face coverings during the commission of a criminal offense; to provide a penalty; and to declare an emergency.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1.** A new section to chapter 12.1-31 of the North Dakota Century Code is created and enacted as follows:

**Wearing of masks during commission of criminal offense prohibited.**

1. An individual may not wear a mask, hood, or other device that covers, hides, or conceals any portion of that individual's face for the purpose of:
  - a. Evading or escaping discovery, recognition, or identification during the commission of a criminal offense; or
  - b. Concealment, flight, or escape when the individual has been charged with, arrested for, or convicted of a criminal offense.
2. A violation of this section is a class A misdemeanor.

**SECTION 2. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly

**2017 SENATE JUDICIARY**

**HB 1304**

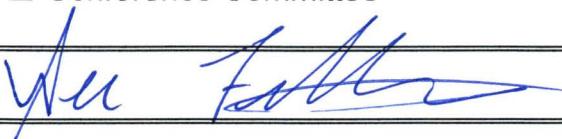
# 2017 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee  
Fort Lincoln Room, State Capitol

HB 1304  
2/13/2017  
28270

- Subcommittee  
 Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Relating to prohibiting the wearing of masks, hoods, and face coverings during the commission of a criminal offense; to provide a penalty; and to declare an emergency.

Minutes:

Testimony attached #

1,2,3

**Chairman Armstrong** called the committee to order on HB 1304. All committee members were present.

**Al Carlson, North Dakota Representative District 41**, introduced and testified in support of the bill. He handed out an attachment of pictures of people wearing masks (see attachment 2) to demonstrate the various types of masks people use to hide their identity while committing criminal mischief.

“As the bill started in the House, it changed quite a bit and Senator Armstrong and I have had different conversations regarding the strictest mask law in the country, which is in Washington DC. This puts several of the same things into statute and it’s much simpler bill today than what it was when it started. The question is, how do you make sure you’re not violating someone’s constitutional rights? If it’s cold, if it’s Halloween, if it’s a costume party, then it would make sense to wear a mask, but when it’s hot outside and you see a bunch of people in a group wearing masks perhaps in a place or doing an activity they shouldn’t be doing, then that changes things.”

**Chairman Armstrong** handed out proposed amendment to the bill. (see attachment 3)

**Senator Larson**: “I’m concerned with under section B on the bill, when the individual has been charged with, arrested for, or convicted of an offense. I’ve seen many times people come out of court and cover their heads to hide from media, I’m wondering if that was addressed in some of the amendments you were looking?”

**Representative Carlson**: “I’m not sure how that would be handled. If it needs to be clarified it needs to be clarified. If you’re not cold, then why are you wearing a mask?”

**Todd Porter, North Dakota Representative District 34**, testified in support of the bill.

"I'm a co-sponsor of the bill, Representative Carlson covered it really well. Really what it comes down to is that this is an intimidation factor. The masks are used for intimidation. When we are in these situations, law enforcement is having issues knowing who is causing a crime if they are wearing masks. These protesters throw feces at officers, rocks, bricks, many things. This bill takes away that concealment and intimidation factor."

**Senator Luick:** "Have you experienced any other peaceful protests in the state where they have been using masks like this?"

**Representative Porter:** "No, I have not. I have been to other peaceful protests and these protests were very well thought out and orchestrated and peaceful. They got the same point across without wearing masks."

**Andrew Alexis Varvel**, testified in opposition of the bill. (see attachment 1)

Andrew put on a costume over the head to show how it is important that we do not stop the 1<sup>st</sup> Amendment.

**Carel Two-Eagle, North Dakota citizen**, testified in opposition of the bill. No written testimony.

"I don't believe the wearing of a mask is automatically proof that you are planning to commit a crime. There are often many reasons why you would wear a mask. One of them is a friend of mine who had such bad burns to his face that if he doesn't wear a mask he can actually scare little kids. One time a little kid saw him and began screaming when he saw my cousin's burnt face. The mother even began calling him a monster. I can't see anyone that wouldn't wear a mask when they are going to commit a crime. They will do it either way. I think this is an overreach, and I think you should give some thought into that. I'm a firm believer in the bill of rights and this is the step in the wrong direction."

**Margaret Landin, Preservice Teacher**, testified in opposition of the bill. No written testimony.

"I already believe my people are profiled just because of the color of their skin. I fear my child may be wearing a mask because it's North Dakota and it's cold. As an educator, I don't agree with the banning of masks. I know you all may not agree with it, but I think you should consider it."

**Chairman Armstrong** closed the hearing on HB 1304.

No motions were made.

# 2017 SENATE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Fort Lincoln Room, State Capitol

HB 1304 Committee Work  
2/13/2017  
28298

- Subcommittee  
 Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Relating to prohibiting the wearing of masks, hoods, and face coverings during the commission of a criminal offense; to provide a penalty; and to declare an emergency.

**Minutes:**

**Attachments**

1

**Chairman Armstrong** began the discussion on HB 1304. All committee members were present.

Proposed Amendment was handed out to the committee. (see attachment 1)

**Chairman Armstrong** just asked the committee to review it because he wants to take it up tomorrow.

No motions were made.

**Chairman Armstrong** ended the discussion on HB 1304.

# 2017 SENATE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Fort Lincoln Room, State Capitol

HB 1304 Committee Work 2  
2/14/2017  
28368

- Subcommittee  
 Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Relating to prohibiting the wearing of masks, hoods, and face coverings during the commission of a criminal offense; to provide a penalty; and to declare an emergency.

**Minutes:**

**Attachments**

1

**Chairman Armstrong** began the discussion on HB 1304. All committee members were present.

The proposed Amendment was reviewed. (see attachment 1)

**Chairman Armstrong:** "I want specific intent language in this bill. What I mean by specific intent is there's two different ways you can do this. You can exclude for Halloween, law enforcement, exclude if you're cold, exclude for all of these things, and all of those arguments make sense. What you cannot wear a mask for is with the intent to intimidate, abuse, or harass an individual."

**Senator Larson:** "I don't see a problem with this bill. If I saw someone covering their face walking down the street I wouldn't be alarmed. But if that same person began throwing rocks at me or pounding on my window, then I'd be alarmed. It's the act of what he's doing that matters."

**Senator Myrdal:** "I agree."

**Chairman Armstrong:** "Does the committee know the absolute essential thing you need to charge somebody with a crime is? You must be able to identify him."

**Senator Myrdal** motioned to Adopt the Amendment. **Senator Luick** seconded.

Discussion followed:

**Senator Nelson:** "There's something about this bill I don't like. I've got Muslims in my district and they wear the full face cover and all you see is the eyes. Is that a mask, or a hood, or what? And who's to say whether or not she is concealing recognition?"

**Senator Myrdal:** "I think the language in the bill covers that. It says in the commission of a criminal offense. Which wouldn't apply to that."

**Senator Nelson:** "Well, who determines if it's a criminal offense? If someone is robbing a bank that's one thing. But if someone is standing on the street next to a group of people and the people are saying they are trying to stop traffic or commit a crime, who gets to determine that? Maybe they were just standing there? I feel a lot of these bills are just overreactions to what is going on down south, and there's one we haven't used for 50 years and all of a sudden we are going to resurrect it and enhance the penalties?"

A Roll Call Vote was taken. Yea: 6 Nay: 0 Absent: 0.  
The motion carried.

**Senator Luick** motioned Do Pass as Amended. **Senator Larson** seconded.

Discussion followed:

**Chairman Armstrong:** "I'd just point out that I understand your concerns, Senator Nelson, and they have been raised by more than just you regarding this issue. I would argue that religious liberty and those types of things are constitutionally protected and that will not change no matter what laws we pass."

A Roll Call Vote was taken. Yea: 5 Nay: 1 Absent: 0.  
The motion carried.

**Senator Myrdal** carried the bill.

**Chairman Armstrong** ended the discussion on HB 1304.

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1304

Page 1, line 9, remove "for the purpose of"

Page 1, line 10, replace "Evading" with "With the intent to intimidate, threaten, abuse, or harass any other individual;

b. For the purpose of evading"

Page 1, line 12, replace "b. Concealment" with:

"c. For the purpose of concealment"

Renumber accordingly

2017 SENATE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1304

Senate Judiciary Committee

Subcommittee

Amendment LC# or Description: 17.0311, 02061

Recommendation:  Adopt Amendment  
 Do Pass     Do Not Pass     Without Committee Recommendation  
 As Amended     Rerefer to Appropriations  
 Place on Consent Calendar  
Other Actions:  Reconsider

Motion Made By Senator Myrdal Seconded By Senator Luick

Senators	Yes	No	Senators	Yes	No
Chairman Armstrong	X		Senator Nelson	X	
Vice-Chair Larson	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Osland	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

**2017 SENATE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1304**

Senate Judiciary Committee

Subcommittee

Amendment LC# or Description: 17.0311.02001

Recommendation:  Adopt Amendment  
 Do Pass     Do Not Pass     Without Committee Recommendation  
 As Amended     Rerefer to Appropriations  
 Place on Consent Calendar  
Other Actions:  Reconsider   

Motion Made By Senator Luick Seconded By Senator Larson

Senators	Yes	No	Senators	Yes	No
Chairman Armstrong	X		Senator Nelson		X
Vice-Chair Larson	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Osland	X				

Total (Yes) 5 No 1

Absent 0

Floor Assignment Senator Myrdal

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1304, as engrossed: Judiciary Committee (Sen. Armstrong, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1304 was placed on the Sixth order on the calendar.

Page 1, line 9, remove "for the purpose of"

Page 1, line 10, replace "Evading" with "With the intent to intimidate, threaten, abuse, or harass any other individual;

b. For the purpose of evading"

Page 1, line 12, replace "b. Concealment" with:

"c. For the purpose of concealment"

Renumber accordingly

**2017 TESTIMONY**

**HB 1304**

#1  
1304  
1-24-17

UNCLASSIFIED

(U) SUBJECTS SEEN WEARING MASKS  
INVOLVED IN DAKOTA ACCESS PIPELINE  
RELATED PROTEST ACTIVITY

UNCLASSIFIED

UNCLASSIFIED



UNCLASSIFIED

UNCLASSIFIED



UNCLASSIFIED

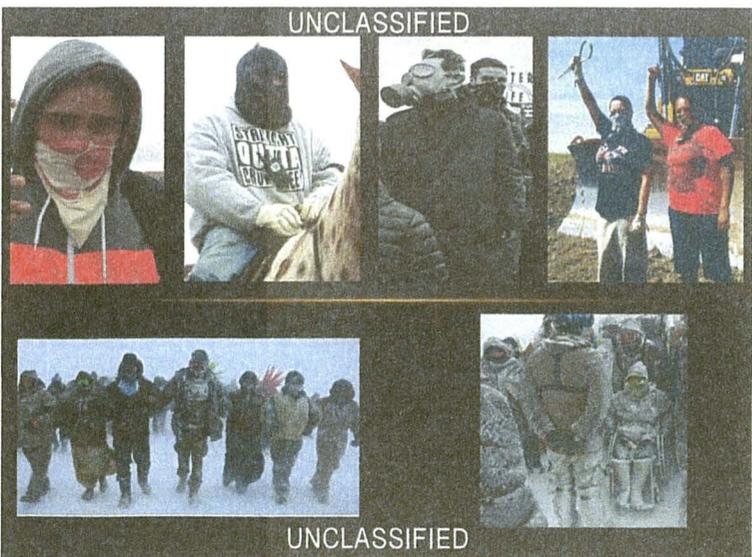
UNCLASSIFIED



UNCLASSIFIED

/





Testimony in Opposition of HB 1304 – Criminalizing Wearing Masks and Hoods in Public

# 2  
1304  
1-24-17

American Civil Liberties Union of North Dakota

House Judiciary Committee

January 24, 2017

Thank you, Chair Koppelman and members of the House Judiciary Committee for your time and attention this morning. My name is Jennifer Cook and I am the Policy Director for the American Civil Liberties Union of North Dakota. The ACLU of North Dakota is a nonprofit, nonpartisan organization with more than 6,000 members, activists, and followers. The ACLU of North Dakota is one of the state's leading organizations dedicated to advancing and defending civil liberties and civil rights.

HB 1304 as written is unconstitutional on several grounds. Most importantly, the proposed legislation unconstitutionally limits public speech and expression through the use of a mask or hood. The exceptions in Section 1, paragraph 2 could not withstand constitutional scrutiny because they would impermissibly favor certain categories of speech.

The U.S. Supreme Court has consistently interpreted the First Amendment to shield a broad and expansive array of speech. Although not all speech is constitutionally protected, longstanding precedent holds that laws should "not be susceptible of application to protected expression." Gooding v. Wilson 405 U.S. 518 (1972). Expression does not only come in the form of the spoken word, but also in the intentional expression of an idea through expressive activities. Texas v. Johnson, 491 U.S. 397, 404 (1989).

First, this mask bill is overbroad and vague in that it is not narrowly tailored to achieve a compelling government interest, and where a law's vague language gives it the potential to ban protected expression, it may be struck down under the "overbreadth doctrine."

When a state seeks to prevent or ban expressive activities, its actions or laws must be narrowly drawn to achieve a compelling state interest. Texas v. Johnson, 491 U.S. 397, 404 (1989). For instance, in Dayton v. Esrati, Mr. Esrati was arrested because he wore a ninja mask to a city commission meeting as a form of political protest. Dayton v. Esrati, 125 Ohio App. 3d 60, 73, 707 N.E.2d 1140, 1149 (1997). Because his mask was used to express First Amendment protected ideas, any act by Dayton preventing him from wearing the mask had to be narrowly tailored to achieve a compelling government purpose. Despite the town's interest in allaying public fear, maintaining decorum and order, and preventing distraction at a public meeting, his removal and arrest was deemed unconstitutional because it restricted Mr. Esrati's right to free expression in a public forum.

Although the mask bill provides at least eight exemptions that would not criminalize a North Dakotan who wears a mask or hood in public, it specifically forecloses the wearing of masks at the exact times when a mask would be most likely to express First Amendment protected ideas because it does not provide for demonstrators to wear a mask in traditional public forums like walkways or other public places.

It has long been commonplace to wear masks, hoods, or facial coverings in political protests, but the bill would ban this. In contemporary political protests, particularly in the case of recent anti-austerity and racial justice protests, the wearing of masks or hoods communicates very clear First Amendment protected content (see pictures of protesters wearing “Guy Fawkes” masks and “hoodies” worn in protest of the Trayvon Martin killing). Specifically, with regard to the NoDAPL protests, masks worn during these protests have clearly communicated First Amendment protected messages (see pictures of NoDAPL protesters wearing bandanas to protest the construction of an oil pipeline).

As was the case in Dayton, this mask bill is clearly overbroad and goes far beyond a narrowly tailored restriction designed to achieve a compelling state interest.

Second, the mask bill and its exemptions are an unconstitutional content-based restriction on protected speech. The recent Supreme Court decision of Reed v. Town of Gilbert outlawed ordinances that allow for some types of speech while practically limiting others. Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015). The Town of Gilbert allowed political signs on private property only when the sign’s message was designed to influence an election. Because signs can hold political messages that are not “designed to influence an election,” the Court saw this ordinance as a content-based restriction on other types of political speech. Thus, the court made clear that ordinances cannot favor some types of protected speech over others. Reed, 135 S.Ct. 2227 (2015).

The same is true for protected expressive activities that have the potential to communicate protected ideas. When cities create limited categories of permissible expression or restrict different categories of expression differently, they are now creating unconstitutional content-based speech restrictions. And, the court made clear that an ordinance that favors some speech over others would not be saved even if it was not intended to restrict protected speech.

The exceptions found in the mask bill clearly create categories of permissible expression with a mask while practically limiting other categories of speech. To allow holiday-related masks during that holiday’s season still restricts when a given mask can be worn and what type of mask can be worn. And, absurdly, a person could potentially wear a Guy Fawkes mask on Guy Fawkes Day, but not on any other day when trying to express a political belief. Under Reed, this type of unnecessary and nonsensical restriction creates a category that favors “holiday-related” expression through a mask but prevents non-holiday related protected expression through a mask. Thus, the statute is a content-based restriction on free expression and is unconstitutional.

Notably, Second Circuit precedent does not necessarily protect mask-wearers whose masks redundantly communicate protected speech. Church of Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197 (2d Cir. 2004). In Ku Klux Klan, the Second Circuit agreed with New York City that it could prevent Ku Klux Klan marchers from wearing facial coverings because they redundantly communicated the same message as their robes and hoods and held the mask or hood was not expressive speech.

To be clear, the ACLU of North Dakota believes that the First Amendment protects North Dakotans’ right to wear a facial covering in public and strongly disagrees with the Second Circuit decision in Ku Klux Klan. And in fact, the Ku Klux Klan decision directly contradicts with the U.S. Supreme Court’s holding in its

#2

seminal free speech in school case Tinker v. Des Moines, 393 U.S. 503 (1969) in which the Supreme Court held clothing, specifically, armbands is expressive. Therefore, any argument that this mask bill would survive constitutional scrutiny of the courts based on the Second Circuit's holding in Ku Klux Klan is likely faulty because this mask bill obviously views masks as expression as evidenced by the expression-based exemptions.

To conclude, we urge the committee to give the mask bill a Do Not Pass recommendation. For all the reasons mentioned above.

However, if the committee determines that it is necessary to recommend to the greater legislative body that a law criminalizing the wearing of a mask or hood by a North Dakota citizen in public is a necessary law, then we would urge the bill be amended in order to avoid infringing upon the First Amendment rights of this state's citizens and to avoid any unnecessary litigation on the issue of First Amendment questions.

#2

**AMENDMENT EXAMPLE FOR HB 1304**

In Honolulu, the city has an anti-mask ordinance that is narrowly tailored to achieve a compelling government interest. The ordinance prohibits the wearing of masks or disguises “for the purpose of:

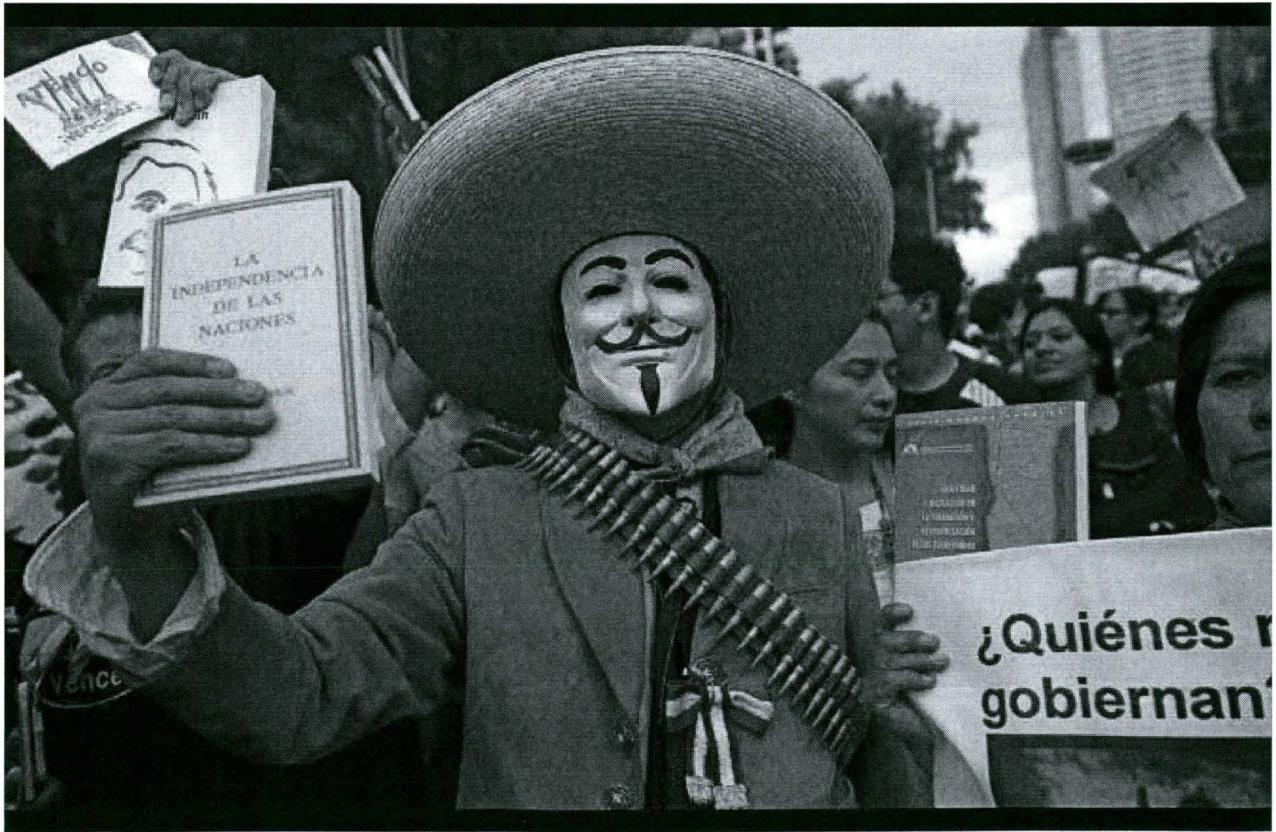
- (a) Evading or escaping discovery, recognition, or identification in the commission of any criminal offense; or
- (b) Concealment, flight, or escape, when the person has been charged with, arrested for, or convicted of, any criminal offense.” Honolulu City Ordinances Sec. 40-22.2.

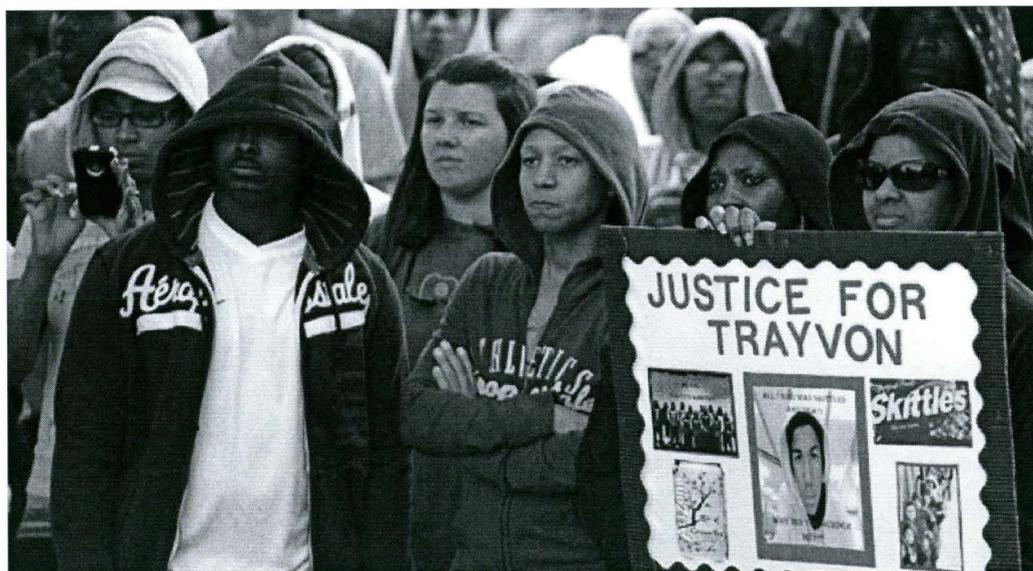
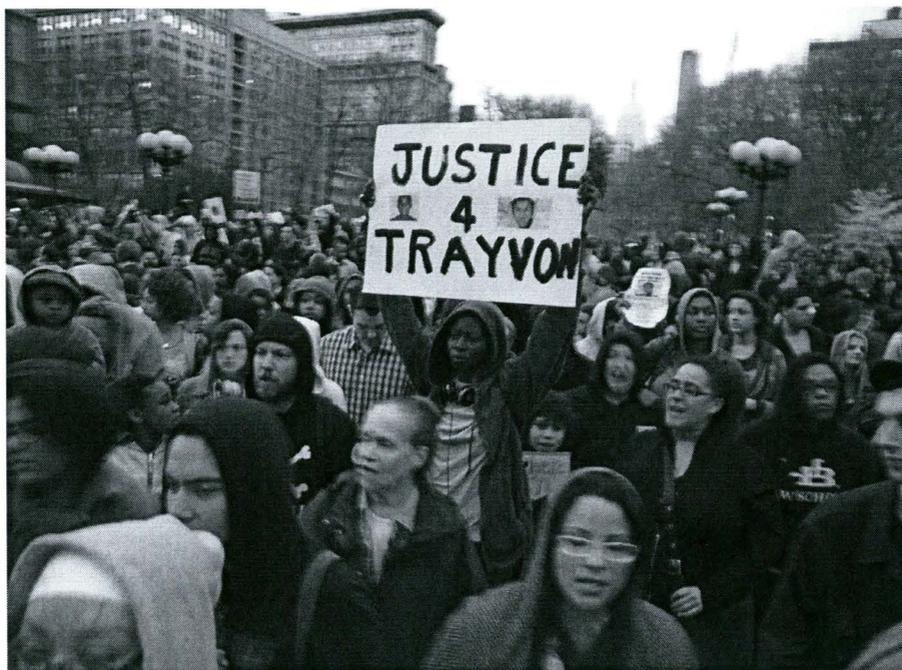
Honolulu narrowly tailored its ordinance in the interest of preventing criminals from trying to conceal their identity to achieve criminal ends; clearly a compelling governmental purpose.

#3  
1304  
1-24-17

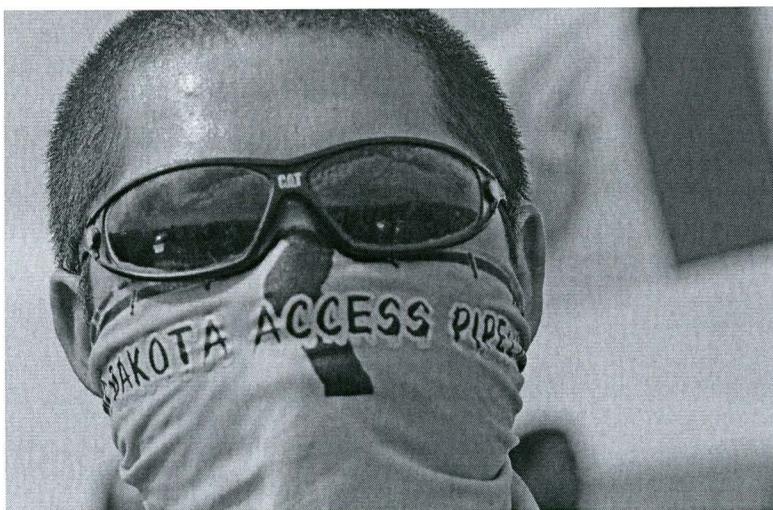


1





#3



4



#1  
1304  
2-1-17

Prepared for Representative K. Koppelman  
February 1, 2017

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1304

Page 1, line 8, after "identity" add ", terrorize or intimidate"

Page 1, line 16, remove the word "written"

Page 1, line 18, replace "seventeen" with "eighteen"

Page 2, line 1, replace "engaged" with "engaging"

Add emergency clause

Renumber accordingly

January 24, 2017

#2  
1304  
2-1-17

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1304

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 12.1-31 of the North Dakota Century Code, relating to prohibiting the wearing of masks, hoods, and face coverings during the commission of a criminal offense; and to provide a penalty.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1.** A new section to chapter 12.1-31 of the North Dakota Century Code is created and enacted as follows:

**Wearing of masks during commission of criminal offense prohibited.**

1. An individual may not wear a mask, hood, or other device that covers, hides, or conceals any portion of that individual's face for the purpose of:
  - a. Evading or escaping discovery, recognition, or identification during the commission of a criminal offense; or
  - b. Concealment, flight, or escape when the individual has been charged with, arrested for, or convicted of a criminal offense.
2. A violation of this section is a class A misdemeanor."

Renumber accordingly

**Paur, Gary A.**

#3  
1304  
2-1-17

**From:** Joseph, Christopher  
**Sent:** Wednesday, January 25, 2017 9:19 AM  
**To:** Paur, Gary A.  
**Subject:** HB 1304

Good morning Representative Paur,

This email is in response to your inquiry regarding the constitutionality of your proposed amendments to HB 1304 relating to prohibiting the wearing of masks. Your proposed amendments would in effect make it a class A misdemeanor for an individual to intentionally conceal his or her identity by wearing a mask or other device covering his or her face for the purpose of facilitating the commission of a crime. Several states (and U.S. territories) have similar statutes, including Michigan, Oklahoma, Puerto Rico, and New Mexico. Constitutionally, prohibiting the wearing of masks for the purpose of concealing one's identity in public, could pose a burden on free speech and association rights and must therefore be narrowly tailored to serve an overriding or compelling government interest. Your amendments to HB 1304, as written, are narrowly tailored to serve North Dakota's interest without potentially creating a chilling effect on the First Amendment. Based on federal court cases, the amendments to HB 1304 should be constitutional based on current constitutional requirements.

I hope this answers your question Representative Paur! If you have any other questions or need additional information, please do not hesitate to contact me.

Sincerely,

Christopher S. Joseph  
Legal Counsel  
North Dakota Legislative Council  
600 East Boulevard Ave  
Bismarck, ND 58505  
(701) 328-2916  
[cjoseph@nd.gov](mailto:cjoseph@nd.gov)

①

**TESTIMONY**  
*to the*  
**Senate Judiciary Committee**  
*of the*  
**North Dakota Legislature**  
February 13, 2017

Andrew Alexis Varvel  
2630 Commons Avenue  
Bismarck, ND 58503

HB 1304

HB 1293

HB 1426

HB 1193

## House Bill 1304

Chairman Armstrong and Members of the Committee:

My name is Andrew Alexis Varvel, and I have severe reservations about House Bill 1304.

House Bill 1304 may appear to be a reasonable measure to stop people from using masks to commit crimes, but appearances can be deceptive. People have many functional and legitimate reasons to wear headgear, and claiming that headgear is intended to hide identity can conceal a desire to render a victim defenseless against the elements – or assault.

This is my hat, which protects me against sunburn. These are my safety glasses, which protect my eyes. This is my scarf, which I wear during winter. You know who I am, so I am hiding none of my identity. Likewise, people have legitimate reasons to wear football helmets, hockey helmets, gasmasks, respirators, or hazmat suits – it's to protect themselves against the elements or against assault.

Wearing armor is a basic and fundamental freedom. In many respects, it should be regarded as even more basic than bearing arms, since armament is offensive while armor is defensive. The only people who might have reason to regard armor as provocative are those who are planning assault. It is inherently insulting to the very idea of liberty that wearing body armor should in any way be regarded as a provocation by anybody, including law enforcement.

I recommend a DO NOT PASS for House Bill 1304.

2/13/17

2

HB 1304

UNCLASSIFIED

(U) SUBJECTS SEEN WEARING MASKS INVOLVED IN DAKOTA ACCESS PIPELINE RELATED PROTEST ACTIVITY

UNCLASSIFIED

UNCLASSIFIED



UNCLASSIFIED

UNCLASSIFIED

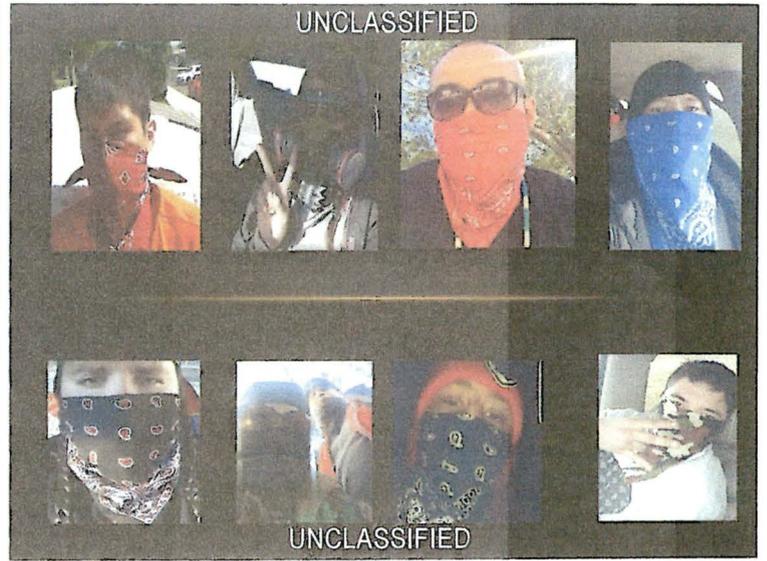


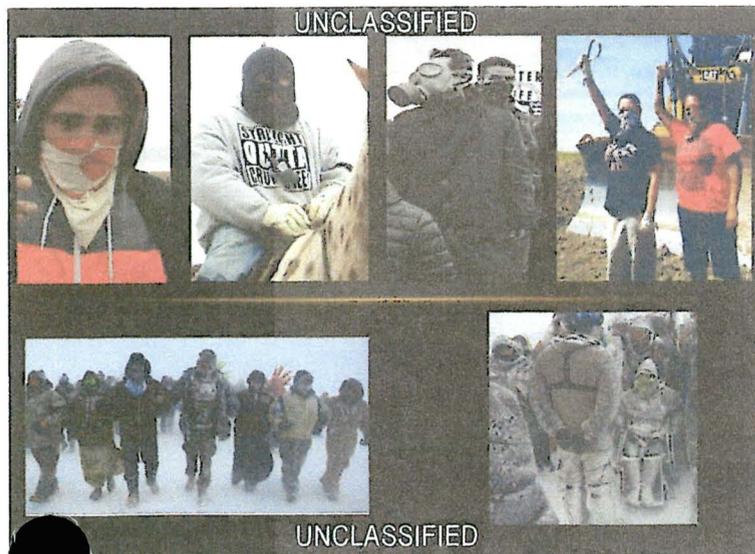
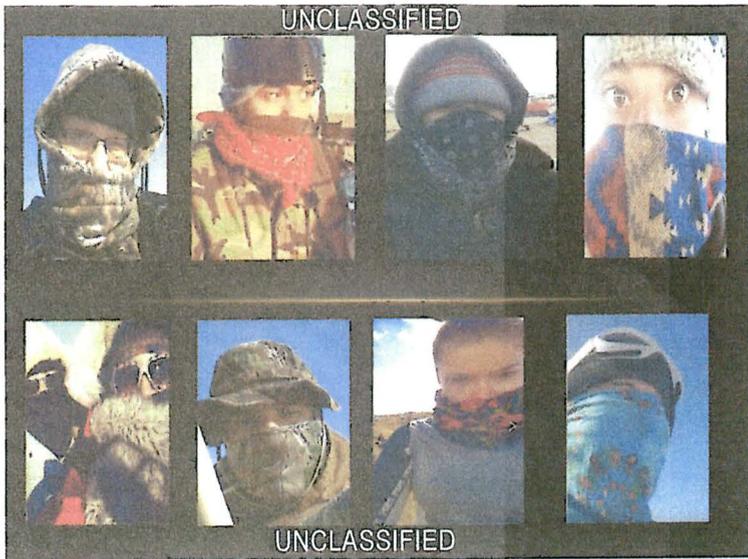
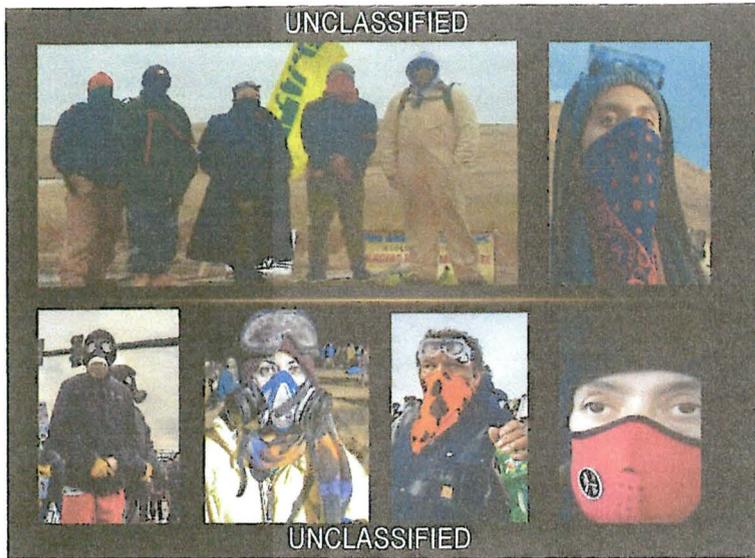
UNCLASSIFIED

UNCLASSIFIED



UNCLASSIFIED





3

17.0311.02001  
Title.

Prepared by the Legislative Council staff for  
Senator Armstrong  
February 8, 2017

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1304

Page 1, line 9, remove "for the purpose of"

Page 1, line 10, replace "Evading" with "With the intent to intimidate, threaten, abuse, or harass any other individual:

b. For the purpose of evading"

Page 1, line 12, replace "b. Concealment" with:

"c. For the purpose of concealment"

Renumber accordingly

HB 1304

①

2/13/17

(Also 02/14/17 Att. 1)

17.0311.02001  
Title.

Prepared by the Legislative Council staff for  
Senator Armstrong  
February 8, 2017

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1304

Page 1, line 9, remove "for the purpose of"

Page 1, line 10, replace "Evading" with "With the intent to intimidate, threaten, abuse, or harass any other individual:

b. For the purpose of evading"

Page 1, line 12, replace "b. Concealment" with:

"c. For the purpose of concealment"

Renumber accordingly