

Privacy Rights

Advancements in technology allow us to communicate and share information with the touch of a button, but legislation that ensures that our right to privacy remains intact has struggled to keep up. Without sideboards in place, government agencies gain unchecked access to surveillance of personal and sensitive information, often in the name of national security. Montana's Constitution guarantees that "the right of individual privacy ... shall not be infringed without the showing of a compelling state interest." This session, Montana made strides towards improving our digital privacy protection with the passing of three bills carried by Rep. Daniel Zolnikov (R-Billings), who carried similar bills in 2013 and 2015 that did not pass, but laid a strong foundation.

Government Surveillance Digital Privacy

HB 149 (Rep. Zolnikov): Revise privacy laws regarding license plate readers

HB 149 prevents the use of license plate readers by law enforcement, with defined exceptions. Without regulation, these readers have been used to mass surveil everything from church parking lots to political conventions – a serious, unwarranted invasion of privacy. A number of amendments were put on the bill in the House Judiciary Committee that included adding exceptions allowing state/local law enforcement to use readers in limited circumstances for purposes of identifying vehicles associated with specific criminal involvement.

HB 146 (Rep. Zolnikov): Revising temporary roadblock laws

HB 146 provides guidance to law enforcement who seek to set-up checkpoints and roadblocks and limits their usage. Providing these sideboards will not only help law enforcement know when and how to use checkpoints, but will also prohibit using them to randomly check for criminal activity that does not have a legitimate public safety purpose. HB 146 had the support of the Montana Highway Patrol and brings Montana law into compliance with *City of Indianapolis v. Edmond*, where the United States Supreme Court ruled that roadblocks and checkpoints could not be used as dragnets for unspecified criminal activity.

HB 147 (Rep. Zolnikov): Requiring search warrant for government access to electronic devices

HB 147 expands Fourth Amendment protections by requiring state law enforcement agencies to obtain a warrant before accessing any electronic device. By extending the holding from the 2014 U.S. Supreme Court decision in *Riley v. California*, which only applied to cell phones, HB 147 acknowledges the sensitive nature and sheer amount of content stored on digital devices and ensures that they are protected from unwarranted searches. With a few questionable changes made along the way, the bill passed out of House Judiciary, House Appropriations, and Senate Judiciary unanimously along with sweeping support on the Floor - a much different result than the 2015 attempt to pass similar legislation.

HB 148 (Rep. Zolnikov): Generally revise privacy laws related to electronic communications

HB 148, an extension of HB 147 (also sponsored by Rep. Zolnikov), ensures that your digital content stays protected after you press send by restricting police access to third party databases containing your electronic records. For example, under HB 148, the police couldn't go to Verizon and ask for all of your text messages without a warrant signed by a judge. Important language requiring that notice be given to you if/when the government does attempt to

access your data (with certain exceptions) was put on in House Judiciary, where it passed out of committee unanimously. Concerns raised by the Attorney General's office and the Department of Justice were addressed in Senate Judiciary and resulted in amendments allowing law enforcement agencies to access information by issuing investigative subpoenas as well as warrants. The ACLU supported this exception provided that subpoenas would be held to the same standard as warrants, which require a finding of "probable cause" that an offense had taken place. The Governor's office made these final changes to bill, and it was signed into law.



Reproductive Autonomy

This legislative session saw the usual introduction of anti-choice legislation we have come to expect from legislators opposed to reproductive freedom. The hard work of the Montana Reproductive Rights Coalition, our legislator allies, and the assistance of Governor Bullock led to the eventual defeat of all three bills targeting abortion access in Montana. SB 282 and SB 329 were vetoed by Governor Bullock and HB 595, a constitutional amendment, failed to meet the required 2/3 vote of the legislative body.

SB 282 (Sen. Olszewski): Revise abortion laws concerning viable fetus

SB 282, sponsored by Sen. Albert Olszewski (R-Kalispell), would have banned abortion based on a medically questionable definition of a “viable fetus.” The bill flew in the face of over 40 years of United States Supreme Court precedent affirming the right to access abortion services. The Supreme Court has found again and again that states are prevented from setting a viability marker and that viability should only be determined by a doctor on a case-by-case basis. SB 282 would have undermined the ability of physicians to provide the best possible health care to their patients by limiting the ability to exercise professional judgement. Additionally, SB 282 would have forced women to undergo invasive procedures with no option for an abortion, even when the health of the woman was at risk. The Ninth Circuit has ruled twice in the last four years that restrictions like those in SB 282 are unconstitutional and contradict case precedent dating back to *Roe v. Wade*. SB 282 passed both chambers on nearly party line votes, but was vetoed by Governor Bullock on May 8th.

HB 595 (Rep. Skees): Constitutional amendment to define person

HB 595 would have asked Montana voters to amend our state constitution’s definition of person to include “all members of the species *Homo sapiens* at any stage of development.” This type of legislation, known as a “Personhood Bill,” would ban birth control, emergency contraception, life-saving procedures for ectopic pregnancies, and abortion. Under HB 595, an estranged spouse, potential grandparents, child protective services, or law enforcement could assert the rights of the fetus from the time of conception. In 2008, 2010, and 2012 anti-choice extremists failed to qualify this type of referendum for the ballot. As a constitutional amendment, HB 595 only needed to pass both houses of the legislature to appear on the November, 2018 ballot – Governor Bullock cannot veto a legislative referendum. Fortunately, Skees was not able to garner the necessary 2/3 vote of the legislature and the bill died on the Senate Floor.

SB 329 (Rep. Regier): Adopt the Montana Pain-Capable Unborn Child Protection Act

SB 329 was yet another unconstitutional ban on abortion, this time based on an arbitrary 20-week gestation marker. Like other “fetal pain” bills, SB 329 was proposed as a means to protect the lives of unborn children. In reality, the bill was an attempt to establish a new legal framework for banning abortion in Montana by completely prohibiting abortion after 20 weeks gestation and allowing civil litigation to proceed against a medical provider if an abortion is performed. This action could be taken by a spouse, parents or guardians of a minor, a prosecuting attorney, or even the Attorney General. Similar to 282, the bill made it all the way to the Governor’s desk, where it was vetoed on May 4th.



QUICK TAKE

VOTER SUPPRESSION

HB 357 (Rep. Skees): Generally revise laws related to strengthening voter identification

HB 357 sponsored by Rep. Derek Skees would have required Montanans to show a valid, government issued photo identification before we can vote in our elections - DEAD.

HB 212 (Rep. Essman): Ballot Interference Prevention Act to restrict ballot collection

Rep. Essman attempted to bar the collection and submission of ballots by individuals and organizations in Montana, a tool frequently used to boost voter turnout - DEAD.

SB 352 (Sen. Olszewski): Referendum on prohibition of ballot collection by certain individuals

Sen. Olszewski sponsored SB 352, which contains the same restriction provided in HB 212 but in the form of a referendum, appealed to legislators who like to "let the voters decide." SB 352 will, unfortunately, be on the ballot in 2018 - PASSED.

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Freedom of Speech

HB 571 (Rep. Usher): Create offense of concealing a person's identity

This legislative session, Montana became one of at least 19 states that introduced legislation that would create new criminal charges targeting peaceful protesters. We have seen the devastating effects of law enforcement overstepping their authority when responding to protesters with rampant use of excessive force and arrest rates that overwhelm local courts. The true intent of HB 571 was to criminalize protesters. This targeted motive came out during the bill's first hearing in House Judiciary, when both the sponsor and multiple proponents referenced footage they had seen on TV, specifically "incidents in North Dakota" and Ferguson, as proof that protesters wearing masks are the most aggressive and dangerous. The troublesome testimony, along with the bill's vague



language, raised concerns amongst committee members regarding free speech, racial profiling, and exactly who was at risk of arrest - someone wearing wearing face paint at a football game or a peaceful protester simply trying to stay warm or protect themselves from water cannons or tear gas behind a scarf. The sponsor attempted to quash these concerns by proposing a set of amendments during Executive Action that would have changed the charge from felony to misdemeanor, narrowed the list of offenses to which the charge could be applied, and allowed for religious exemptions. In the end, three Republicans agreed that even with the proposed the amendments, the bill could not be fixed and HB 571 was tabled in committee on an 11-8 vote.

Rights of Prisoners and the Accused

HB 258 (Rep. Hill-Smith): Require detention center to allow inmates free calls to attorney

HB 258 will provide inmates with free calls to their attorneys, eliminating the charge of \$0.24-per-call connection fee and \$0.12-per-minute that applied to most of Montana's adult correctional facilities. As dictated by the Sixth Amendment, all criminal defendants, regardless of their ability to pay, are constitutionally entitled to effective representation of counsel at critical stages of prosecution, including initial appearances, bond hearings, and preliminary hearings. Simply providing initial access is not enough if economic barriers stand in the way of an inmate's ability to fully utilize the provided counsel. HB 258 passed with broad support in both chambers.



Rights of Marginalized Groups

LGBTQ

HB 609 (Rep. Glimm): Generally revise privacy laws concerning protected facilities

HB 609, sponsored by Rep. Carl Glimm (R-Kila), was part of a dangerous and hateful trend that we have seen in legislatures across the country. Based completely on unfounded safety and privacy fears, this bill sought to mandate that individuals use the public facility (bathroom, locker room, etc.) according to the sex designated by their original birth certificate. The bill would have opened local governments and their school districts to extensive litigation and allowed anyone who encountered an individual perceived to be of the opposite sex in a public facility to sue the government entity or public school who controls that facility. More importantly, HB 609 would have compromised the safety and dignity of the transgender, intersex, and gender nonconforming communities in Montana. Due to the countless phone calls and emails to legislators, the courageous individuals who travelled to the Capitol to provide very personal opposition testimony, and the work of the multi-organizational Coalition for Dignity and Safety, HB 609 died in House Judiciary after three Republicans joined Democrats in voting no and a fourth abstained. This was a landmark accomplishment that should be viewed as step forward for LGBT rights in Montana – an anti-LGBT bill has never before been stopped in its first committee.

SJ 15 (Sen. Howard): Resolution opposing a proposed Montana Supreme Court rule

The American Bar Association recently adopted a new Model Rule of Professional Conduct that would prohibit discrimination in the provision of legal services – including discrimination against LGBT people. SJ 15, sponsored by Sen. David Howard (R-Park City) was a resolution opposing adoption of a similar rule in Montana, Proposed Rule 8.4(g), currently under consideration by the Montana Supreme Court. Sen. Howard argued that the proposed rule “infringes upon and violates First Amendment Rights, including Freedom of Speech, Free Exercise of Religion and Freedom of Association” by regulating the conduct of lawyers outside of courtroom and preventing them from declining to represent particular clients. Regardless of the sponsor’s complete misinterpretation of the First Amendment, the Montana Supreme Court is given sole authority to regular attorneys under the Montana Constitution Article 7, section 2, which was affirmed by the 1974 decision *In the Matter of SENATE BILL NO. 630*. Unfortunately, this resolution passed both chambers of the legislature. Fortunately, a resolution is (according to House Speaker Knudsen) a “letter to Santa Claus” with no actual impact on the law or the decisions made by the Montana Supreme Court.

Immigrants and Refugees

SB 97 (Sen. Regier): Prohibit the application of foreign law in state

Sen. Keith Regier (R-Kalispell) revived a bad bill from past sessions, previously titled “Prohibit the Application of Sharia Law in State Courts,” slapped a less blatantly unconstitutional name on it, and introduced it to the 2017 legislature. SB 97 contained a litany of provisions that would have wreaked havoc in Montana courts, prohibiting consideration of foreign laws in private contracts and some business transactions. “Foreign law bans” have a sordid history in the US, first introduced as a response to the United States Supreme Court decisions prohibiting

the use of the death penalty for minors and the mentally disabled, and then re-emerging when the Court began to strike down anti-LGBT statutes. Each time, proponents of foreign law bans clung to dicta in SCOTUS decisions which referenced, in passing, the more humane laws of other countries. This latest iteration is nothing more than attack on Muslim-Americans and we thank Governor Bullock for seeing through the smoke screen. SB 97 was vetoed on April 6th.

