



Ohio Legislative Service Commission

Bill Analysis

Bethany Boyd

H.B. 354

130th General Assembly
(As Introduced)

Reps. Butler and Young, J. Adams, Beck, Becker, Brenner, Henne, Hood, Lynch, Retherford, Roegner, Sprague, Stebelton, Terhar

BILL SUMMARY

- Prohibits Ohio agencies and political subdivisions, and their employees, and Ohio organized militia members on official state duty, from knowingly aiding a federal agency in the investigation, prosecution, or detention of a person within Ohio pursuant to certain federal laws, if doing so would violate the United States or Ohio Constitution.
- Exempts from this prohibition participation by state or local law enforcement or the Ohio organized militia in a joint task force, partnership, or other similar cooperative agreement with federal law enforcement, under certain circumstances.
- Declares it to be state policy to refuse to provide material support for or to participate with the implementation in Ohio of any federal law that purports to authorize indefinite detention of a person within Ohio.
- Prohibits political subdivisions, their employees, and their law enforcement agencies from knowingly using state funds to engage in any activity that aids a federal agency in the unconstitutional detention of any person within Ohio for purposes of implementing certain federal laws.

CONTENT AND OPERATION

Prohibition against assisting a federal agency in unconstitutional investigation, prosecution, or detention of a person

The bill, notwithstanding any contrary provision of law, prohibits any agency or political subdivision of this state, an employee of either acting in the employee's official

capacity, or any member of the Ohio organized militia¹ when on official state duty, from knowingly aiding an agency of the United States in any investigation, prosecution, or detention of a person within Ohio, pursuant to any of the following federal laws, if the agency, political subdivision, employee, or member would violate the United States or Ohio Constitution: (1) Section 1021 or 1022 of the National Defense Authorization Act for Fiscal Year 2012, (2) the Authorization for Use of Military Force of 2001, or (3) any other federal law that would deprive a person who is lawfully present in the United States of the right to petition for a writ of habeas corpus.² (These federal statutes are explained below.)

This prohibition does not apply to participation by state or local law enforcement or the Ohio organized militia in a joint task force, partnership, or other similar cooperative agreement with federal law enforcement if that joint task force, partnership, or similar cooperative agreement is not for the purpose of investigating, prosecuting, or detaining any person who is lawfully present in the United States pursuant to the aforementioned federal laws.³

The bill declares it to be a state policy to refuse to provide material support for or to participate in any way with the implementation in this state of any federal law that purports to authorize indefinite detention of a person within Ohio.⁴

Prohibition against knowingly using state funds for illegal detention

The bill, notwithstanding any contrary provision of law, prohibits a political subdivision, a law enforcement agency of a political subdivision, and an employee of a political subdivision acting in the employee's official capacity from knowingly using, in whole or in part, state funds or funds appropriated by the state to local entities on or after the bill's effective date, to engage in any activity that aids a federal agency in the detention of any person within Ohio for purposes of implementing the federal laws described in (1) to (3), above, if that activity would violate the United States or Ohio Constitution.⁵

¹ The Ohio organized militia is comprised of the Ohio National Guard (the Ohio Army National Guard and the Ohio Air National Guard), the Ohio Naval Militia, and the Ohio Military Reserve. R.C. 5923.01(B).

² R.C. 2935.034(A)(1). A writ of habeas corpus commands that a person under detention be brought before a court so the court can determine whether the person is being lawfully detained.

³ R.C. 2935.034(A)(2).

⁴ R.C. 2935.034(B).

⁵ R.C. 2935.034(C).



Sections 1021 and 1022 of the National Defense Authorization Act for Fiscal Year 2012

Section 1021 of the National Defense Authorization Act for Fiscal Year 2012⁶ affirms that the authority of the President of the United States to use all necessary and appropriate force under the Authorization for Use of Military Force of 2001⁷ includes authority for the U.S. Armed Forces to detain, pending disposition under the law of war, essentially any person who planned, authorized, committed, or aided the September 11, 2001, terrorist attacks or harbored those responsible for those attacks, or who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners. The disposition of a person under the law of war may include detention without trial until the end of the hostilities, trial by military courts, transfer for trial by an alternative court or competent tribunal having lawful jurisdiction, or transfer to the custody or control of the person's country of origin or another foreign country or foreign entity. Section 1021 does not apply to the detention of U.S. citizens, lawful resident aliens, or persons who are captured or arrested in the United States.⁸

Section 1022 of that Act requires the U.S. Armed Forces to detain any person, pending disposition under the law of war, who is determined to be a member of, or part of, al-Qaeda or an associated force and to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners, and who is captured in the course of hostilities. The requirement to detain a person in military custody does not apply to U.S. citizens or to lawful resident aliens on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States. The President issues the procedures

⁶ Pub. L. No. 112-81, 125 Stat. 1298 (2011).

⁷ The Authorization for Use of Military Force of 2001 is a joint resolution of the United States Congress that authorizes the President of the United States "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." The joint resolution constitutes specific statutory authority for introduction of the U.S. Armed Forces into hostilities. Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁸ Section 1021 is currently being challenged in the U.S. District Court for the Southern District of New York. The case was last heard by the U.S. Court of Appeals for the Second Circuit on grounds that the expansion of the President's military detention authority violated the plaintiffs' First and Fifth Amendment rights, but the case was remanded to the district court. The Second Circuit Court found that Section 1021 does not apply to American citizens, so the plaintiffs, who are American citizens, failed to establish standing because they had not shown a sufficient threat that the government would detain them under that law. *Hedges v. Obama*, 724 F.3d 170 (2013).



for implementing Section 1022, including procedures designating the persons authorized to make disposition determinations.⁹

Law of war

Disposition of detainees under the law of war includes detention without trial until the end of hostilities, and trial by military courts. Habeas corpus is unavailable for the detainees.¹⁰ Although habeas corpus is a right recognized by the United States and Ohio Constitutions,¹¹ a person who is not a U.S. citizen, lawful resident alien, or a person who was captured or arrested in the United States and who is being detained under Section 1021 or 1022 may be denied that right. The bill creates a conflict with those federal laws because the bill's effect is to deny aid to any federal agency that, within Ohio, seeks to investigate, prosecute, or detain any person who is being denied that right, even though the person lawfully may be denied that right under federal law. This effect may be questionable because, under the Supremacy Clause of the United States Constitution, federal statutes prevail over state laws if they are found to obstruct the execution of a federal law.¹²

HISTORY

ACTION	DATE
Introduced	11-19-13

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⁹ Section 1029 of the National Defense Authorization Act for Fiscal Year 2013 specifies that the National Defense Authorization Act for Fiscal Year 2012 does not deny "the availability of the writ of habeas corpus or . . . any Constitutional rights in a court ordained or established by or under Article III of the [U.S.] Constitution to any person inside the United States who would be entitled to the availability of such writ or to such rights in the absence of such laws."

¹⁰ Sections 1021(c) and 1022(a)(3).

¹¹ U.S. Constitution, art. I, § 9, cl. 2 and Ohio Constitution, art. I, § 8.

¹² *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). Also, see generally, *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

