

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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Limiting this draft to detaining persons from border counties, or from counties only in Michigan, may be unconstitutional under article I, section 8, of the U.S. Constitution. That article gives Congress the power to regulate commerce among the states. The U.S. Supreme Court has interpreted that clause to limit the states' power to affect the interstate flow of articles of commerce. That court has long held that the transportation of individuals is "commerce" within the meaning of the commerce clause. The court determines if a state law affects the interstate flow of articles of commerce by determining if the law regulates evenhandedly with only incidental effects on interstate commerce or if it discriminates against interstate commerce. "Discrimination" means differential treatment of in-state and out-of-state economic interests, and is unconstitutional on its face. Incidental effects on interstate commerce are valid unless the burden imposed on such commerce is clearly excessive in relation to the local benefits.

This proposal does not create differential treatment between in-state and out-of-state economic interests, but it does give some states the right to have interstate commerce with this state while denying that right to other states. The local benefits of that treatment include keeping the prisoner near his or her family, easing the burden of transportation to the court in the other state when necessary, and being able to return the prisoner to the other state for medical or other services when appropriate. The courts would weigh these benefits against the differential treatment to determine if the provision is constitutional. By having the draft apply only to Michigan counties, it could shift the court's opinion toward finding it unconstitutional because the local benefits do not apply to Michigan only, but to border counties in all border states.

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