

# COUNCIL OF STATE GOVERNMENTS—NATIONAL CENTER FOR INTERSTATE COMPACTS

## Congressional Consent and other Legal Issues

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While a host of legal issues exist for interstate compacts, state officials have traditionally been most concerned with two areas: 1) congressional consent and the permission for states to enter into regional and national interstate agreements (and the resultant federal statutory authority granted to the compact); and 2) the loss of state sovereignty by delegating regulatory authority to a third party administrative agency that may oversee a regional or national agreement. In both instances, thorough case law charts the maturation of the interstate compact mechanism and offers clear and compelling support to states that may be considering the creation and/or adoption of an interstate compact.

### Legal History of Compacts

Compacts are rooted in the nation's colonial past where agreements similar to modern compacts were utilized to resolve inter-colonial disputes, particularly boundary disputes. These boundary disputes arose from broad royal land charters that left colonial borders subject to constant adjustment. The colonies and crown employed a process by which colonial disputes would be negotiated and submitted to crown through the Privy Council for final resolution. This created a long tradition of resolving state disputes through negotiation followed by submission of the proposed resolution to a central authority for approval.

This “compact process” was formalized in the Articles of Confederation. Article VI provides, “No two or more states shall enter into any treaty, confederation or alliance whatever without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.”

The founders were so concerned over managing interstate relations and particularly the creation of powerful political and regional allegiances that they barred states from entering into “any treaty, confederation or alliance whatever” without the approval of Congress. The founders also constructed an elaborate scheme for resolving interstate disputes. Under Art. IX of the Articles of Confederation, Congress was to “be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever[.]”

The concern over unregulated interstate cooperation resulted in the adoption of the “compact clause” in Article I, sect. 10, cl. 3 of the U.S. Constitution. That clause provides that “No state shall, without the consent of Congress enter into any agreement or compact with another state, or with a foreign power[.]” In effect, the Constitution does not so much authorize states to enter into compacts as it bars states from entering into compacts absent congressional consent. Unlike the Articles of Confederation in which interstate disputes were resolved by Congress, the Constitution vests ultimate resolution of interstate disputes in the Supreme Court either under its original jurisdiction or through

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the appellate process. For a thorough discussion on the history of interstate compacts from their origins to the present, *see generally*, Michael L. Buenger & Richard L. Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 *ROGER WILLIAMS U. L. REV.* 71 (2003).

### **Congressional Consent**

Although compact clause appears to require congressional consent in every case, the Supreme Court has determined that the clause is activated only by those agreements that would alter the balance of political power between the states and federal government or intrude on a power reserved to Congress. *Virginia v. Tennessee*, 148 U.S. 503 (1893). Thus, where an interstate agreement accomplishes nothing more than what the states are otherwise empowered to do unilaterally, the compact does not intrude on federal interests requiring congressional consent. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978). In this circumstance, the compact continues to be a contract between the states, the meaning of which may be subject to the Supreme Court's original jurisdiction over disputes between the states. The compact is not, however, "federalized" for purposes of enforcement and interpretation.

However, where congressional consent is required because the compact intrudes on federal interests, the lack of congressional consent renders the agreement void as between the states. By contrast, where the compact does not intrude on federal interests, the agreement is not invalid for lack of congressional consent. *New Hampshire v. Maine*, 426 U.S. 363 (1976).

Even where congressional consent is given, the mere act of consent is not dispositive of whether the compact actually required consent. *U.S. Steel Corp.*, *supra*, 470-71 ("The mere form of the interstate agreement cannot be dispositive . . . . The relevant inquiry must be one of impact on our federal structure.").

Congressional consent is given in one of three ways:

1. Consent can be implied after the fact when actions by the states and federal government indicate that congress has granted its consent even in the absence of a specific legislative act. *Virginia v. Tennessee*, *supra*.
2. Consent can be explicitly given after the fact, as in the case of border compacts, by enacting legislation that specifically recognizes and consents to the compact.
3. Consent can be given preemptively by congress passing legislation encouraging states to adopt compacts to solve particular problems. Thus, the Interstate Compact on Adult Offender Supervision (ICAOS) is based on congressional consent granted under the Crime Control Act of 1934, 4 U.S.C.A. § 112(a), which provides, "The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts." This was the

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consent relied upon in the adoption of the Interstate Juvenile Compact and the ICAOS's precursor, the Interstate Compact on Probation and Parole.

Considerations in obtaining consent:

1. In giving consent, Congress is not required to accept a compact as presented nor is Congress constrained in imposing limitations or conditions on the party states as a condition precedent to the acceptance of a compact. Congress is fully within its authority to impose limitations on compacts, both in terms of their duration and substance. *See, e.g.*, 16 U.S.C § 544 et seq, concerning the Columbia River Gorge Commission.
2. Although the states may negotiate a compact and obtain near universal assent to the instrument, Congress retains full authority to alter, amend, or set conditions on the compact as part of granting its consent. *See*, *Columbia River Gorge United-Protecting People & Property v. Yeutter*, 960 F.2d 110 (Cir. 9<sup>th</sup> 1992); *Seattle Master Builders v. Pacific N.W. Elec. Power*, 786 F.2d 1359, 1364 (9<sup>th</sup> Cir. 1986), *cert. denied*, 479 U.S. 1059, 93 L. Ed. 2d 989, 107 S. Ct. 939 (1987). Other conditions that Congress can impose include the waiver of Eleventh Amendment immunity to compact commissions and agencies, (*See*, *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959)) and jurisdictional selection for litigation of disputes, (*See*, 42 U.S. 14616). Because of the purely gratuitous nature of consent, Congress may extract as part of its consent to an interstate compact conditions that it might not otherwise extract in other contexts. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 43 (1988).
3. States that adopt an interstate compact to which congress has attached conditions – even after the fact – are deemed to have acceded to those conditions as a part of the compact. *See*, *Petty v. Tennessee-Missouri Bridge Commission*, *supra*. (congressionally mandated provisions regarding suability of bridge commission were binding on states because Congress was within its authority to impose conditions as part of its consent and the states acceded to those conditions by enacting the compact.)
4. Congress does not pass upon a compact in the manner as a court of law deciding a question of constitutionality. The requirement that Congress approves a compact is an act of political judgment about the compact's potential impact on national interests and, if approved, to impose any conditions necessary to ensure that those national interests are not harmed by the compact. In short, the Congressional consent requirement is an exercise of political judgment as to the appropriateness of the compact vis-à-vis national concerns, not a legal judgment as to the correctness of the form and substance of the compact. As a rule, there are virtually no limitations on Congress's substantive right to grant, withhold, or condition the granting of its consent, save perhaps a finding that the compact itself somehow violated constitutional principles.

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Limitations on Congressional Consent do exist. Once congress grants consent to a compact, the general principle is that consent cannot be withdrawn nor additional conditions added subsequent to the granting of consent. Although the matter has never been finally determined by the U.S. Supreme Court, at least two lower courts have held that congressional consent, once given, is not subject to alteration. *See, Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir. 1962); *Mineo v. Port Authority of New York and New Jersey*, 779 F.2d 939 (3rd Cir. 1985).

### **Delegation of State Authority to a Joint Administrative Agency**

Delegation of authority to a joint administrative agency of the state is not only constitutionally allowed, but encouraged.

1. ***WEST VIRGINIA EX. REL. DYER VS. SIMS, 341 U.S. 22 (1951)*** – Justice Felix Frankfurter refers to interstate compacts as “*one of the axioms of modern government.*” Writing for a unanimous Court, which upheld the validity of a state’s authority to enter into an interstate compact, and to delegate authority to an interstate agency, Justice Frankfurter also called such action by the states as “*a conventional grant of legislative power.*”
2. In the *Dyer* case Justice Frankfurter sums up advantages of interstate compacts:
  - a) As a means of resolving disputes concerning problems which are clearly the states responsibility but which transcend the boundaries of a particular state.
  - b) As a means of uniformly and cooperatively managing problems of an inherently interstate nature by eliminating the inconsistency which arises with potentially conflicting provisions of the laws of each state.
  - c) As a means of safeguarding the national interest.
    - 1) For purposes of public safety (e.g., crime control measures).
    - 2) To maintain the principles of federalism enshrined in the Constitution. Without a mechanism such as compacts to allow states to occupy their necessary and proper sphere of authority within our federal system, we are in danger of usurpation of state prerogatives and power by the central government.
      - a) In times of crises there is a natural tendency of government to become more centralized in order to protect the national interest from external threats, however states have a duty to be vigilant not to cede more authority or control than necessary for such external threats to be resisted.
      - b) In areas of regulation where uniformity is called for, there is a federal tendency to preempt the states’ authority for reasons of administrative convenience, to avoid the specter of 50 different sets of rules.
      - c) Just as nature abhors a vacuum in the physical world, the regulatory and statutory world abhors the failure of a regulatory structure to properly administer its responsibilities and some power structure will emerge to fill the void. (e.g., Adult Offender

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compact and threats of federal intervention over offenders by Congress; Insurance industry and its failure to successfully regulate failing insurance companies, (Sen. Howard Metzenbaum chastised NAIC in late 80's); threat of congress to amend Federal Energy Regulatory Commission Act to allow federal siting of electrical power lines if states failed to streamline the process.