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INTERSTATE COMPACTS

Congressional Consent and the Permission for States to Enter into Interstate Compacts

When our Founding Fathers wrote the Constitution, they included language that grants states the authority to enter into interstate agreements to achieve a common purpose. This directive, found in Article I, Section 10, Clause 3 of the Constitution, is known as the Compacts Clause. In it, the founders asserted, in part, that "no state shall, without the consent of Congress enter into any agreement or compact with another state, or with a foreign power."[1] This often-overlooked clause of the Constitution also grants Congress the power to approve or deny the validity of a compact—a concept called congressional consent.

The founders included the compact clause in the Constitution to protect the dual-sovereign nature of the democratic government structure, while also promoting the ability of the states to cooperatively solve problems. While the Founding Fathers believed interstate cooperation was an important and necessary feature of American democracy, they feared states would use this authority to enter into agreements that would alter the federal balance of power. To avoid such an event, the compact clause instructs states entering into interstate compacts to obtain congressional consent for the agreement to be valid.

Types of Compacts Requiring Congressional Approval

A literal interpretation of the compact clause would conclude all interstate agreements must obtain the approval of Congress before they take effect and carry the weight of law. The Supreme Court, however, has ruled that "any" does not mean "all" in the context of interstate compacts and congressional consent. To clear up the ambiguity of the compact clause, the U.S. Supreme Court in *Virginia v. Tennessee* held that Congress must approve only two types of compacts:

- Those compacts that alter the balance of political power between the state and federal government; or
- Those compacts that intrude on a power reserved to Congress.

Thus, when a compact does not touch on either of those two items, the courts have ruled the federal government does not have a direct interest in the compact and congressional consent is not technically required.[2] Essentially, if federal supremacy is threatened, then congressional consent is required for the compact to be valid. On the other hand, if federal supremacy is not threatened, then an absence of congressional consent will not render the compact invalid.

Categories of Congressional Consent

Noticeably absent from the compact clause are specific procedures the states must follow to obtain consent and Congress must follow when granting it. Although the text of the Constitution is void of any specific direction, it is generally understood that Congress specifies consent in one of three ways:

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1. Explicitly

Most frequently seen in compacts that resolve boundary disputes, this type of consent is granted after the compact has been adopted by the requisite number of state legislatures and is submitted by the member states to Congress for approval. In these instances, Congress is able to review, amend and/or revise the agreement and, as a result, is able to provide a clear determination of approval or disapproval. Therefore, explicit congressional consent is sometimes considered desirable, even if it is not strictly required at the time the compact is created.

2. Implicitly

Most notably seen in the form of border compacts, which establish or alter the boundaries of a state as result of conflicting territorial claims, congressional consent may be implied when actions by the states and federal government demonstrate approval of the compact.[3] Such actions usually include federal legislation supporting the terms of a compact or legislation that strengthens the objective of a specific compact. Given its uncertain nature, implied consent should not be assumed by compacting states.

3. Pre-emptively

Congress may give its approval in advance by adopting legislation encouraging states to enter into an interstate compact for a specific purpose.[4] In these instances, Congress grants consent before the compact reaches critical mass, meaning that once the required number of states adopts the compact, it becomes enforceable. While pre-emptive consent deprives Congress the opportunity to review the compact and its objectives once it is drafted, it often encourages states to cooperatively resolve a policy challenge they otherwise might not have addressed.

There are also several recent examples of Congress pre-emptively granting states consent to explore the use of interstate compacts. Notable examples include the Environmental Protection Act of 2005, which granted three or more contiguous states the right to enter into an electric transmission line siting compact, and the Nonadmitted Insurance and Reinsurance Act contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which encouraged states to explore the use of interstate compacts to create uniformity in the surplus lines insurance industry. The Council of State Governments, through its National Center for Interstate Compacts, has assisted states in exploring the appropriateness of an interstate compact to address each of the challenges highlighted above.

The process of congressional approval mirrors that of the legislative approval process of any other federal statute. The House or Senate introduces compact bills, but both congressional bodies must approve it, and the president must sign the compact into law.

Withholding Consent

Congressional consent is a political judgment rather than a legal judgment —essentially a gratuitous action by Congress.[5] With this notion in mind, Congress may withhold consent when it feels approval may lead to "imprudent combinations, dangerous joint action or intrusion on traditional federal matters" or "has the potential to alter the balance of power between the states and federal government."[6] Congress faces essentially no limitations in its authority to grant or withhold consent.

When presented with a compact seeking adoption, Congress has the authority to either deny approval or alter the compact as presented by the states by imposing various limitations and conditions on the compact or the member states. If Congress does amend the compact, however, member states are not required to adopt the revised compact. If the member states choose to adopt the amended legislation, they concede to Congress' changes to the compact.[7]

Congress' Ability to Amend, Withdraw or Repeal Congressional Consent

If Congress so chooses, it may amend or "change the landscape" of a compact via legislation.[8] In fact, "the granting of congressional consent in no way limits Congress's right to exercise its legislative prerogatives, even to the extent that such an exercise significantly impacts or impairs the workings of an interstate compact."[9] Additionally, the binding authority of interstate compacts approved by Congress is important. Once Congress grants consent, all compacting states are bound to the terms of the agreement. "While congressional consent may transform an interstate compact into federal law, consent does not transform a compact into a binding agreement between the states and Congress."[10]

Two federal court decisions provide guidance about whether Congress may withdraw consent. In *Tobin v. United States*[11] and *Mineo v. Port Authority of New York-New Jersey*,[12] the court held that once congressional consent was given, Congress could not withdraw consent nor place additional stipulations on the compact. Congress can, however, work around this legal requirement by amending the proposed compact in a way that specifically enables it to withdraw consent at a future date. The judiciary has not made any declaration on whether such a maneuver is legal.[13] The courts have, however, noted that withdrawing consent after the fact "would be damaging to the very concept of interstate compacts."[14]

Federalization of Interstate Compacts

Once Congress grants consent, a compact then becomes federal law. In the case of *Cuyler v. Adams*,[15] the court articulated congressional consent "transforms the States' agreement into federal law under the Compact Clause."[16] Thus, "once Congress gives consent, the compact is presumptively transformed into the law of the United States absent compelling evidence that consent was not required."[17]

This transformation from state-created agreement into federal law is unique. In no other context does a state law become "federalized" with such miniscule influence by the federal government than in the congressional approval of interstate compacts. This "transformation" effect also places the compact within the scope of federal jurisdiction while insulating the compact from constitutional attack.[18]

For more information about congressional consent of interstate compacts, when it is appropriate and how to go about seeking it, please visit NCIC's website at www.csg.org/compacts.

REFERENCES

[1]U.S. Constitution, Art. I, Sec. 10, Cl. 3.
[2]U.S. Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978).Accessed from *http://www.oyez.org/cases/1970-1979/1977/1977_76_635*.
[3]See , e.g., Georgia v. South Carolina (*http://supreme.justia.com/us/497/376/case.html*), 497 U.S. 376 (1990), wherein Georgia brought suit against South Carolina over the location of their boundary along the Savannah River; Michigan v. Wisconsin (*http://supreme.justia.com/us/270/295/case.html*), 270 U.S. 295, 308 (1926), wherein suit was brought to determine the boundary between Michigan and Wisconsin from the mouth of the Montreal river at Lake Superior to this ship channel entrance from Lake Michigan into Green Bay; Vermont v. New Hampshire (*http://supreme.justia.com/us/289/593/case.html*), 289 U.S. 593 (1933), wherein Vermont brought suit against New Hampshire over the determination of the boundary line with involving the Connecticut River.
[4]Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 281-82 (1959). Accessed from *http://supreme.justia.com/us/359/275/case.html*.
[5]College Savings Bank v. Florida. Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999) "Granting of consent is a gratuity on the part of Congress not a right that the states possess under the Constitution." Accessed from: *http://supreme.justia.com/us/527/666/case.html.*
[6]Broun, Caroline N., Buenger, Michael L., McCabe, Michael H., & Masters, Richard L. (2006) p. 41. "The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide." Chicago: American Bar Association.
[7]Broun, et al. p. 43-7. Also see Arizona v. California (*http://supreme.justia.com/us/373/546/case.html*), 373 U.S. 546 (1963).
[8]Broun, et al. p. 43. Also see Arizona v. California (*http://supreme.justia.com/us/373/546/case.html*), 373 U.S. 546 (1963). Also see Merrion v. Jicarilla Apache Tribe (*http://supreme.justia.com/us/455/130/case.html*), 455 U.S. 130, 148 (1982) "Contractual arrangements remain subject to subsequent legislation by the presiding sovereign."
[9]Broun, et al. p. 43. Also see, Arizona v. California (*http://supreme.justia.com/us/373/546/case.html*), 373 U.S. 546 (1963) wherein the Supreme Court held Congress acted within its realm of authority when it created a plan to manage and operate the Colorado River even though it had previously granted consent to the Colorado River Compact whose purpose was to assist in the management and operation of the body of water.
[10]Broun, et al. p. 44.
[11]Tobin v. United States, 306 F.2d 270, 273 (D.C. Cir. 1962). Accessed from *http://openjurist.org/306/f2d/270/tobin-v-united-states*.
[12]Mineo v. Port Authority of New York-New Jersey, 779 F.2d 939 (3d Cir. 1985). Accessed from *http://ftp.resource.org/courts.gov/c/F2/779/779.F2d.939.83-5588.html*.
[13]Broun, et al. p. 43.
[14]Tobin v. United States, 306 F.2d 270, 273 (D.C. Cir. 1962). Accessed from *http://openjurist.org/306/f2d/270/tobin-v-united-states*.
[15]Cuyler v. Adams, 449 U.S. 433 (1981). Accessed from *http://supreme.justia.com/us/449/433/case.html.*
[16]Ibid.
[17]Broun, et al. p. 43. Also see Old Town Trolley Tours of Wash. V. Wash. Metro. Area Transit Commission (*http://ftp.resource.org/courts.gov/c/F3/129/129.F3d.201.96-1069.html*), 129 F.3d 201, 204 (D.C. Cir. 1997); Reed v. Farley (*http://supreme.justia.com/us/512/339/*), 512 U.S. 339 (1994).
[18]Broun, et al. p. 56.

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