Interstate Compacts and the Federal Government

Interstate compacts often are viewed as a way for states to work cooperatively to avoid federal intervention or a federally mandated solution. While that is an accurate statement, it does not mean the federal government does not play a role in the compact process. In fact, federal officials are active participants in a number of compacts. That participation ranges from congressional consent to direct federal participation.

The Carrot and the Stick

At times, the federal government has encouraged states to explore and ultimately adopt interstate compacts to address a specific issue. This typically occurs through congressional action. In these instances, federal officials are encouraging states to utilize compacts to solve cross-border challenges instead of federally mandating a solution. In many ways, this is analogous to federal officials dangling compacts in front of state policymakers as a carrot while maintaining the threat of federal pre-emption as a stick.

The creation of the Surplus Lines Insurance Compact—known as SLIMPACT—is one example. President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act July 21, 2010. Congress recommended in the reform act that states adopt uniform requirements, forms and procedures, such as an interstate compact, to facilitate the reporting, payment, collection and allocation of premium taxes for nonadmitted insurance. SLIMPACT, which nine states have adopted as of March 2014, was a direct outgrowth of the nonadmitted insurance provision contained in Dodd-Frank.

Federal Participation

The federal government has taken a more active role in interstate compacts by serving as an observer and, in some cases, directly participating on a compact commission. In these instances, federal officials often participate in an ex-officio capacity. This means they serve as a nonvoting member of the compact’s governing body, which allows federal officials to directly participate and influence the direction a compact commission takes.

One such example of this type of arrangement can be found in the Interstate Compact on Educational Opportunity for Military Children. The compact, which was developed jointly by CSG’s National Center for Interstate Compacts and the U.S. Department of Defense, resolves education transition issues faced by children of active duty service members transferring between school districts and states. Forty-six states and the District of Columbia have adopted the compact as of March 2014.

Representatives from each of the member states serve on the compact’s commission and are responsible for passing rules, appointing committees, electing commission leadership and passing bylaws. DOD, through a representative from the Department of Defense Education Activity (DoDEA), still serves on the commission in an ex-officio capacity. DoDEA representatives attend commission meetings, serve on committees, assist with training and outreach, and generally serve as a resource for the compact commission and its staff.

Another less obvious way the federal government engages with compact commissions is through the participation of agencies over which federal officials have substantial influence. The most obvious example is the participation of the District of Columbia in...
interstate compacts. The district, with congressional approval, is eligible to join an interstate compact. In fact the district is a member of 17 different interstate compacts, including several 50-state compacts.

**Congressional Consent**

Congressional consent is the most direct way the federal government can influence the compact process. Article 1, Clause 10, Section 3 of the Constitution, which is often referred to as the Compact Clause, reads as follows: “No state shall, without the consent of Congress … enter into any agreement or compact with another state.”

The clause provides states the right to form compacts, while simultaneously ensuring Congress has significant influence over the process. The reality, however, is congressional consent is not as cut-and-dried as it first appears.

The Founding Fathers may have included the clause to protect the dual-sovereignty nature of our democratic government, while simultaneously granting states the ability to cooperatively resolve problems. If that is the case, they likely called for consent to ensure that states did not use this authority to alter the balance of power between the states and the federal government.

In fact, a literal reading of the compact clause would suggest that all interstate compacts require the approval of Congress. The Supreme Court, however, has concluded that “any” does not mean “all.” In the case of Virginia v. Tennessee, the court ruled that only two types of compacts require consent:

- Compacts that alter the balance of power between the states and the federal governments; and
- Compacts that intrude on a power traditionally reserved for Congress.\(^6\)

As long as a compact does not touch on either of these two areas, courts have ruled the federal government does not have a direct interest in the compact and, therefore, congressional consent is not required.

Further muddying the question of consent is the fact that the Constitution is noticeably silent about how states must seek consent and the procedures Congress must follow when granting it. Generally speaking, however, consent is granted in one of three ways:

**1. Explicitly\(^4\)**

In these instances a compact is submitted for consent only after it has been signed into law by the minimum number of states required to make the compact effective. Congress then reviews, amends and revises the agreement if necessary. The advantage to seeking consent explicitly is that it allows Congress to make a clear determination about the validity and legality of a specific compact.

**2. Pre-emptively\(^5\)**

From time to time Congress provides advanced consent. In these instances, states are encouraged by Congress to enter into a compact that addresses a very specific purpose. This form of consent typically occurs through the legislative process. The Surplus Lines Insurance Compact referenced above is an example of advanced consent. Because of its advanced nature, this type of consent tends to be broad and can ultimately deprive Congress of the opportunity to review the specific content of the newly formed compact.

**3. Implied\(^6\)**

In these instances, consent is simply inferred by Congress demonstrating acquiescence with the terms of a given compact. Acquiescence is most often inferred when Congress adopts subsequent legislation that is consistent with the new compact.

While the need for consent and ways to obtain it remain somewhat ambiguous, the impact of consent on a particular compact is profound. When Congress considers a compact, it has the authority to either withhold consent or amend the agreement. If Congress denies consent, the compact does not ultimately be adopted, the member states are, in essence, accepting the changes called for by Congress.\(^8\)

In the instance where Congress provides consent, the new compact is elevated to the status of federal law. In the case of Cuyler v. Adams, the court concluded congressional consent “transforms the States’ agreement into federal law under the Compact Clause.” 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.”\(^9\)

In this respect, interstate compacts are unique. Consent remains the quickest and least obtrusive way for state law to be federalized and placed under federal jurisdiction.

---


\(^{5}\) Ibid.

\(^{6}\) Ibid.

\(^{7}\) Ibid.

\(^{8}\) Ibid.

\(^{9}\) “Interstate Commission on Educational Opportunity for Military Children.”

**REFERENCES**

1. National Center for Interstate Compacts | www.csg.org
2. State search for interstate compacts | apps.csg.org/nvic/