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The Federal Government and Interstate Compacts

Cover Page Footnote

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THE FEDERAL GOVERNMENT AND INTERSTATE COMPACTS

RICHARD H. LEACH*

The recent congressional foray into the affairs of the Port of New York Authority has dramatized a growingly menacing attitude toward interstate compacts and agencies even while they have become increasingly indispensable arms of state government. In asking for a clarification of the nature of Congress' interest in the interstate compacts, Professor Leach urges a greater exercise of federal restraint. "Compromise and adjustment, not challenge and counterchallenge, are basic to a strong federal system."

I

INTERSTATE compacts have been a part of the American political experience since the days of the Articles of Confederation. In fact, even before the Revolution a number of intercolonial agreements had been concluded. The Articles of Confederation merely recognized the existence of the custom and did not seek to restrict it.¹ When the Articles were superseded by the Constitution of 1787, the use of compacts was by then assumed to be a proper exercise of state power, and the Convention carried the compact clause of the Articles over into the new document virtually intact. If the phraseology in the Constitution is negative,² it is nevertheless permissive, and the states continued to make use of compacts as before. For many years, they were used only sparingly and generally as last resorts to settle boundary and jurisdictional disputes between pairs of states.³ With such limited objectives, none of the early compacts created an administrative agency to carry out its terms. Since the end of World War I, however, compacts have been turned to with increasing frequency as devices to permit a number of states to take positive cooperative action in fields where they cannot act effectively, or do not wish to act, alone, fields which might otherwise fall by default to the federal government if not occupied through the initiative of the states. Frederick L. Zimmermann and Mitchell Wendell set 1925 as the date when the new era of compact use began.⁴ With

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1. Art. VI, cl. 2, provided: "No two or more States shall enter into any treaty, confederation or alliance . . . 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."

2. U.S. Const. art. I, § 10, cl. 3, provides: "No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State. . . ."

3. Only twenty-one compacts became effective between 1789 and 1900. Leach & Sugg, *The Administration of Interstate Compacts* 5 (1959).

4. Zimmermann & Wendell, *The Interstate Compact Since 1925* (1951). This constitutes the first definitive work on interstate compacts and is invaluable to the student of the subject.

the broader use of interstate compacts as effective tools of state power, compact agencies began to be created, and in the last quarter century they have come to occupy an important place in state administration.⁵

By 1960, compacts were used by virtually every state in the Union in attacking interstate problems in a wide variety of fields. Today, by means of compacts, oil is being conserved; pollution is being removed from major harbors and river basins; higher education is being advanced in three regions of the country; water is being fairly apportioned among many states and new sources of water supply are being developed; forest fire protection is being extended; fisheries research is making headway; flood control measures are being perfected; parolees are being given a better chance to rehabilitate themselves; the New York waterfront is being released from its long bondage to the underworld; the welfare of juveniles is being advanced. The list could be extended. The point is that the states have found in the compact device a feasible and effective way of moving ahead on a great many fronts which long defied attack by individual action. In so doing, they have not only made progress in solving their own problems, they have also frequently removed the need for federal intervention or control.

New York is perhaps the leader in the use of compacts. It has, for example, provided for waterfront regulation and harbor development by joint action with New Jersey through the compacts creating the Port of New York Authority⁶ and the Waterfront Commission of New York Harbor;⁷ tackled problems of conservation and development by joining with the other Atlantic coast states in the Atlantic States Marine Fisheries Compact,⁸ with twenty-nine other states in all parts of the country in the Interstate Oil Compact,⁹ with the Northeastern states in the Northeastern Forest Fire Protection Compact,¹⁰ and with Vermont

5. See Leach & Sugg, *op. cit. supra* note 3.

6. 42 Stat. 174 (1921); N.J. Stat. Ann. §§ 32:1-1 to -23 (1940); N.Y. Unconsol. Laws §§ 6401-23 (McKinney 1953).

7. 67 Stat. 541 (1953); N.J. Stat. Ann. §§ 32:23-1 to -108 (Supp. 1960); N.Y. Unconsol. Laws §§ 6700-aa to -zz (McKinney Supp. 1960).

8. 56 Stat. 267 (1942); N.Y. Sess. Laws 1941, ch. 500. Other member states are Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Carolina and Virginia.

9. 49 Stat. 939 (1935); N.Y. Sess. Laws 1941, ch. 501. There has been congressional consent to extension and renewal for four years to Sept. 1, 1963. 73 Stat. 290 (1959). Other member states are Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia and Wyoming. In addition, Georgia, Idaho and Oregon participate as associate members.

10. 63 Stat. 271 (1949); N.Y. Sess. Laws 1949, ch. 744. Other member states are

in the Interstate Commission on the Lake Champlain Basin;¹¹ sought ways to eliminate water pollution by joining with the New England states in the New England Interstate Water Pollution Control Compact,¹² with the states in the Ohio Valley in the Ohio River Valley Water Sanitation Compact,¹³ and with Connecticut and New Jersey in the Interstate Sanitation Compact;¹⁴ provided for recreation for her millions of citizens by joining with New Jersey in operating the Palisades Interstate Park;¹⁵ and improved conditions affecting correction, parole and social welfare in a number of other compacts with a variety of states.¹⁶ Indeed, one cannot read a report of the New York Joint Legislative Committee on Interstate Cooperation¹⁷ without recognizing the extent to which New York now relies on compacts and on compact agencies, their administrative arms, to solve some of the complex problems which face her on every side. The same can be said of a great many other states, particularly in the East, the South and the Far West, where increasing population and consequent heavy demands on state resources combine to point up the desirability of continuing cooperative state action through the agency of compacts and compact commissions.

Indeed, the evidence is clear that the states have accepted compacts

Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. Congressional consent was given to the participation of any Province of the Dominion of Canada contiguous to a party state in the compact. 66 Stat. 71 (1952).

11. N.Y. Sess. Laws 1956, ch. 876, as amended, N.Y. Sess. Laws 1957, ch. 73; Vt. Stat. Ann. tit. 10, 171-74 (Supp. 1959). This is not a compact per se but parallel acts to promote interstate cooperation.

12. 61 Stat. 682 (1947); N.Y. Sess. Laws 1949, ch. 704. Other member states are Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

13. 54 Stat. 752 (1940); N.Y. Sess. Laws 1939, ch. 945. Other member states are Illinois, Indiana, Kentucky, Ohio, Pennsylvania, Virginia and West Virginia.

14. 49 Stat. 932 (1935); N.Y. Sess. Laws 1932, ch. 499.

15. 50 Stat. 719 (1937); N.J. Stat. Ann. §§ 32:17-1 to -13 (1940); N.Y. Sess. Laws 1937, ch. 170.

16. Interstate Compact for the Supervision of Parolees and Probationers, 4 U.S.C. § 111 (1958); N.Y. Correc. Law § 224. All states are members.

Interstate Compact on Juveniles, N.Y. Unconsol. Laws §§ 1801-06 (McKinney Supp. 1960). Other signatories are Alaska, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington and Wisconsin. No action has been taken by Congress.

Interstate Compact on Mental Health, N.Y. Mental Hygiene Law §§ 141-45. Other signatories are Connecticut, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, Oregon, Rhode Island and West Virginia. No action has been taken by Congress.

17. See N.Y. Joint Legislative Comm. on Interstate Cooperation, Report, Legislative Doc. No. 45 (1958); Legislative Doc. No. 43 (1959); Legislative Doc. No. 6 (1960).

and have come to rely on them increasingly in recent years. Even a cursory study of state legislative action in the last biennium¹⁸ reveals the place compacts now occupy in state government. New compacts continue to be developed and old compacts continue to acquire new state participants.¹⁹ Moreover, an analysis of state budgets during the same period shows that in no case have state appropriations to compact agencies been decreased and that in many instances they have been increased. Thus the states party to the Western Interstate Commission for Higher Education,²⁰ for example, recently upped their annual appropriations from \$7,000 to \$10,000 each per year; and the states party to the Atlantic States Marine Fisheries Compact have agreed to a revision upward in the formula for state contribution to the Atlantic States Marine Fisheries Commission.²¹ The primary reason, of course, that the states continue to negotiate new compacts and to support existing ones is the success which has attended compact agency efforts. One need only read about the work of the Ohio River Valley Water Sanitation Commission, through whose leadership "the Ohio, river named for its beauty, is becoming itself again,"²² or the reports of the Attorney General of the United States on the operation of the Interstate Oil Compact Commission, all of which are laudatory in the extreme,²³ to see why the states which are party to those compacts are enthusiastic about their use. The success pattern of many other compacts is equally good.

This enthusiasm is not confined to state legislatures and executive officials. The people in the Potomac River Valley, for example, are becoming increasingly aware of the important role the Interstate Commission for the Potomac River Basin has played in getting pollution removed from that river, and the people in the arid Colorado River region are conscious of their debt to the Upper Colorado River Commission in getting the important Colorado River Storage Project underway. This broader enthusiasm is reflected in the endorsement given to compacts by such organizations as the United

18. See *Action by the Legislatures: 1960*, 33 *State Gov't* 263-75 (1960); *Trends of State Gov't in 1959 as Indicated by the Governors' Messages*, 32 *State Gov't* 78-96 (1959).

19. See *Action by the Legislatures: 1960*, 33 *State Gov't* 67-69, 71 (1960); *Action by the Legislatures: 1959*, 32 *State Gov't* 199, 205, 208-09 (1959).

20. 67 *Stat.* 490 (1953). Member states are Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming.

21. N.Y. Joint Legislative Comm. on Interstate Cooperation, Report, Legislative Doc. No. 6, at 81-82 (1960).

22. *Time*, Jan. 11, 1960, p. 17.

23. E.g., U.S. Dep't of Justice, Fourth Report of the Attorney General Pursuant to Section 2 of Joint Resolution of July 28, 1955 (1959).

States Chamber of Commerce, which has recommended their use again and again. Speaking generally of compacts in its 1960 *Policy Declarations*, for example, it declares that "Interstate Compacts . . . are . . . serviceable instruments for bringing about joint action by a group of states in meeting common problems of a regional nature." And with specific regard to the field of water resources, the Chamber goes on to say that "compacts can be effective in accomplishing results that cannot be achieved through more direct action by private initiative or local agencies. Likewise, interstate compacts can be used advantageously in providing for multi-state action on regional or basin-wide problems which otherwise might require unilateral action by the federal government."²⁴

The Chamber is not the only such group to subscribe to the compact device. The list of compact supporters is growing all the time. The current wave of enthusiasm for their use and the fact that the states have considerably broadened both their use of and their reliance on compacts since World War II underscores the fact that the states anticipate their continued availability in the future. A study of compact operations in the states today can hardly fail to yield the conclusion that as the states seek ways to exercise their own powers in the future on the one hand and existing compact agencies continue to prove their value in practice on the other, the states will seek to utilize compacts even more frequently in the years ahead.

To say all this, however, is not to say that as compact use has developed, it has been regarded by the states as a universally applicable panacea to all their problems. Of course compacts are not. However useful they are, they should be considered only as one of a number of methods available for attacking problems jointly. The Council of State Governments and its constituent Committees on Interstate Cooperation in the states offer one valuable channel for cooperative action.²⁵ Certain problems can be dealt with by formal or informal cooperation by state administrative officers and others can be solved by the passage of uniform or reciprocal legislation. Compacts are only one method of interstate cooperation, a method admirably suited for action on certain problems and inappropriate for others.

Nor should increasing reliance on compacts lead one to conclude that their use is easy. Compacts are often difficult to formulate in the first place. Compromise is an essential ingredient of a successful compact recipe, and when a problem has been neglected and allowed to fester,

24. U.S. Chamber of Commerce, *Policy Declarations* 24-25 (1960).

25. See Leach & Zimmermann, *The Commissions on Interstate Cooperation*, 33 *State Gov't* 233-42 (1960).

as many interstate problems have, compromise is often hard to achieve. Once in force, compacts are hard to amend. A compact becomes law upon ratification by the party states and assumes the rigidity of law. But because it is joint law, to change it is often a tedious and sometimes an impossible task. Sometimes the only solution is for one or all the parties to a compact to repudiate it, as the legislature of Maryland did in 1957²⁶ to the time-hallowed Potomac River Compact. With the decks thus cleared, a new and more suitable compact can be drawn. In addition, compacts are hard to enforce.²⁷ Their effectiveness depends in the last analysis on a willingness to act rather than on legal compulsion.

Moreover, agencies created by compacts are often forced to operate in a sort of administrative limbo. Regarded as neither fish nor fowl by other state agencies and officials, it is hard as a result for compact agency activities to be well meshed with those of purely state agencies. Indeed, compact agencies have learned that they must take the initiative in seeking accommodation with state agencies, and the most successful ones devote careful attention to finding ways of bringing such accommodation about. Nor do many state legislatures feel any more at home with compact agencies, as the difficulty several have had in getting adequate financial support from their parent states attests.²⁸

Notwithstanding these caveats, however, compacts and compact agencies have become an accepted and even expected part of state government activity. By their effectiveness in meeting the problems they were designed to meet, they have proved that they deserve the confidence the states have placed in them. No longer can state government be treated without considerable attention to its interstate aspects. The age of the compact has arrived.

II

As the states turned to compacts more frequently, the federal government came to be more and more involved in their use. Although there can be little constitutional doubt that compacts are legitimately within the prerogative of state power, the Constitution nevertheless clearly makes them a matter of federal concern. Article I, section 10, declares not only that "No State shall enter into any Treaty, Alliance, or Confederation. . . ," but also that "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State. . . ." The Constitution does not go on to say how the former

26. Md. Acts 1957, ch. 770, repealing Md. Acts 1785, ch. 1.

27. See Zimmermann & Wendell, *op. cit. supra* note 4, at 43-56.

28. Many of these problems are considered in more detail in Leach & Sugg, *op. cit. supra* note 3.

prohibition shall be enforced nor when or in what way Congress shall act in carrying out the latter. Indeed, no further word about compacts appears in the Constitution. But since both restrictions were placed in article I, the legislative article, and since Congress is specifically mentioned in connection with consent, the inference seems clear that the framers intended Congress to be the point of contact with interstate compacts. Although a number of other federal relationships with compacts have developed, they are derivative only.

For many years, traffic in interstate compacts was so light and their purposes so narrow that Congress was not obliged to concern itself about the implications of its constitutional mandate. Consent, if given at all, was given almost automatically, and there was no need to examine motives or question expected results in the process. It was not until 1893 that Congress had any clearly stated rationale for granting consent, and even then it came, characteristically enough, from the Supreme Court rather than from the Congress itself.²⁹ In *Virginia v. Tennessee*,³⁰ the Court held that "there are many matters upon which . . . States may agree that can in no respect concern the United States."³¹ The wording of the compact clause, it held, and thus the requirement of consent, was "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."³² Only those compacts, in other words, which affected the political balance of the Union were subject to congressional consent. "Although little or no warrant for distinguishing between permissible classes of . . . [compacts] is to be found in the Constitution itself," Zimmermann and Wendell commented in 1951, "this bit of judicial construction would seem to be in harmony with the political purposes . . ." underlying the Constitution.³³ Certainly it squared with the other provision in article I that states should not be permitted to form treaties, alliances or confederations among themselves. The only difficulty with the political balance formula in practice is that Congress has since seemed to feel that an examination of every compact entered into by the states is necessary to determine what its effect might be on the Union. At least since 1893, and in the continued absence of a specific declaration of policy

29. In an earlier case, *Holmes v. Jennison*, 39 U.S. (14 Pet.) 470 (1840), the Court had dealt with the tacit consent of Congress to an extradition agreement between Vermont and Canada.

30. 148 U.S. 503 (1893).

31. *Id.* at 518.

32. *Id.* at 519.

33. Zimmermann & Wendell, *op. cit. supra* note 4, at 34.

to the contrary, the custom has become firmly established that *all* compacts are automatically to be submitted to Congress for consent.

As compacts began to be used more frequently by the states and the flow of compacts for approval thus increased, Congress was forced to develop a method for handling consent. The Judiciary Committees in both Houses were assigned general responsibility for compacts, while compacts in certain specific subject-matter areas were assigned to committees concerned with those topics. Thus in the House, for example, fisheries compacts are handled by the Committee on Merchant Marine and Fisheries and water apportionment compacts by the Committee on Interior and Insular Affairs. Before committees in both Houses, compacts were treated like other matters being considered and were made subject to the same procedures—assignment to subcommittee, inquiries of concerned executive departments, hearings, referral to the whole committee for action—as all other legislative business. Since the compact under consideration had already been accepted by the states party to it in exactly the form submitted to Congress, there was little occasion to discuss the compact itself, thus forcing the focus of committee attention where *Virginia v. Tennessee* seemed to direct it, to the effect of the compact on the balance of the federal system. Over the years, Congress followed much the same procedure every time a compact came before it, and a consent act became a standard affair. One section normally gave the text of the compact being approved, another section reserved to Congress the right later to amend, alter or repeal the act giving its consent, and a third section, used chiefly in connection with compacts concerned in some way with navigable waters, declared that nothing in the consent act itself or in the compact contained therein should be construed as impairing or affecting the authority of the United States or any of its rights and jurisdiction over the area or waters which were the subject of the compact. Recently a fourth so-called “standard” section has been added to consent acts. It merely seeks to preserve federal antitrust prohibitions by declaring that nothing in the consent act is to be construed as providing a defense against any subsequent “prohibited antitrust or monopolistic act” by the compact agency established by the compact.³⁴

As new areas for compact activity began to be explored by the states, the standard pattern of asking for consent after the fact was deviated from occasionally by the states asking for legislative approval to negotiate a compact, and simple acts giving consent to negotiations became fairly common. When a compact was finally drawn up under such permission, it then had to be given consent as well. Since the whole

34. H.R. Rep. No. 948, 86th Cong., 1st Sess. 2 (1959).

consent procedure took action by both Houses of Congress, it sometimes took a relatively long time. But at least until recent years, congressional consent, if slow, was pretty sure to be forthcoming.³⁵

If a general *procedure* for handling congressional consent has been arrived at, however, a *standard* for consent has not been so easy to establish. Indeed, Congress has consistently been inconsistent in handling the details of consent. In one case, that of the Gulf States Marine Fisheries Compact,³⁶ Congress required an alteration in the text of the compact as a condition for approval. In other cases, consent has been granted only subject to conditions—consent only for a limited period of time, as in the case of the Interstate Oil Compact;³⁷ the requirement of an annual investigation of activities under the compact by the Attorney General of the United States, again in the case of the Interstate Oil Commission;³⁸ or the requirement of periodic reports to Congress from the compact agency, as with the Atlantic and Pacific Marine Fisheries Compacts.³⁹ In most cases, however, the Congress seemed to desire the compact to become operative and the limitations it imposed were not designed to hamper compact development.

From time to time, Congress has departed from its passive role with regard to compact use and has become to all intents and purposes an active partisan of compacts. By passing consent-in-advance legislation before any compacts had been submitted for approval, it has in effect advocated their use in certain areas⁴⁰ to the states.

Perhaps Congress has not been consistent in granting consent to compacts because it has not developed a single concept on which to base its thought about them. As in many areas of legislative action, the broad picture is never seen by Congress as a whole; rather, only parts—specific compacts in specific subject matter areas—are seen by parts of Congress—an occasional subcommittee or at best only a few committees as a whole. It is doubtful, indeed, if the average member of Congress is very much aware of compacts and compact agencies (or at least it was doubtful until the recent controversy over the Port of New

35. The Southern Regional Education Compact, submitted in 1948, was approved by the House of Representatives, H.R.J. Res. 334, 80th Cong., 2d Sess. (1948), without comment; but the Senate, fearing then to take federal action on a matter touching both education and segregation, took no action at all. S.J. Res. 191, 80th Cong., 2d Sess. (1948).

36. 63 Stat. 70 (1949).

37. See note 9 *supra*.

38. 73 Stat. 296 (1959).

39. Atlantic Marine Fisheries Compact, art. XII, § 3, 56 Stat. 270 (1942); Pacific Marine Fisheries Compact, art. XI, § 2, 61 Stat. 422 (1947).

40. Specifically in the areas of airport construction, 73 Stat. 333 (1959), 49 U.S.C. § 1103a (Supp. I, 1959); civil defense, 64 Stat. 1249 (1951), 50 U.S.C. App. § 2231(g) (1958); and forest conservation, 36 Stat. 961 (1911), 16 U.S.C. § 552 (1938).

York Authority!). There is no focal point of contact with compacts in either House and no regular occasion for a display of congressional concern about them. Congress' relation to compacts is thus a casual one—one might even say offhand—and, since it has pretty well confined itself to granting *prior* approval, its knowledge of subsequent compact agency activity is fragmentary. Presumably some members of Congress have personal associations with compact agencies, but as a whole, Congress is remote from their activities. Or so it has been until very recently.

Although the Constitution mentions only the Congress in connection with compacts, agencies in the executive branch have also come to have a number of relations with both compacts and compact agencies. Congress itself has been responsible to some degree for bringing executive agencies into the picture. Congressional committees have come to rely on the executive departments for help and guidance on compact matters as they do on all legislative business, and they have formed the habit of asking executive departments for comments on compacts being considered by them for approval. Thus in the Eighty-sixth Congress the Senate Committee on the Judiciary asked the Department of Justice, the Department of Interior and the Bureau of the Budget for comments on the compact for a new boundary between Arizona and Nevada which the Committee had before it for consent.⁴¹ And the House Committee on Public Works, while considering the Northeastern Water and Related Land Resources Compact,⁴² solicited opinions from eight executive agencies which it felt might have an interest in the proposed compact.⁴³ Very frequently, staff members of executive agencies are especially qualified to testify because they participated in the negotiation of the compact in the first place, often at the instance of the states themselves. All the western water apportionment compacts, for example, included a federal participant in the negotiation stage. Federal agencies have been generous in permitting staff members to cooperate with the states in this way. The states are thus able to draw on the services of experts in drawing up the compact, and the federal agencies concerned benefit by being made party to state plans to solve problems of importance to both levels of government. Since participation obviously aids Congress in assessing the objectives of the compact as well as facilitating subsequent operation of the compact agency if federal participation is required, the comments of participating agencies are listened to carefully by the committees and often are incorporated into the consent act.

41. S. Rep. No. 1864, 86th Cong., 2d Sess. 2-3 (1960).

42. Compact set forth in the N.Y. Joint Legislative Comm. on Interstate Cooperation, Report, Legislative Doc. No. 6, at 313-18 (1960).

43. H.R. Rep. No. 1767, 86th Cong., 2d Sess. 6-22 (1960).

In one area, that of civil defense, the Office of Civil and Defense Mobilization is specifically charged by Congress to urge the use of compacts by the states,⁴⁴ and in carrying out the charge OCDM reviews the terms and conditions of proposed compacts for conformity and consistency with national civil defense plans and programs and coordinates activities under the compacts. Virtually every executive department cooperates in compact drafting in the same way without specific charge when the states ask for assistance.

And once compacts are approved and ratified and the agencies they create begin operations, direct relations between them and federal executive departments become common. On the water apportionment and stream pollution commissions, for example, federal representatives appointed by the President serve as members and in most cases as chairmen. Since they are employees of federal departments concerned with the same matters as the compact agencies, they provide an effective link for the coordination of the work of those bodies and that of the federal government. In addition to membership on compact commissions, and even where that particular arrangement is not in effect, federal departments have other helpful connections with compact agencies. The reports of the Yellowstone River Compact Commission, to give but one illustration, never fail to express appreciation to officials of the Department of the Army, the Department of the Interior, the Department of Agriculture, the Department of Commerce and the Federal Power Commission for the performance upon request of services and the provision when asked of data useful and necessary to the Commission. In a few cases, a more formal cooperative arrangement is in effect. The Atlantic and Gulf States Marine Fisheries Commissions utilize, by contract, the U. S. Fish and Wildlife Service as their primary research arm. In both cases the years have brought an increasingly close liaison between the Commissions and the Service. Neither Commission asks the Service for research which the states party to the compacts can do themselves; instead, they "ask primarily for studies involving species of interstate significance and wide range or off-shore research or work of a character that . . . requires integration of data along the whole range of a species."⁴⁵ Several water apportionment commissions contract with the U. S. Geological Survey to operate stream gauging stations and to compile the data needed for the administration of the compact terms.

44. Federal Civil Defense Act of 1950, § 201(g), 64 Stat. 1249 (1951), 50 U.S.C. App. § 2281(g) (1958).

45. Letter from Wayne D. Heydecker, Secretary-Treasurer, Atlantic States Marine Fisheries Commission, to Richard H. Leach, July 15, 1954, in Leach & Sugg, *op. cit.* supra note 3, at 58-59.

The cooperative relationships just described are the most consistent of those in existence between compact agencies and executive agencies of the federal government. But other compact commissions have had occasional beneficial contacts with Washington. Even the Southern Regional Education Board—the compact establishing the Board was not approved by Congress because it felt that education was not a subject of federal interest—has founded one of its most extensive programs, that in mental health, on a grant from the National Institute of Mental Health. And when the Western Interstate Commission for Higher Education wished to study dental educational facilities in relation to manpower requirements in the West, it turned to the Division of Dental Resources of the U. S. Public Health Service for assistance. The survey made under the Division's auspices lasted eighteen months and resulted in the formulation of a new program by the Commission. The Interstate Oil Compact Commission not only benefits from the enforcement of the so-called "Connally Hot Oil Act,"⁴⁶ which supports state conservation laws by prohibiting the shipment in interstate commerce of oil produced in excess of that allowed by the state regulatory agencies, but receives much valuable assistance in its work from such federal agencies as the Department of Interior and the Federal Power Commission. A great many other examples could be cited—so many, in fact, that as Zimmermann and Wendell concluded, "About the only generalization possible is that many of the devices that have been developed for federal-state cooperation. . . ," including grants-in-aid, have also been brought to bear in the compact field.⁴⁷

While there are other federal-compact relationships,⁴⁸ the limits of space prevent a more detailed discussion. Suffice it to say that there are many federal-compact relations today, and that in the main, those relations are based on a recognition on the part of Washington of the right of the states to use the compact device and have been directed toward facilitating that use. Federal-compact relations have generally been cordial, and cooperation has been their hallmark. Indeed, it is probably not putting it too strongly to say that at least some of the success compact agencies have had in the last twenty years stems from the support and encouragement extended to their work by the federal government. With compact agencies so widely accepted by the states as tools for the exercise of state power, one would have been surprised if the federal attitude had been anything else. In fact, one would have sup-

46. 49 Stat. 30 (1935), as amended, 15 U.S.C. §§ 715—715 m (1958).

47. Zimmermann & Wendell, *op. cit.* supra note 4, at 65.

48. Compacts and compact agencies obviously are subject to the jurisdiction of the federal courts, and there are a large number of compact cases. Since these relationships, however, are seldom operational, they have been omitted from this discussion.

posed that the problems of accommodating these relative newcomers to the complex pattern of federal-state relations had largely been overcome and that the future promised only a continuation of the commendable record of the past. If so, however, one seems to be in for a rude awakening.

III⁴⁹

If by and large the federal government has not restrained the states in their use of compacts in the past, there are increasing indications that its attitude toward compacts has become critical, if not actually hostile, in recent years. Indeed, the attitude now developing in Washington toward interstate compacts presents the most serious challenge yet made to their use, a challenge which must be met if compacts are to continue to serve as useful tools of the states.

By and large, the challenge is from Congress. Although there is ample evidence that Congress has been led at least part of the way to her present position by a change in the executive heart toward compacts,⁵⁰ it cannot escape accountability for the consequences, since it has the chief responsibility for action in the area.

Perhaps the first evidence of a change of congressional attitude was to be seen in connection with the Interstate Compact on Juveniles.⁵¹ Enacted by New York in 1955 and submitted that year to Congress for approval,⁵² it has subsequently been enacted by twenty-seven other states.⁵³ The House Judiciary Committee, however, has not been willing in any session of Congress since then to report out a consent bill which the states party to the compact can accept. The Committee has taken the position that it will grant its consent only to those states party to the compact at the time the consent bill is before Congress,⁵⁴ thus in effect requiring a new consent measure each time another state subsequently ratifies the compact—even though, as Brevard Crihfield points out, “every comma, period, sentence and paragraph is identical in every state ratification act.”⁵⁵ Despite the pleas of state officials, as well as those of officers of the Council of State Governments, the New York Joint Legislative Committee on Interstate Cooperation, and the Association of Juvenile

49. The author is indebted to Brevard Crihfield, Executive Director, Council of State Governments, for many of the details in this section of the article.

50. See N.Y. Joint Legislative Comm. on Interstate Cooperation, Report, Legislative Doc. No. 45, at 35, 42-43 (1958).

51. Note 16 *supra*.

52. H.R.J. Res. 290, 291, 84th Cong., 1st Sess. (1955).

53. Note 16 *supra*.

54. Address by Brevard Crihfield to the Southern Political Science Association, Nov. 4, 1960.

55. *Ibid*.

Compact Administrators, that such a consent bill would subject states later wishing to join the compact to needless and unpredictable delays in becoming a part of the compact's operation, the Congress has not seen fit to override the Judiciary Committee's position. Instead, it has failed to act on the Juvenile Compact at all. Fortunately, the states have not suffered unduly by congressional foot-dragging in this case. The twenty-eight states so far party to the compact have organized and worked out procedures for operation under it, and by now all the goals of the compact are substantially being met despite the imbroglia in Congress.

Unhappily, the attitude of Congress toward the Juvenile Compact was symptomatic of a continuing complaint. Almost at once congressional hostility popped up in another case. The seven states in the Tennessee River Valley had worked long and hard to develop the Tennessee River Basin Water Pollution Control Compact.⁵⁶ They considered themselves fortunate to have had two very good models to follow in drawing up the compact, both of which, incidentally, had won the approval of Congress—the Ohio River Valley Pollution Compact⁵⁷ and the New England Interstate Pollution Compact.⁵⁸ There was final agreement on a draft compact very much like its predecessors, and the states in the Tennessee Valley all accepted its terms. When they came to Congress for approval, however, Congress refused to give the states party to the new compact the same treatment it had given their sister states party to the older compacts. Instead of approving the compact by a simple consent act as it had done before, Congress incorporated into its consent legislation, passed in 1958, a provision denying the Tennessee Valley states the same flexibility of operation allowed the earlier pollution commissions by strictly limiting the agency to be created by the Tennessee Compact to those functions specifically enumerated in the compact.⁵⁹ The compact itself was thus accepted but its further development was prejudiced. Only once before had such a restriction been imposed—this in connection with the Bi-State Development Agency,⁶⁰ which is concerned with several aspects of the metropolitan problem in the St. Louis area. In that case, however, the limitation was

56. 72 Stat. 823 (1958). Member states are Alabama, Georgia, Kentucky, Mississippi, North Carolina, Tennessee and Virginia.

57. 54 Stat. 752 (1940). Member states are Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia and West Virginia.

58. 61 Stat. 682 (1947). Member states are Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont.

59. 72 Stat. 828 (1958).

60. Established, with the Bi-State Metropolitan District, under 64 Stat. 568 (1950). Member states of the compact are Missouri and Illinois. The limiting provision appears at 64 Stat. 571. Additional powers were later approved, 73 Stat. 582 (1959).

understandable. There was no precedent to follow. In the Tennessee case, Congress had already accepted two similar compacts without denying the agencies created under them the flexibility it denied the Tennessee Valley Commission.

Congressional hostility was felt again almost as soon as the Eighty-sixth Congress convened. The states of Indiana and Illinois had ratified the Wabash Valley Compact,⁶¹ by which they agreed to cooperate in research and in the development of plans and programs for the conservation, development and proper utilization of the land, water and related resources of the Wabash Valley. Both states had accepted the compact, and early in the first session of the Eighty-sixth Congress it was submitted for approval. This time the usual pattern for consent legislation was abandoned altogether, and in reporting out a bill for consent, the House Judiciary Committee inserted two novel limitations. It prohibited the legislatures of the two party states from devolving *any* additional duties on the commission to be created, even though they were clearly within the stated purposes of the compact and even though federal representation on the commission was provided for in the compact, without seeking congressional approval for *each* new duty they sought to add. And though there is nothing in the Committee's report to the House to give a clue as to why it did so, the Committee asserted the right of Congress "to require the disclosure and furnishing of such information or data by the Wabash Valley Interstate Commission as is deemed appropriate by the Congress or any such Committee."⁶² "Never in the history of federal compact legislation had a statute gone so far in the direction of giving such broad and firm federal control over state activities."⁶³

The Judiciary Committee of the House, reporting on the Wabash Compact consent bill, noted that "any modification of the instant compact will constitute a new or further agreement which of course should be submitted to Congress for approval."⁶⁴ The idea seems to have stemmed from a suggestion by Deputy Attorney General Lawrence E. Walsh in a letter to Representative Emanuel Celler, Chairman of the Committee. Mr. Walsh noted that "because provisions contained in this compact and the consent legislation may be urged as precedents for similar provisions in subsequent compacts or legislation it is recommended that a reasonable limitation be placed upon the functions delegable to the commission. . . . A similar problem arose with respect

61. Ill. Ann. Stat. ch. 127, § 63t-1 (Smith-Hurd Supp. 1960); Ind. Ann. Stat. § 27-1601 (1960).

62. 73 Stat. 699 (1959). See H.R. Rep. No. 948, 86th Cong., 1st Sess. 2 (1959).

63. Cribfield, *supra* note 54.

64. H.R. Rep. No. 948, 86th Cong., 1st Sess. 2 (1959).

to the Tennessee Basin Water Pollution control compact and was similarly resolved."⁶⁵ Walsh spoke of the "latitude" given to the Commission under the compact with suspicion and seemed to feel that it must be checked. The Committee on the Judiciary evidently went along with his feeling and was able to carry the Congress as a whole with it.

But in none of these cases was open warfare declared on a compact agency. Early in 1960, however, the Judiciary Committee made what amounts to such a declaration. It is idle to speculate on the motivations for the action. Representative Celler is from New York, and there are undoubtedly personal and political explanations for his leadership of the crusade against the Port of New York Authority. The Authority is not popular,⁶⁶ and baiting it has long been fun for both the press and politicians. Despite an active public relations program, the Authority is not well understood by the public and lacks man-in-the-street defenders. Thus it is an easy target. The active cause of Mr. Celler's attack was probably the announcement by the Port Authority of its plans to build a new jet airport in the swamps of Morris County, New Jersey. At least the reaction to that announcement was sufficient to lead to a demand by the New Jersey delegation in Congress for an investigation of the Authority's power to construct the airport,⁶⁷ and Mr. Celler carried it from there. The question to be dealt with here, however, is *what* and not *why*, although the latter question is intriguing and important in itself. To date, the fighting has been confined to the Port of New York Authority, but the issues at stake in this limited war have a vital impact on all compact agencies operating in the United States.

The first shot was fired when Representative Celler introduced a resolution⁶⁸ in Congress which would have required the consent of Congress for every new project the Port Authority proposed to construct, even though it was within the purview of the compact, even though it had been approved by the Governors and Legislatures of New York and New Jersey, and even though all of the projects which the Authority had built up to that time had not been subjected to the requirement. When it appeared obvious that such a resolution would get nowhere in Congress, Mr. Celler changed his tactics and in his capacity as Chairman of the Judiciary Committee took two other steps which were surer to accomplish his objective. First, he sponsored a resolution amending

65. Letter from Lawrence E. Walsh, Deputy Attorney General, to Representative Emanuel Celler, June 16, 1959, quoted in H.R. Rep. No. 948, 86th Cong., 1st Sess. 9 (1959).

66. See Chase, How to Rescue New York From Its Port Authority, Harper's, June 1960, p. 67.

67. See Morris, Jetport Showdown in New Jersey, Saturday Evening Post, Dec. 17, 1960, p. 29.

68. H.R.J. Res. 615, 86th Cong., 2d Sess. (1960).

the rules of the House by inserting a new clause in the list of subjects the House Judiciary Committee is authorized to investigate, specifying matters "involving the activities and operations of interstate compacts."⁶⁹ When that resolution had been passed, he then directed the staff of the Judiciary Committee "to make a study of the activities and operations of the authority under the 1921 and 1922 compacts, including a review of the scope of the authority's major operations."⁷⁰

Despite the weight of history on the side of noninterference in the internal affairs of compact agencies, Celler declared that there were ample reasons to depart from precedent.

The operations of the authority exercise a far-flung influence on interstate commerce. They yield tax-exempt revenues in excess of \$100 million annually. . . . The port authority's operations affect the economic lives of millions of Americans living outside as well as inside the port . . . area. . . . They intimately affect the operation of Federal agencies responsible . . . for the national defense, navigable waterways, and air, rail, and highway traffic. In short, they profoundly affect Federal interests of many and various kinds.⁷¹

Yet, Celler went on to point out, Congress had never held a "general investigation of the Port of New York Authority to determine its conformance or nonconformance to the limits of its authority or the extent or adequacy of its performance of its responsibilities in the public interest."⁷² Now was the time, the Chairman concluded, to correct that error, and the Judiciary Committee, already suspicious of compacts, was the proper agency to undertake the project.

In order to make the study, Mr. Celler requested the Authority to make certain documents, some of which were concerned with the minutiae of Authority operations, available to members of the Committee staff. The Executive Director of the Authority complied with Mr. Celler's request for the most part, but at the direction of the Governors of both the party states, and backed by members of the Authority itself, he refused to let the Committee staff see "communications, preliminary memorandums, interoffice memorandums, and all other documents relating solely to the internal administration of the port authority. . . ."⁷³ And the fat was in the fire. When Authority officials refused to change their stand, Mr. Celler succeeded in getting the

69. H.R. Res. 530, 86th Cong., 2d Sess., 105 Cong. Rec. 10752 (daily ed. June 1, 1960).

70. Inquiry Before Subcommittee No. 5 of the House Committee on the Judiciary, 86th Cong., 2d Sess., ser. 20, at 2 (1960) [hereinafter cited as *Inquiry*].

71. *Ibid.*

72. *Ibid.*

73. Letter from Austin J. Tobin to Representative Emanuel Celler, June 10, 1960, quoted in *Inquiry* 19.

Judiciary Committee to recommend to the whole House that they be cited for contempt of Congress. The House adopted the resolutions, citing three officials.⁷⁴ Late in November, the Chairman brought his subcommittee to New York to hold an on-the-spot inquiry into the Authority. A great many charges were hurled, but as the *New York Times* commented editorially when the affair was over, "So far the Port Authority's reputation for integrity, efficiency and large contribution in the public interest is . . . unshaken."⁷⁵ The Department of Justice meanwhile had brought an information for contempt against Austin J. Tobin, Executive Director of the Authority, and he was tried before a judge without a jury in federal court in New York. The trial was concluded in mid-January 1961, but the verdict is still pending at this writing.⁷⁶

So much for the bare facts of the case. What is important is its meaning. Certainly the whole business ignores the fact that agencies established by interstate compacts are administrative units of the states and have long been regarded as such. The Judiciary Committee seems to take the position that the powers of the Authority are derived from congressional action rather than from delegation by the states. At least Herbert Maletz, the chief counsel for Subcommittee No. 5, remarked in the course of the subpoena inquiry that the documents in question were "needed to apprise the subcommittee of the scope and extent of the Port Authority's activities in order that the subcommittee may ascertain whether or not the authority is adhering to the duties, responsibilities and limitations placed upon it by Congress in the enabling resolutions of 1921 and 1922."⁷⁷ But there is nothing in this case or in the history of compacts and compact agencies generally to demonstrate that congressional consent gives a federal character to their operations. It cannot be argued that the federal government by its action created the Port Authority. Like all compact agencies, it was created by the states party to it. Nor did the consent act passed by Congress endow the Authority with any of its powers or jurisdiction. Those too were given it by the states. Indeed, the enabling legislation

74. See proceedings against the three Port of New York Authority officials commencing at 106 Cong. Rec. 16059 (daily ed. Aug. 23, 1960).

75. *N.Y. Times*, Dec. 6, 1960, p. 40, col. 1.

76. After seven days of testimony, District Judge Luther W. Youngdahl took the case under advisement, noting: "There is mostly analogy—not precedents—to guide the court. This novel test case is breaking new constitutional ground." The verdict was expected to be handed down "sometime in March." *N.Y. Times*, Jan. 17, 1961, p. 68, col. 1.

77. Inquiry 48-49. (Emphasis added.)

in this case is a model of simplicity and brevity. If the ruling in *Virginia v. Tennessee*⁷⁸ still has meaning, Congress' consent merely attested to its conviction that the compact does not infringe on federal powers and jurisdiction. Nothing more. How the states operate the Authority is entirely beyond the permissible range of inquiry of the federal government. Compact agencies are legally no different than an ordinary department or agency of state government. The mere fact that they are agencies of two or more states has no bearing on the matter. To admit the right of Congress to investigate the operation of the Port of New York Authority would not only set a dangerous precedent for interstate compact agencies but for all purely state agencies as well. Basic principles of American federalism are at stake here.

It is not as if the Authority had operated without any reference to the federal interest. In its manifold operations it has always been subject to federal restrictions. The Corps of Engineers passes on all its bridge and tunnel plans. The Department of the Army passes on the reasonableness of its toll rates. The Federal Aviation Agency audits and has full investigative power over the airports it operates. The Coast Guard and the Navy impose restrictions on its operations in New York harbor. In all these relationships harmony and consideration for the federal interest have been the general pattern. Moreover, the Authority has not tried to operate in secrecy. Any responsible federal official is quite welcome to examine the Authority's books, to consult with Authority officers freely, and to review with them any and all phases of the Authority's operations. The Authority has in fact done a better job than most government agencies, federal or state, in making cooperation its working method. It is this very fact which casts the largest shadow over the whole subcommittee proceeding and makes it obvious that there is no justification from the federal government's point of view for a blanket investigation of the Authority's operations.

In any case, where would such an action lead? Congress has by now approved several dozen compacts which provide for an administrative arm. If Mr. Celler's logic is followed with regard to all of them, should not the rest of them be investigated in turn? There are always complaints against government agencies, and compact agencies are no exception. If Congress undertook to act on all such complaints, could it accomplish anything else? If there is actually maladministration to be corrected in a compact agency—and the Port Authority is obviously not immune from the disease—it lies with the party states to make the corrections rather than with Washington. After all, states have controls

78. 148 U.S. 503 (1893).

over compact agencies even as they do over purely state agencies.⁷⁹ Problems in a bistate agency like the Port Authority are as subject to state correction as if they occurred in an agency of a single state or one of its subdivisions, as in the Massachusetts Port Authority, for example, or in the New York City Department of Marine and Aviation. And conversely they are as immune from federal corrective measures as the latter two agencies are.

To be sure, the Port Authority is now an operating giant. One way or another its twenty-one bridges, tunnels and piers, air, truck, train and other terminals are involved in the commercial activities of the entire Nation. Moreover, the Authority has invested over one billion dollars of bondholders' money in its operations since 1921. To date its equity in its facilities amounts to almost half that amount.⁸⁰ But does its size and importance change its status as an agency of the states? Perhaps Congress could, under the commerce power or as an act of national defense, take the Authority over as a national enterprise. If that is its aim, the current investigation might be justified. There is no indication, however, that any such object is in mind. Despite its size, the Authority remains what it was in 1921, an agency of the states and as such, out of reach to the federal government.

There is perhaps one legitimate product of the inquiry. As Representative George Meader of Michigan, a member of the subcommittee, stated it, the purpose of the investigation is the amendment of the compact clause of the Constitution, though to what end he did not make clear.⁸¹ Proposing amendments is of course within the prerogative of Congress, but it seems doubtful that the amendment of the compact clause is a real possibility. With the increased devotion of the states to the use of compacts in the last fifteen years, it is unlikely that three-fourths of the state legislatures would approve the addition of limitations on their use. Moreover, such a constitutional amendment would fly in the face of the fact that both the executive branch and Congress itself have encouraged the states to use the compact device, as, indeed, has the United States Supreme Court.

But it is idle to talk about what practical purposes the investigation may have in view. In fact, no practical results seem to be desired. If they had been, a moderate approach would have been employed at the outset, and the whole problem here described would have been avoided.

79. See Leach & Sugg, *The Administration of Interstate Compacts*, ch. 2 (1959).

80. Tobin, *The Port of New York Authority: Financial Conditions and Plans*, Port Authority Release, March 24, 1960.

81. Inquiry 53.

What is involved here is not investigation for knowledge's sake. If the subcommittee had really wanted to study the Port Authority, it could have done so from the information which was made available to the Committee staff. But the subcommittee evidently had a different concept of its role. The investigation was launched with a punitive purpose in mind. In the words of the Executive Director of the Council of State Governments, the Committee's action amounted to nothing more than a "fishing expedition" for the purpose of persecution.⁸² Or as Governor Robert Meyner of New Jersey put it, the affair constitutes "a novel intrusion by the Federal Government into areas reserved by the Constitution to . . . [the] States. . . ."⁸³ What seems to have been launched, rather than an ordinary investigation for legislative purposes, is a crusade against the compact principle. For when the attack on the Port Authority is added to the growing list of actions against compacts taken in the last few years by the House Judiciary Committee, it is obvious that this is not a small skirmish. For the first time, Congress has been led to vote against *state* officers serving a *state* agency in a field properly within the reserved powers of the *states*. In the words of the Governor and three former Governors of New York, the Nation is thus "faced with an assertion of Federal power to control State and municipal agencies which could wrench our system of government from its established foundations. . . . There has . . . been precipitated a clash between the Congress on the one hand and the constitutional rights of the people of the States to administer their own governments on the other . . . ,"⁸⁴ a clash which must be resolved if the federal system as we have known it is to be maintained.

IV

Fortunately, the compact picture today is not all black by any means. Indeed, the action has been limited pretty much to the House and there to the Judiciary Committee. And not all members of either of those bodies have subscribed to what has been happening recently. Five members of the New Jersey delegation to Congress denied that it was the intention of that delegation to open a full investigation of the Port of New York Authority. Rather, they declared, they wanted merely a study of the Authority's right to build an airport in Morris County and

82. Cribfield, *supra* note 54.

83. Letter from Governor Robert Meyner to James C. Kellogg, III, Vice-Chairman, Port of New York Authority, June 25, 1960, in *Inquiry* 38.

84. Telegram from Governor Rockefeller and former Governors Harriman, Dewey and Lehman to New York Members of Congress, Aug. 22, 1960, in 106 Cong. Rec. A6183 (daily ed. Aug. 22, 1960).

were opposed to the subcommittee's broader approach.⁸⁵ Representative John Lindsay of New York, a member of Subcommittee No. 5, went even further in his dissent from the report of the whole Judiciary Committee and called its action "an unprecedented, unlawful, and unconstitutional exercise of Federal authority over a bistate agency, which can and should be avoided."⁸⁶ And in response to the Committee's move, Representative Laurence Curtis of Massachusetts sprang to the defense of the Authority and went so far as to submit a bill specifically designed to protect a compact agency to which Massachusetts is a party⁸⁷ from similar unwarranted federal investigation or regulation. A number of other Representatives spoke out, but since the action of the Judiciary Committee against the Port Authority was taken in the short rump session of the Eighty-sixth Congress, and since it is difficult to resist the demands of a committee chairman under the rules and customs of the House, the opposition was unable to do more than voice protests. If the attack is carried on in the Eighty-seventh Congress, it can probably be counted on to do something more.

Nor has the Senate, always more conscious of states' rights than the House, joined the crusade. Both Senators Keating and Javits of New York, while making it clear that they were not attempting to criticize members or actions of the other house, expressed their convictions that it is "a matter of grave concern for any congressional committee, in the purported pursuit of its own interests, to overrun the legitimate rights of State agencies."⁸⁸ Moreover, the Senators pointed out that the action of the House did not necessarily reflect the sentiments of the Senate on the question. Senator Williams of New Jersey likewise expressed his grave concern about the proceedings,⁸⁹ and Senator Butler of Maryland took pains to call the attention of his colleagues to a resolution condemning the House position in the Port of New York Authority affair.⁹⁰

Meanwhile the executive agencies continue to cooperate as usual with the compact agencies in operation. And Congress continues to pass legislation permitting states to negotiate and enter into new compacts,

85. 106 Cong. Rec. A6238 (daily ed. Aug. 22, 1960) (extension of remarks of Representative Osmer).

86. 106 Cong. Rec. 16060 (daily ed. Aug. 23, 1960).

87. H.R. 13269, 86th Cong., 2d Sess. (1960) (relating to the New England Interstate Water Pollution Control Commission).

88. 106 Cong. Rec. 15928 (daily ed. Aug. 23, 1960) (remarks of Senator Keating); see also 106 Cong. Rec. A6188 (daily ed. Aug. 22, 1960) (extension of remarks of Senator Javits).

89. 106 Cong. Rec. A6189 (daily ed. Aug. 22, 1960).

90. 106 Cong. Rec. 14741 (daily ed. Aug. 8, 1960).

as it did most recently in the acts consenting to negotiations between Kansas and Nebraska to formulate a compact apportioning the waters of the Big Blue River⁹¹ and to negotiations between any states who might wish to enter into compacts for the joint development and/or operation of airport facilities.⁹² Moreover, it readily consented to an extension of the Interstate Oil Compact for another four years.⁹³ And it approved the compact creating a New York-New Jersey Transportation Agency,⁹⁴ as well as the Washington Metropolitan Area Transit Regulation Compact.⁹⁵

Thus total war has not yet been declared. The hostility expressed by the Judiciary Committee has not yet infected the rest of Congress nor gone very far into the executive branch. There is still time to prevent the action from spreading. If it still seems important to maintain the basic pattern of cooperation and good will which has grown up over the years between the federal government and interstate compact agencies, there are a number of things Congress can do to ameliorate the situation. Although the fate of the Port of New York Authority case now rests with the federal courts, Congress can act to prevent a similar situation from arising by passing a bill such as the one proposed by Senator Keating⁹⁶ to the Eighty-sixth Congress which would have made it possible to settle the kind of questions raised in the Port Authority case—which are essentially civil—in a civil proceeding rather than by a criminal prosecution. Keating's proposal would have made it possible for congressional committees to invoke the aid of federal courts to determine the relevance and privilege of testimony heard before them without the necessity of subjecting witnesses to a criminal contempt action, which is now the only way to get a judicial settlement of the issue. Such a law would not only free such outstanding citizens as the officers of the Port Authority from the indignity of a criminal trial, but it would also speed up a settlement of these important questions.

Another step Congress could take would be to establish criteria as to which compacts, under the *Virginia v. Tennessee* rule, Congress wishes to see and which it does not, and to make it clear to the states that only certain compacts need to be submitted at all. Delay in Congress

91. 74 Stat. 160 (1960).

92. 73 Stat. 333 (1959).

93. 73 Stat. 290 (1959).

94. 74 Stat. 575 (1960).

95. 74 Stat. 537 (1960).

96. S. 1515, 86th Cong., 1st Sess. (1959).

has now come to be a serious burden on the development of new compacts, and it would greatly facilitate congressional action if only those compacts which fall under the political balance formula were sent to Congress for approval. Or, if this step seems too bold, another way would be to adopt the General Compact Consent Act, first proposed by the Council of State Governments in 1952. That act would have declared flatly that "It is the intent of the Congress to encourage cooperation among the several states. Recognizing that compacts are essential devices for interstate cooperation, the Congress hereby declares its policy to be the facilitation of such compacts among the several states."⁹⁷ The proposed act went on to list five areas which seemed beyond controversy as proper for the exercise of state power through the agency of a compact—boundary adjustments, the conservation and allocation of natural resources, the construction, maintenance and operation of joint institutions and the provision of joint services, the construction, operation and maintenance of joint public works, and metropolitan area planning and development—and provided that copies of any compact made by states in these areas could be submitted to Congress and upon the expiration of sixty days thereafter, if Congress had not acted by specifically disapproving the compact, that it be considered approved. No action was taken by Congress, and although the Council still pushed a slightly altered version of the idea as late as 1959, Congress has not so far taken the Council up on its idea. It should do so, for there can be little doubt that such an act would provide Congress with all the opportunity it needs to protect the national interest while at the same time it would facilitate the adoption of compacts by the states and provide relief from the congressional workload.

The adoption of some such act as the General Compact Consent Act just described would also have the advantage of making Congress' position with regard to compacts a matter of record. Since the Constitution places federal responsibility for compacts on Congress, it would be appropriate for Congress to define its position with regard to them. Once defined, in perhaps more detail than a simple declaration of intent would give, not only would the committees of Congress itself be bound by the statement but it would serve also to guide agencies in the executive branch in their dealings with compact matters. Indeed, a statement of congressional policy with regard to compacts should be framed if for no other reason than that the executive branch is entitled to a clear exposition of principles in the area.

97. Draft of General Compact Consent Act § 2, Council of State Governments Release, August 1952.

If the use of compacts continues to burgeon in the next decade or so as it has since World War II, eventually it may be necessary to consider establishing a single point of contact in Congress for compacts and compact agencies. Whether such a point would be a joint committee or a select committee is not important now. But if the emphasis of the last few years on the strengthening of state power vis-a-vis that of the federal government is maintained, as there is every indication that it will be, and if compacts continue to be used by the states in exercising their power, Congress will have to work into its organizational pattern some sort of focal point for compact matters.

The immediate problem, however, must be met first. The danger is that if Congress continues to follow the path it has taken lately with regard to compacts, it will take both itself and the executive branch along with it away from the cooperative spirit that has marked federal-compact relations over the last twenty years and may cause a slackening of interstate efforts to solve common problems. If the harassment by congressional committees against existing interstate agencies continues, and if improper demands for control are inserted in future congressional consent acts, then without question the progress that the states have been making via the interstate compact route will slow down. Ironically, this will be used by the centralizers as an additional reason why only the federal government can do the job. Or to put it another way—the massive power of the federal government is first used to block action by the states and is then invoked to intervene directly on the ground that the states refuse to act.⁹⁸

Basically, it is a matter of respect for the meaning and application of federalism. Such a system demands forbearance; it depends on mutual respect. If one party or the other—either the federal government or the states—presses too hard, the stability of the whole system is threatened. Compromise and adjustment, not challenge and counter-challenge, are basic to a strong federal system. By and large, the federal government has shown restraint in its dealings with the states. The idea basic to both the report of the Commission on Intergovernmental Relations⁹⁹ and William Anderson's separate study¹⁰⁰ is that the federal government and the states are partners in the business of government and that cooperation is vital to the successful conduct of that business. Anything that threatens this tradition must be resisted. In the words of Repre-

98. See Cribfield, *supra* note 54.

99. See Commission on Intergovernmental Relations, Report to the President for Transmittal to Congress, H.R. Doc. No. 193, 84th Cong., 1st Sess. (1935).

100. Anderson, *The Nation and the States, Rivals or Partners?* (1935).

sentative Curtis of Massachusetts, "The fight . . . against unwarranted Federal interference must be a continuous one. . . . The main purpose of interstate compacts is to find a way of avoiding the constant growth and concentration of Federal power, and to make provision for the States to assume responsibilities and act effectively in matters of local concern. . . . This purpose is prejudiced, if not defeated . . ." by the current trend in Congress.¹⁰¹ That trend must be reversed.

101. 106 Cong. Rec. A7248 (daily ed. Sept. 21, 1960).