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Constitutional Law - Federal Investigatory Power over Bi-State Agency through Reservation to Congress under Compact Clause of Constitution

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CASE NOTES

CONSTITUTIONAL LAW — FEDERAL INVESTIGATORY POWER OVER BI-STATE AGENCY THROUGH RESERVATION TO CONGRESS UNDER COMPACT CLAUSE OF CONSTITUTION.

Tobin v. United States, (D.C. Cir. 1962)

Appellant was the Executive Director of the Port of New York Authority (Port Authority), a corporate body created in 1921 by compact between the states of New York and New Jersey. He had been requested to appear before a Subcommittee of the House of Representatives which was conducting an investigation for the purpose of amending or repealing the consent given by Congress to the aforementioned compact pursuant to Article I, § 10 of the United States Constitution. Appellant had voluntarily furnished the Subcommittee with many of the Port Authority's records but had objected to the production of internal file material, including subordinate staff reports, day-to-day working papers, and other similar memoranda. The Director's refusal to comply with a subpoena calling for virtually all of the Port Authority's records resulted in his conviction in a federal district court for Congressional contempt. The United States Court of Appeals for the District of Columbia reversed, *holding* that the Subcommittee's probe was unauthorized since Congress had not meant to delegate to it the power to conduct such an extensive investigation. *Tobin v. United States,* 306 F.2d 270 (D.C. Cir. 1962).

In reaching its conclusion, the circuit court, adhering to the well-established rule of avoiding constitutional issues when possible, by-passed the important point raised by the appellant concerning the constitutionality of conditioning Congressional consent to the formation of interstate compacts by reserving to itself the power to alter, amend, or repeal such consent. Nevertheless, because of the possible importance of this question in future litigation, this note shall consider the constitutionality of such a reservation.

Article 1, § 10, of the United States Constitution provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . ."[1]

1. U.S. CONST. ART. 1, § 10: "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War unless actually invaded or in such imminent Danger as will not admit of delay."

It must be conceded that since a compact may involve the interests of states other than the actual parties immediately involved, Congress must exercise national supervision through its power to grant or withhold consent, or by granting it only after appropriate conditions have been fulfilled.[2] However, it does not necessarily follow that Congress, having granted consent, may effectually reserve the right to amend or to repeal. There has been little judicial comment on this topic. Research reveals no instance where Congress has ever amended or repealed its consent once given.

"Where government consent is essential, the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation."[3] It would seem that the reservation of the right to alter, amend, or repeal, allows future federal governing power which would tend to circumscribe state jurisdiction regarding matters whose control rests exclusively within the power of the state. The states do not derive the power to enter into compacts with other states from the compact clause. This power is inherent in the very notion of sovereignty and is reserved to the states by the Tenth Amendment. Mr. Justice Brandeis recognized this principle when, in *Hinderlider v. La Plata River Co.*,[4] he stated that the compact clause incorporated to our nation the ancient treaty making power of independent sovereign nations which was practiced by the states long before the Constitution was adopted.

The compact power has not been surrendered under the Constitution but is expressly recognized by it although guarded in its exercise by a single limitation — the consent of Congress.[5] Unless and until this condition precedent is met a compact remains invalid. But when Congressional consent is given the *lone* impediment is removed and the states are able to exercise their sovereign power.[6] Just as the consent of Congress does not cause the compact to come into existence neither does it endue the compact with any federal power or jurisdiction. Rather, it is from the states that the endowments of character, power, and jurisdiction derive. The compact becomes an agency of the state. "This Union was and is a union of states, equal in power, dignity, and authority, each competent to exert that residum of sovereignty not delegated to the United States by the Constitution itself."[7] If a right to amend, alter, or repeal is permitted it would appear that the necessity of Congressional consent had somehow federalized the compact and deprived the state of the freedom from federal interference which it would have had had it performed essentially the same functions on its own. The compact clause has for its purpose the maintenance of ordinary and otherwise lawful federal jurisdiction while, at the same time preserving the traditional function of the states to handle local

2. Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 695 (1925).
3. James v. Dravo Construction Co., 302 U.S. 134, 148, 58 S. Ct. 208, 215 (1937).
4. 304 U.S. 92, 104, 58 S. Ct. 803, 808 (1938).
5. Poole v. Fleeger, 36 U.S. (11 Pet.) 182, 207 (1837).
6. Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 1233, 1261 (1838).
7. Coyle v. Smith, 221 U.S. 559, 31 S. Ct. 688, 690 (1910).

difficulties. The present reservation would violate this goal by permitting the federal government to usurp a local administrative position totally outside the domain of legitimate federal interest. The net result would be that the state would be deprived of the management and control of the important domestic functions of its own agency. Although Congress may legitimately prefix its consent upon the performance of "appropriate" conditions, these do not include conditions by which Congress may acquire powers not conferred upon it by the Constitution. The vital condition precedent to the validity of any condition attached to Congressional consent is that it be constitutional. No power to amend, alter, or repeal appears expressly in the compact clause. "The power to impose conditions is not a lesser part of the greater power to withhold, but instead a distinct exercise of power which must find its own justification."[8] If the power was not conferred as a corollary to the consent function the fact that Congress reserved such power when giving its consent does not fill the void of constitutional omission — especially such purposeful omission.[9] If such a restriction of a state's reserved power is to be sanctioned merely because of a strained implication arising from the power to give consent, it is difficult to see where the line will be drawn against restriction imposed upon the state. If one constitutional right of a state be yielded as a condition to receiving Congressional consent what is there that will prevent Congress from seeking the surrender of all a state's reserved rights? Fundamental constitutional guaranties should not be disposed of so easily.

In contrast, consider the type of condition that allows future governing acts which tend to circumscribe state power regarding matters whose control rests exclusively within the scope of conceded Congressional power. Good examples of proper Congressional action to foster legitimate federal interests are two of the reservations included by Congress in the compact creating the Port of New York Authority. The first reads that no "right or jurisdiction of the United States in and over" the areas within the port district is impaired.[10] Here Congress did not declare any right that obtruded into purely local governmental problems. "It was merely a caveat to obviate a claim that Congress was consenting to the creation of an enclave in which the normal 'right or jurisdiction of the United States' might be deemed to have been lost."[11] The second was an affirmance of the then existing statutory requirement for approval by the Chief of Engineers and the Secretary of War for the construction of certain bridges and tunnels and for changes regarding navigable waters.[12] This was a valid

8. Note, *Unconstitutional Conditions,* 73 HARV. L. REV. 1595, 1609 (1960).

9. Article 1, § 10, exemplifies the Framers' ability to devise language capable of linking a consent function with a continuing power of revision and control: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, . . . and all such Laws shall be subject to the *Revision* and *Controul* of the Congress." Compare with language of article 1, § 10 which is cited in *supra* note 1.

10. 42 Stat. 822, 826 (1922).

11. Brief for Defendant, p. 89.

12. 42 Stat. 822, 826 (1922).

condition imposed to belie any suspicion that the Port of New York Authority was to be in any way privileged as regarding federal regulation applicable to other agencies engaging in similar pursuits.

This is not to say that the federal government is without power to exercise a check over any of the Port Authority's actions. Therefore, although the presence of a reservation does not create an extraordinary Congressional power, the absence of reservation does not avoid an ordinary regulatory power which Congress would otherwise have. The Constitution gives to Congress certain plenary powers. Until Congress exercises these powers the states may generally proceed to regulate and control the subject to which they would apply. But, a careful distinction must be made between the ways in which Congressional control over an operational interstate compact may be constitutionally exercised. We find merit in Mr. Tobin's contention that "control undertaken pursuant to the plenary power is licit, whereas control attempted in the sense of withdrawing consent under the compact clause is illicit."[13] The condition upon which consent is given cannot be more than a technique for protecting existing federal interests. It cannot create a new and unknown federal right which would otherwise be wholly beyond the scope of legitimate federal concern.

The large number[14] and great variety[15] of interstate compacts in effect today evidence the confidence of the states in an irrevocable consent upon which to anchor interstate covenants of long duration and far reaching effect. Great tragedy would ensue were it to be decided the founding fathers meant to prescribe an evanescent consent. States would be hesitant to enter into a compact where the agreement could be obliterated by a decree of the federal government. States would be reckless to attempt solution of regional problems by use of compacts instead of individual state action when use of the former method would amount to relinquishment of the state's freedom of action and subjection to federal supervision and control, while the latter device would permit unimpeded independent sovereign action.

It must be concluded that both from a constitutional and practical point of view it would be unwise to allow Congress to reserve the power to alter interstate compacts.[16]

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13. Tobin v. United States, 306 F.2d 270, 274 (D.C. Cir. 1962).

14. More than 170 compacts have been formed since the Constitution was adopted.

15. Compacts have been used in the following fields: "Development of terminal and transportation facilities, maintenance of an interstate park, forest fire protection, water supply, control of water pollution, marine fisheries conservation, aspects of higher education—this is but a random list of present activities." 1955 INTERGOVERNMENTAL RELATIONS COMMISSIONS REP. 46.

16. See S. REP. No. 1367, 85th Cong., 2d Sess. 2, 18, 19 (1958), which related to H.R. 7153 providing for the consent of Congress to a boundary compact between Oregon and Washington. The Report recommended deletion of a provision reserving the right to alter, amend, or repeal the consent because of the conclusion of the Senate Judiciary Committee and the Department of Justice that such a reservation was beyond the power of Congress. The Senate deleted the amend or repeal reservation from H.R. 7153 and the bill went to the Conference Committee in which the Managers on the Part of the House were headed by Chairman Celler. The Conference Report reinstated the reservation but carefully stated the basis on which it did so:

But even assuming that Congress, through the compact clause, does have the right to amend or repeal the charter of the Port of New York Authority, it still remains to be answered whether Congress has the right to compel the present witness to produce the documents in question. It should be noted that certain records were willingly given at the request of the Subcommittee. The objection was to the production of internal file material, such as subordinate staff reports and inter-office memoranda.

In general, the power of Congress to investigate is inherent in its legislative powers.[17] In order to legislate effectively and prudently the legislature must be adequately informed.[18] However, the power of investigation is limited both in itself and in its operation. The investigation must have a valid legislative purpose[19] and every question asked must be pertinent to that purpose.[20] Even so, where the right to investigate conflicts with the fundamental rights of another, there must be a reconciliation.[21] In *United States v. Rumley*,[22] the United States Supreme Court, in reaffirming the Congressional right to conduct investigations, quoted Mr. Justice Holmes' statement in *Hudson County Water Co. v. McCarter*:[23]

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own where a certain point is reached.[24]

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if the Senate's legal position were correct, the reservation would be of no effect and, therefore, harmless; whereas, if the Senate were not correct, it would be wiser to leave the provision in since Congress has been doing so for 47 years. It was reasoned that omitting it from the legislation might give rise to the inference that Congress was foreclosing itself from amending the act at some later date. Conference Report, *Statement of the Managers on the Part of the House*, H.R. REP. No. 2234, 85th Cong., 2d Sess. 4 (1958).

17. Watkins v. United States, 354 U.S. 178, 77 S. Ct. 1173 (1957); Kilbourn v. Thompson, 103 U.S. 168 (1881); McGrain v. Daugherty, 273 U.S. 135, 47 S. Ct. 319 (1927).

18. United States v. Rumley, 345 U.S. 41, 73 S. Ct. 543 (1953).

19. Barenblatt v. United States, 360 U.S. 109, 79 S. Ct. 1081 (1959), in reiterating the time honored doctrines of investigations, declared that " . . . Congress may only investigate into those areas in which it may potentially legislate or appropriate."

20. In Braden v. United States, 365 U.S. 431, 81 S. Ct. 584 (1961), the court said that facts requested must be pertinent to the question under inquiry, and the investigating committee must have reasonable grounds for believing them to be pertinent.

21. The idea of striking a compromise between conflicting rights is not new. As stated by the lower court in this case:

> . . . in analogous situations where a conflict has been presented between asserted rights and privileges, often having Constitutional origins, courts have attempted to resolve the problem by balancing the interests in the particular. This has been so, for example, where First Amendments rights have conflicted with the Congressional investigatory power; where a criminal defendant's right to prepare his defense has clashed with the Government's interest in protecting the flow of information from informants; where a state's interest in maintaining an important activity has conflicted with the Federal power to tax; and, significantly, where the interest of a defendant in a civil contempt case in preparing a full defense has conflicted with a Federal agency's asserted executive privilege for "internal" documents. United States v. Tobin, 195 F. Supp. 588, 610 (D.D.C. 1961).

See also Mr. Justice Harlan's opening remarks in Barenblatt v. United States, *supra* note 19.

22. 345 U.S. 41, 73 S. Ct. 543 (1953).

23. 209 U.S. 349, 28 S. Ct. 529 (1908).

24. *Supra* note 22 at 43, 73 S. Ct. at 545 (1953).

The few decisions of the United States Supreme Court which deal with the conflict of the Congressional right to investigate with other safe guarded rights chiefly are concerned with the right to protection against self incrimination and the due process requirement that the questions asked by Congress be pertinent to the subject matter of the investigation.[25] The present case involves the right of state sovereignty. The question of to what extent the sovereign right of a state to operate its agencies without interference limits the Congressional right to investigation seems to resolve itself into the more basic issue of how much power was granted to Congress under the compact clause. Since Congress can only request documents which are pertinent to a subject about which it can legislate, it must first be decided whether the request for the documents in question was pertinent to the right to repeal or amend consent before there can be any need for a balancing of interests. For the documents in question to be pertinent it would have to be assumed that the power of Congress to repeal its consent implies a right of Congress to examine any document used by the Authority. Pertinency is given a very broad interpretation by the courts.[26] It does not seem that it would be unreasonable to allow as extensive an investigation as was attempted in the present case if Congress has the power to repeal its consent. The right to withdraw its consent seems to imply a right to have the compact operated in a manner substantially in accord with the desires of Congress. At this point, there would arise the need for a balancing of interests.

A further consideration relates to whether Congress has the right to withdraw its consent to a compact in pursuance of one of its plenary powers. In this case, the impact of the Port of New York Authority on interstate commerce is obvious,[27] and it cannot be doubted that the Authority would be bound by any restrictions placed on its operations by Congress in pursuance of that power. If Congress were to require the Authority to collect an excise tax on certain goods, the Authority would be obligated to abide by that regulation. An early United States Supreme Court decision held that the exercise of the right to regulate interstate commerce is not limited by the operation of the compact clause.[28] In that case, a Congres-

25. Braden v. United States, *supra* note 20.

26. "A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress. . . . A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which may arise thereunder and the evidence to be admissible must be responsive to the scope of the inquiry which generally is very broad." (Emphasis supplied.) Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir. 1938).

". . . pertinency in this context is necessarily broader than relevancy in the law of evidence." United States v. Orman, 207 F.2d 148, 153 (3d Cir. 1953).

27. The floor discussions at the time of the adoption of the compact included a statement by the resolutions' sponsor that "the port of New York is an asset of the entire nation . . ., the people of New York and New Jersey owe it to themselves and to the country to properly develop it." 195 F. Supp. 588, 605 (D.D.C. 1961).

28. Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 435 (1856). Pennsylvania sued to enjoin the defendants from constructing a bridge over the Ohio River. The compact between Virginia and Kentucky attempted to establish a perpetual freedom of navigation of that river. Congress passed a law which