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ALEC Issue Analysis

# Don't Turn Out the Lights: Interstate Compacts and State Sunshine Laws

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January 2002

## I. Introduction

Interstate compacts are important tools for the state governments as they provide their citizens with the services they demand and expect. Since joining an interstate compact involves the ceding of state sovereignty, however, states must be careful to protect the people by ensuring that compacts take no action that will harm the state or otherwise be contrary to state law. One of the bulwarks of constitutional republicanism is the idea of open government: citizens should know when governmental bodies meet and what they consider at those meetings. These assurances are normally present in the normal functions of the state and federal government; they are not always present, however, in the case of the governing bodies of interstate compacts. States must act now to proactively and retroactively remedy this situation. The Interstate Compact Sunshine Act, model legislation developed by the American Legislative Exchange Council, is designed to meet this new challenge.

## II. What Are Interstate Compacts?

Interstate compacts can be explained using basic contract theory. Two people enter into a contract to do together what cannot be done separately. The contract defines the rights and duties of the parties and allows both parties to enforce the contract before a neutral, third-party. Like contracts, interstate compacts are designed to address public policy concerns that cannot be addressed unilaterally by the individual states.

The most notable example of an interstate compact is the United States Constitution. In this federal compact the people of the original thirteen states agreed to give up their sovereign power to conduct foreign affairs, regulate commerce, and print money, among others,

because they knew that ceding these powers to a central government would make all the states, and the people, stronger. Of course, strength by itself was not the sole design of the Founding generation. Rather, as stated in the preamble to the Constitution, the people of the states willingly entered into the federal compact to “secure the blessings of liberty to ourselves and our posterity.”

Interstate compacts today come in all shapes and flavors. Some are created to allow for regional regulation of common commodities. The most famous example of this type of interstate compact is the Northeast Dairy Compact, created to “take such steps as are necessary to assure the continued viability of dairy farming in the northeast, and to assure consumers of an adequate, local supply of pure and wholesome milk.”<sup>1</sup> Other compacts, such as the Woodrow Wilson Bridge and Tunnel Compact, are designed to solve a transportation problem that plagues two or more states. Finally, some compacts, like the Streamlined Sales Tax Project, are created with the goal of making cross-jurisdictional tax collection less onerous.

Interstate compacts function by the creation of a governing body or commission. The compact itself provides for the representation of the governing body, which is usually composed of an equal number of representatives selected by the individual members. The governing body, like Congress or a General Assembly, acts on behalf of the members to implement the purposes of the interstate compact. The governing body is, for all intents and purposes, the final authority over the issues granted to its authority. Of course, a state can rescind its participation in a compact at any time, but one can assume that a state will not agree to cede its sovereignty over important issues unless it was prepared to bind itself to the decisions of the compact. Since interstate

compact governing bodies entail a great deal of permanency, it is important to ensure that the public has the same deal of protection from these institutions as it does against the three branches of government in the state.

### III. Open Government: Predicate to Freedom

The people restrain the government in a number of ways, such as the passage of “open government” laws. These laws seek to ensure the transparency of government process. Transparency is a bulwark of constitutional republicanism: citizens cannot inform themselves on the issues of government if they cannot see what the government is doing. Thus, transparency serves as an important feedback mechanism by allowing the citizens to monitor and more accurately select their representatives.<sup>2</sup>

The most famous open government law is the federal Freedom of Information Act (FOIA).<sup>3</sup> FOIA requires disclosure of certain government documents unless they fall under specifically enumerated exceptions, such as national defense. Another well known federal open government law is the Government in the Sunshine Act (GISA).<sup>4</sup> GISA provides that “every portion of every meeting of an agency shall be open to public observation” unless it fits within a few exceptions. Many states have open government laws as well. Most state open meeting laws are similar to the federal laws.<sup>5</sup>

When a state joins an interstate compact, the enabling legislation often contains a severance clause, providing that the state’s participation (or any action of the compact) is null and void if the compact takes any action that fails to comply with state law.<sup>6</sup> The language in the severance clauses, however, typically apply to the substantive outcomes of the interstate compact process. It is generally unclear whether they apply to the procedural requirements of the interstate compact governing bodies. Thus, the argument can be made that a state’s open meeting laws are typically not applicable to the process of an interstate compact. Separate legislation is therefore necessary to ensure that a state’s participation in an interstate compact includes the application of its open meeting laws.

Even if a state does not, as a legal matter, require an interstate compact governing body to comply with its open government laws, these bodies should still provide open access to the citizens of the members states. As the state cedes some of its sovereign power to a board or council that will often be meeting outside the state, the need for citizen access arguable becomes

greater. Interstate compacts, while clearly within the boundaries of the Constitution, undoubtedly fly under the public’s radar screen and therefore the need for public protection is paramount.

### IV. ALEC’s Interstate Compact Sunshine Act

The Interstate Compact Sunshine Act (ICSA), developed by the ALEC Task Force on Tax and Fiscal Policy, addresses the open government concerns of interstate compact governing bodies. The bill does this in two ways: first, by incorporating the laws of the state with regard to its participation in any interstate compact; second, by requiring a minimum threshold of “openness” that applies to a state’s participation in an interstate compact, regardless of the substantive nature of the state’s open meeting laws. The bill also has its own generally applicable “severance clause”, removing the state from current participation in any interstate compact previously approved if the governing body does not comply with the state’s open access laws.

The ICSA requires that the state “shall not enter into any interstate compact unless the governing body of the interstate compact complies with the open access laws of” the state.<sup>7</sup> This section has prospective applicability: it only applies to interstate compacts the state enters in the future. The ICSA defines “interstate compact” as “any agreement entered into between the state...and one or more other states, regardless of subject matter or the need for federal congressional approval.”<sup>8</sup> This makes the act applicable to even informal agreements between the states. “Governing body” is defined as “the organization of an interstate compact that is authorized by the respective members to act on behalf of the respective members in the particular business that is the subject of the interstate compact.”<sup>9</sup> This is a fluid definition that allows the act to apply even if the structure or organization of the interstate compact changes. Equally fluid is the ICSA’s definition of “open access law”: “a duly enacted law of the state...constitutional provision, regulation, or court ruling, such as a sunshine law or freedom of information act, that intends or has the effect of increasing the transparency of any government operation to public scrutiny.”<sup>10</sup>

Beyond incorporation of a state’s open access law, the ICSA provides substantive open access requirements, below which a governing body may not go. This section also has prospective applicability. It was designed to provide substantive requirements for those states that have few, if any, open access laws on their books.<sup>11</sup> It was also designed to give a sense of the

kind of open access requirements that an interstate compact should adopt to maintain compliance with the open access laws of the member states. The act forbids the state from entering into “an interstate compact unless the governing body of the interstate compact provides, 30 days before an official meeting, written notice of its meeting and provides the public access to the written and electronic records of all official meetings.”<sup>12</sup> The act defines “written notice” as “the written conveyance of information from the governing body to the citizens of the state.”<sup>13</sup> The act uses constructive as opposed to actual receipt of information by the citizens. “Records” are defined as “meeting minutes, records of votes, or any other information that the governing body is required to keep under the terms of an interstate compact.” This gives the citizen access to all information relevant to their state’s participation in the interstate compact. “Official meeting” is defined as “any meeting of an interstate compact governing body that is required by the terms of the interstate compact or a decision of the governing body.”<sup>14</sup> This is broad enough to include meetings where official policy will be decided, but narrow enough to not include private meetings or discussions among governing body members.

The act also contains one section of retrospective applicability. It requires that “(t)he participation of the state...in any interstate compact that does not comply with (this act) shall be null and void and is hereby rescinded, unless the governing body of the interstate compact shall take measures to comply with (this act) within 6 months after the effective date of this Act.”<sup>15</sup> This section is designed to apply to the state’s current participation in interstate compacts. It automatically withdraws the state from any interstate compact that does not comply with the act, unless remedial steps are taken to ensure open access within six months of passage.

## V. Conclusion

In order to effectively exercise their political rights and responsibilities, the people of the states need to know about the activities of their governments. This includes the activities of the governing bodies of interstate compacts. These bodies are given a great deal of power over the lives of the people, and yet the people’s access to information about these bodies is suspect. States must act to correct this oversight by conditioning their participation in interstate compacts on compliance with the open meeting laws of the state. The citizens deserve no less.

## NOTES

1 See Vermont Code, Title Six, Chapter 141, § 1801. The 107th Congress allowed the Northeast Dairy Compact to expire on September 30th, 2001.

2 For an excellent discussion of the public efficacy of open access laws, see Teresa Pupillo, *The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws*, 71 Wash. U. L.Q. 1165, 1166 (1993).

3 See 5 U.S.C. § 552.

4 See 5 U.S.C. § 552b.

5 See generally Pupillo, *supra* note 3.

6 For an example, see Public Act No. 122, §8(1), 91st Legislature (Michigan 2001); California Penal Code §853.4(d).

7 See Interstate Compact Sunshine Act § 4(A), *ALEC Model Legislation* (September 2001).

8 See *id.* at §3(B).

9 See *id.* at §3(A).

10 See *id.* at §3(C).

11 The number of states without open government laws is, admittedly, low. See Pupillo, *supra* note 3.

12 See *id.* at §4(B).

13 See *id.* at §3(D).

14 See *id.* at §3(E).

15 See *id.* at §4(C).

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