

TO: Bill Taylor, Legislative Counsel, Oregon Joint Judiciary Committee
FROM: Amy L. Becerra
DATE: February 25, 2000
RE: **Interstate Compact for Supervision of Adult Offenders**

MEMORANDUM

At your request, I conducted a review of the 1999 Model Interstate Compact for Adult Offender Supervision currently being proposed and circulated by the National Institute of Corrections for adoption by the states. I also researched the nature of interstate compacts and their constitutionality under the U.S. Constitution. You asked me to compare bills proposing the Compact's adoption in six states; more specifically, you asked me to examine how other states' legislatures are addressing the Compact's finance, liability, and State Council provisions. You asked me to summarize relevant case law. In addition, you asked me address several issues raised by Mr. Jefry Van Valkenburgh, Assistant Attorney General, in his January 25, 2000 letter questioning the constitutionality of the Compact under the Oregon Constitution.

BACKGROUND OF THE NIC MODEL INTERSTATE COMPACT:

Every state in the nation is part of an interstate compact setting forth how states will regulate the interstate supervision and regulation of individuals on probation or parole. Oregon became part of the Compact when it adopted ORS 144.610-.622 in 1937. Most corrections officials throughout the country believe that the current compact no longer works. Too often dangerous parolees are released from one state and move to another state where they are not supervised. The National Institute of Corrections, in conjunction with the Counsel of State Governments, has drafted a new compact to replace the current interstate compact. The purpose of the Compact is to provide the framework for promotion of public safety and to protect victims' rights through the control and regulation of the interstate movement of offenders in the community. The Compact also seeks to provide for the effective tracking, supervision, and rehabilitation of these offenders by the sending and receiving states. The costs, benefits, and obligations of the compacting states are also to be equitably distributed.

WHAT THE BILL DOES:

The NIC proposal abolishes the current interstate compact for the out-of-state supervision of parolees and proposes a new interstate compact for the supervision of adult offenders. The compact will take effect when 35 states adopt the compact. The compact creates an Interstate Commission to regulate the supervision of parolees and probationers who have moved or propose to move from one state to another. The Compact requires that each state have a State Council for Interstate Adult Offender Supervision and sets forth who must be on the council. Membership must include representatives from all three branches of state government as well as the victims' rights community. The council shall, among other things, appoint the state's representative to the Interstate Commission.

The Interstate Commission consists of representatives from the participating states. The Commission has the authority to adopt rules and by-laws that have the force and effect of statutory law and are binding on the compacting states. Rules are binding on compacting states unless a majority of their state legislatures rejects the rule. All lawful actions of the Commission,

including all commission rules and by-laws are binding on the compacting states. The Commission will oversee the interstate movement of offenders. The Commission will have the authority to levy on each compacting state an assessment to pay for the Commission's operations. States may withdraw from the Compact by enacting a statute that specifically repeals the statute that enacted the Compact into law.

INTERSTATE COMPACTS:

Interstate compacts are agreements between two or more states that bind them to the compact's provisions. Compacts have the force and effect of statutory law. As a statute, an interstate compact supersedes prior law. Hinderlider v. La Plata River, 304 U.S. 92, 106 (1938). A compact takes precedence over a signatory state's subsequent statutes and conflicting state laws. Green v. Biddle, 21 U.S. (8 Wheat.) 1, 92 (1823).

Interstate compacts are not only statutes but also contracts that are binding on member states and their citizens. West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951). Interstate compacts are subject to substantive principles of contract law. As with other contracts, the Contract Clause of the United States Constitution protects compacts from impairment by the states. U.S. CONST. art. I, §10, cl. 1. "A state may not unilaterally nullify, revoke, or amend one of its compacts if the compact does not so provide." Dyer, 341 U.S. at 28. Consequently, one legislature may not unilaterally change the terms of the contract by changing state law. A state must withdraw from the contract and then, only pursuant to the terms of the agreement. Also, as a contract, each state that enacts the Compact must use language that does not materially differ from what the other states adopt. The Supreme Court has held that a state may not withdraw from a compact on the ground that its highest court has found the agreement to be contrary to the state constitution. Id.

The Compact Clause of the United States Constitution, provides that "No State shall, without the Consent of Congress,...enter into any Agreement or Compact with another State..." U.S. CONST. art. I, §10, cl. 3. Congressional consent transforms the States' agreement into *federal law* under the Compact Clause where Congress has authorized the agreement and where the subject matter of the agreement is an appropriate subject for congressional legislation. Cuyler v. Adams, 449 U.S. 433, 440 (1981). Congress may consent by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined. Id. at 441. The U.S. Supreme Court has held that in the case of the Interstate Agreement on Detainers, Congress gave its consent in advance by enacting the Crime Control Consent Act of 1934 and that the subject matter of the Act was an appropriate subject for congressional legislation. Id. at 442.

Not all interstate agreements fall within the scope of the Compact Clause thereby requiring congressional consent. Agreements "not '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' [do] not fall within the scope of the Clause and will not be invalidated for lack of congressional consent." Id., at 439.

Compacts may create ongoing administrative agencies with jurisdiction over important aspects of economic or social life. Examples of this type of interstate compact to which Oregon is a member include: the current Uniform Act for Out-of-State Supervision (ORS 144.610-.622); Oregon-Washington Columbia River Fish Compact (ORS 507.010-.030); Pacific Marine Fisheries Compact (ORS 507.040-.050); Wildlife Law Violator Compact (ORS 496.750); Interstate Compact on Pest Control (ORS 570.650-.680); Interstate Compact on Juveniles (ORS 417.010-.080); Interstate Compact on Placement of Children (ORS 417.200-.260); Pacific Northwest Economic Region Compact (ORS 285A.240-.243); Columbia River Gorge Compact (ORS 195.150-.165); Pacific Ocean Resources Compact (ORS 196.175-.185); Driver License Compact (ORS 802.540-.550); and Multistate Highway Transportation Agreement (ORS 802.560).

STATE CONSTITUTIONAL ISSUES:

Central among the issues raised by the Attorney General's Office is whether the Oregon Legislature has authority, under the state Constitution, to enter into a compact which involves delegation of power to an interstate agency and an agreement to appropriate funds for the administrative expenses of the agency.

Non-Delegation of State Legislative Power:

The Oregon Constitution vests the state's legislative power in the Legislative Assembly, subject only to the initiative and referendum powers reserved to the people. ORE. CONST. art. IV, §1. Oregon's Constitution also prohibits the passage of any law "the taking effect of which is made to depend upon any authority" other than authority provided in the constitution. ORE. CONST. art. I, §21. The Oregon Supreme Court has interpreted these provisions, read together with the state's separation of powers clause, to prohibit the Legislative Assembly from delegating its legislative powers if that delegation "leaves wholly to persons outside of the legislature the power to determine whether there shall be a law at all and, if there is to be a law, what the terms of that law shall be." Schmidt v. City of Cornelius, 211 Or. 505,525; 316 P.2d 511 (1957) (*quoting* Van Winkle v. Fred Meyer, Inc., 151 Or. 455, 463; 49 P.2d 1140 (1935)).

Articles III and IV of the NIC's Model Compact create and grant to an interstate commission the power to promulgate rules that are binding on compacting states with the force and effect of statute. However, "that a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government." Dyer v. Sims, 341 U.S. 22, 30 (1951). In Dyer, the U.S. Supreme Court did not find West Virginia's control of river pollution by interstate compact to be inconsistent with the state's constitution despite the presence of a non-delegation of state legislative power clause similar to that of Oregon. The Court reasoned that if, in the exercise of its original jurisdiction, it were to enter a decree requiring West Virginia to abate pollution of interstate streams, that decree would bind the state. Id. at 31. The state legislature would not be able to alter or disregard the decree. The Court felt that the state's use of an interstate compact to address the problem was a more effective means of resolution.

Constitutional Debt Limitation:

Art. XI, § 7 of the Oregon Constitution prohibits the Legislature from enacting a law, the effect of which would be to "lend the credit of the state or in any manner create any debt or

liabilities which shall singly or in the aggregate with previous debts or liabilities exceed the sum of fifty thousand dollars." The Oregon Supreme Court and Attorney General's office have interpreted this provision to prohibit the Legislative Assembly from enacting a law that would expose the State Treasury and the state's taxing power to an unfunded, contingent liability. Terry v. Multnomah County, 279 Or. 127 (1977). Articles III, IV, IX and XI of the Model Compact grant the Interstate Commission the power to levy on and collect from a compacting state an unknown annual assessment that (together with the assessments of other compact states) is sufficient to cover any liability or operating expense of the Commission without limitation.

In Dyer, the Court also addressed the issue of debt limitation and interstate compacts, and found that the compact in that case did not violate West Virginia's Constitution. West Virginia has a debt limitation provision similar to that of Oregon. As in the compact at issue in Dyer, the Model Compact provides that the interstate "Commission shall not incur any obligations of any kind prior to securing the funds adequate to meet the same; nor shall the Interstate Commission pledge the credit of any of the compacting states, except by and with the authority of the compacting state." (Art. X) Unlike the compact in Dyer, the Model compact does not have the additional provision requiring the interstate commission's annual budget be approved by the governors of the signatory states.

Separation, Distribution, and Exercise of State Power:

The Oregon Constitution also provides for the separation, distribution, and exercise of the state's sovereign power among the three branches--legislative, executive, and judicial. ORE. CONST. art. III, §1. Articles III and IV of the Model Compact require that all three branches of the state government as well as victims right groups be represented on the state council.

PROPOSED LEGISLATION IN OTHER STATES: States' Bills Comparison with NIC Model Compact

HAWAII: (SB 2152 & HB 1896): Style and structure of proposed bill is substantially similar to the NIC Model Compact. The act is effective upon approval. Additionally, the bill names the State's Commissioner on the Interstate Commission for Adult Offender Supervision as the "contract administrator" of the state council. The bill further establishes the state council for interstate adult offender supervision, placing it administratively in the judiciary. Hawaii's State Council is to consist of five members: one member of the house of representatives appointed by the speaker of the house of representatives; one member of the senate appointed by the senate president; one member of the judiciary appointed by the chief justice of the supreme court; the director of public safety, or the director's designee; and one member from the general public representing victims groups appointed by the governor. The contract administrator is appointed by the governor with the advice and consent of the senate and the chief justice; it is ambiguous whether the contract administrator is one of the state council's five appointed member or is a sixth member of the council. Hawaii is the only State so far to more specifically mention finance in its bill draft:

Expenditures by the council, including the amounts fixed annually as the equal contribution of each member to the compact, shall be made upon warrants issued by the state comptroller based upon vouchers approved by any one of the commissioners. A

report of the activities and expenses of the commissioners and a proposed program for the State's continuing participation in the activities of the Interstate Commission for Adult Supervision, including a budget request, shall be submitted by the Commissioners to each regular session of the legislature.

KENTUCKY: (HB 454): Style and structure of proposed bill is substantially similar to Model Compact with exception only in structural order of articles regarding to the Interstate Commission and State Council where Articles III and IV of the Model Compact are combined into one section. Previous compact is specifically repealed. The act takes effect the later of July 1, 2001, or upon enactment of the Compact by no less than 35 states. Additionally, the governor is to establish by executive reorganization: (1) the initial composition, terms, and compensation of the State Council, with the governor making the appointments to those positions, (except that any positions representing the legislative branch shall be made jointly by the speaker of the house of representatives and the president of the senate, and any positions representing the judicial branch shall be made by the chief justice of the commonwealth); and (2) the qualifications, term, and compensation of the compact administrator, in consultation with the speaker of the house of representatives, the president of the senate, and the chief justice of the commonwealth. An additional provision grants authority to the Department of Corrections to promulgate any administrative regulations necessary to implement and administer the compact once in effect.

MISSOURI: (HB 1321): Style and structure of proposed bill is substantially similar to Model Compact.

VERMONT: (SB 311): Style and structure of proposed bill is substantially similar to Model Code with the addition of more specific provisions regarding the composition of the State Council. Vermont's State Council is to consist of five members: one representative of the legislative branch appointed by the general assembly pursuant to a process determined by the joint rules committee; one representative of the judicial branch appointed by the chief justice of the supreme court; one representative of the executive branch appointed by the governor; one representative of a victims group appointed by the governor; and one individual who in addition to serving as a member of the council shall serve as the compact administrator for the state, appointed by the governor after consultation with the general assembly and the supreme court. In addition, the state council shall appoint the compact administrator as the Vermont commissioner to the Interstate Commission. Specifically repeals previous compact and provides for effective date.

VIRGINIA: (SB 270 & HB 446): Style and structure of proposed bill is substantially similar to Model Compact. Specifically repeals previous compact. The only difference is an additional section granting authority to the "Director" to 'do all things necessary and incidental to the carrying out of the compact in every particular. He may in his discretion delegate this authority to some other appropriate official.' The use of the term "Director" is ambiguous as there is no reference throughout the preceding section (adding the Interstate Compact provisions) to a director. It is unclear whether the director is the Commissioner, the Compact Administrator, or some other person under the act.

WASHINGTON: (SB 6621): Establishes a task force to study the Interstate Compact.

POINTS AND AUTHORITIES

OREGON CONSTITUTION PROVISIONS

Article I, §21: (in relevant part) “[N]or shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution.”

Article III, §1: “The powers of the Government shall be divided into three separate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.”

Article IV, §1 (1): “The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.”

Article XI, §7: (in relevant part) “The Legislative Assembly shall not lend the credit of the state nor in any manner create any debt or liabilities which shall singly or in the aggregate with previous debts or liabilities exceed the sum of fifty thousand dollars, except in case of war or to repel invasion or suppress insurrection or to build and maintain permanent roads; and the Legislative Assembly shall not lend the credit of the state nor in any manner create any debts or liabilities to build and maintain permanent roads which shall singly or in the aggregate with previous debts and liabilities incurred for that purpose exceed one percent of the true cash value of all the property of the state taxed on an ad valorem basis; and every contract of indebtedness entered into or assumed by or on behalf of the state in violation of the provisions of this section shall be void and of no effect.”

CASE SUMMARIES

West Virginia ex rel. DYER et al. v. SIMS, State Auditor (341 U.S. 22)-1951

Procedural History: With the consent of Congress under the Compact Clause of the Federal Constitution (Art. I, 10, cl. 3), West Virginia and seven other States in the Ohio River basin entered into a Compact to control pollution in the Ohio River System. The Compact created an administrative commission of representatives from each of the eight States and the United States. The States agreed to contribute to the commission's expenses although no obligations could be incurred without prior appropriations or consent of the state legislatures. The West Virginia Legislature approved the Compact and appropriated funds to cover West Virginia's share of the expenses.

Mandamus was brought against the state auditor to compel him to pay out moneys appropriated for the commission. In denying this relief, the Supreme Court of Appeals of West Virginia held invalid the statute authorizing the State's participation in a Compact with other States on the grounds that (1) the Compact was an unconstitutional delegation of power to an agency outside the State, and (2) it was a violation of the debt limitation provision of Art. X, §4 of the State Constitution, in attempting to bind future legislatures

to make appropriations for the commission. The U.S. Supreme Court granted certiorari. Reversed and remanded.

Held: The U.S. Supreme Court disagreed with the West Virginia court on both issues. The court, per Frankfurter, held that:

- (1) The U.S. Supreme Court has final power to pass upon the meaning and validity of compacts between states;
- (2) An agreement entered into between states by those who alone have political authority to speak for a state cannot be nullified unilaterally, or given final meaning by any organ of one of the contracting states;
- (3) The U.S. Supreme Court is free to examine determinations of law by state courts where an interstate compact brings in issue the rights of other states and the United States;
- (4) The fact that the questions as to the compact were before the Court on a writ of certiorari rather than by way of an original action brought by a state does not affect the power of the Court to decide those questions;
- (5) West Virginia had authority under her Constitution to enter into a compact which involves only such delegation of power to an interstate agency as the Ohio River Compact presents; and
- (6) The obligation of the State under the compact is not in conflict with the debt limitation provision of the State Constitution.

CUYLER, Correctional Superintendent, et al. v. ADAMS, (449 U.S. 433)-1981

Procedural History: While respondent Adams was serving a sentence in a Pennsylvania correctional institution, the prosecutor's office of Camden County, NJ, lodged a detainer against him and sought custody pursuant to Art. IV of the Interstate Agreement on Detainers in order to try him in New Jersey on criminal charges. The Detainer Agreement is a compact among 48 states, the District of Columbia, and the United States, establishing procedures by which one jurisdiction may obtain temporary custody of a prisoner incarcerated in another jurisdiction for the purpose of bringing that person to trial.

In an effort to prevent his transfer, Adams filed a pro se class action in the U.S. District Court for the Eastern Dist. of Pennsylvania seeking declaratory, injunctive, and monetary relief under 42 USC §§1981 and 1983, alleging that Pennsylvania officials had violated the XIV Amendment due process and equal protection clauses by failing to grant him the pre-transfer hearing that would have been available had his transfer been sought pursuant to the Uniform Criminal Extradition Act, and had violated the due process clause by failing to inform him of his right pursuant to Art. IV of the Detainer Agreement to petition the Governor of Pennsylvania to disapprove New Jersey's request for custody. The court dismissed his complaint. Adams was transferred to New Jersey, convicted, sentenced, and returned to Pennsylvania.

The Court of Appeals for the Third Circuit vacated the District Court judgment and remanded for further proceedings, finding no need to reach Adams' constitutional claims, and concluding as a matter of statutory construction that he had a right under the

Detainer Agreement to the procedural safeguards, including a pre-transfer hearing, prescribed by the Extradition Act. On certiorari, the U.S. Supreme Court affirmed.

Held: The Supreme Court, per Brennan, held that:

(1) The Detainer Agreement is a congressionally sanctioned interstate compact the interpretation of which presents a question of federal law. An interstate agreement does not fall within the scope of the Federal Constitution's Compact Clause, and will not be invalidated for lack of congressional consent, where the agreement is not "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." But where Congress has authorized the States to enter into a cooperative agreement and the subject matter of that agreement is an appropriate subject for congressional legislation, Congress' consent transforms the States' agreement into federal law under the Compact Clause, and construction of that agreement presents a federal question. In this case, Congress gave its consent to the Detainer Agreement in advance by enacting the Crime Control Consent Act of 1934. That Act was intended to be a grant of consent under the Compact Clause, and the subject matter of the Act is an appropriate subject for congressional legislation.

(2) As a matter of statutory construction, a prisoner incarcerated in a jurisdiction that has adopted the Extradition Act is entitled to the procedural protections of that Act, including the right to a pre-transfer hearing, before being transferred to another jurisdiction pursuant to Art. IV of the Detainer Agreement. Both the language and legislative history of the Agreement support the interpretation that, whereas a prisoner initiating the transfer procedure under Art. III waives rights which the sending State affords persons being extradited, including rights provided under the Extradition Act, a prisoner's extradition rights are preserved when the receiving State seeks the prisoner's involuntary transfer under Art. IV of the Detainer Agreement. Art. IV preserves all the prisoner's extradition rights under state or other law except his right, otherwise available under the Extradition Act, to oppose his transfer on the ground that the sending State's Governor had not explicitly approved the custody request. The remedial purpose of the Agreement in protecting prisoners against whom detainers are outstanding supports and interpretation that gives prisoners the right to a judicial hearing in which they can bring a limited challenge to the receiving State's custody request.