DOCUMENT 12:
INTRODUCTION TO THE LAWS GOVERNING FORMATION OF CROSS-BORDER AGREEMENTS BY THE STATES AND GENERIC PUBLIC HEALTH ANNEX

ASTHO
Association of State and Territorial Health Officials

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Cross-Border Public Health Preparedness Legal Issues

Introduction to the law governing formation of cross-border agreements by the States

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Introduction

In the immediate aftermath of the September 11, 2001 terrorist attacks, one of the many initiatives undertaken by state governments across the nation was to begin comprehensive reviews of state law, agreements and protocols dealing with emergencies. State and territorial health officials played a unique role in these processes through their identification and definition of the central importance of public health issues, expertise and approaches in emergency planning, preparedness and response at all levels of government: local, state, territorial and federal.

Four years into the enterprise of re-envisioning public health's emergency preparedness and response capabilities and responsibilities, many state public health laws, regulations and procedures have been newly developed or extensively revised. The public health workforce has been challenged to embrace new competencies and missions. With these efforts has come a growing awareness of the magnitude of the potential threats to the public's health and, therefore, also the need for public health professionals from all jurisdictions to work together through sharing information, resources and expertise. All states are interdependent and public health emergencies do not respect borders. State health officials have recognized that the public health system must be prepared in all jurisdictions at all times.

Success brings new challenges. As states and local jurisdictions have been confronted with the challenge of working across jurisdictional lines in the cause of public health preparedness, so they are now increasingly confronted with the challenge of working across national boundaries. In the spring of 2005, the Association of State and Territorial Health Officials (ASTHO) and its Preparedness Policy Committee requested that a work group be established to examine cross-border public health preparedness and attendant legal issues. Working in concert with experts from the Johns Hopkins Bloomberg School of Public Health, this work group identified two basic resources that would assist with cross-border public health preparedness efforts: (1) an introduction to the law governing the formation of cross-border agreements by the states; and (2) a draft template for a "public health annex" to existing, international mutual assistance agreements. Both documents were initially presented for feedback at a meeting of northern border states that was held in Detroit, Michigan on May 16, 2005.

These resources are intended to serve as a tool to assist states in public health planning, preparedness and response across both sides of the United States' borders in a common effort to protect the health of the U.S. population and that of its neighbors in the Americas. These briefing documents are by no means an exhaustive review of all of the legal issues and should be considered only as a starting point for discussion.

Introduction to the law governing formation of cross-border agreements by the States

ASTHO commissioned this short summary. Its purpose is to begin an exploration of the legal rights and restrictions of the States as they consider entering agreements with sovereign entities outside the United States of America ("foreign sovereigns"). The conclusions and statements contained herein are not ASTHO's and have not been endorsed by ASTHO.

Topics introduced include the scope of states' authority under the United States constitution; the parameters of that authority as described in some of the case law; and federal legislation and/or policy bearing on the formation of agreements between the states and foreign sovereigns.

It must be noted that this briefing paper concerns itself with "cross-border" agreements – agreements with foreign sovereigns that are territorially contiguous with the United States (i.e., Mexico and Canada). Some of the considerations discussed below may apply only to "cross-border" agreements.

U.S. constitutional considerations

The U.S. constitutional provision most frequently advanced in a discussion of the states' authority to enter into agreements with foreign sovereigns is found in Article I §10, clause 1. It provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation."[1] Article 1 §10, clause 3 appears to amplify this prohibition: "No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."[2] The framers may have drawn some distinction between the "treaty, alliance, or confederation" of the 1st clause and the "agreement or compact" of the 3rd clause. However, the distinction – if any – is not explored in this briefing paper.

These two provisions work to ensure the supremacy of the government of the United States in the field of foreign relations. The federal government's power in this field arises both from express and implied grants of authority by the U.S. Constitution. Article II §2, clause 2 expressly gives the President "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[3] This power is not limited to entering into formal Treaties but has been held to extend to entering into and enforcing other kinds of international agreements falling short of treaties.[4] The Supreme Court has stated that this authority derives not from the U.S.

[1] USCA Const. Art. I §10, cl. 1.
[2] USCA Const. Art. I §10, cl. 3.
[3] USCA Const. Art. II §2, cl. 2.
[4] 16A Am Jur 2d, Constitutional Law §234, *citing* B. Altman & Co. v. U.S., 224 U.S. 583, 32 S.Ct. 593, 56 L. Ed. 894 (1912).

constitution but, instead, is inherent in the federal government's position as a sovereign international power.[5]

Cases interpreting the effects of Article I's prohibitions

Relatively few judicial opinions interpret the effect of Article I on the states' power to enter into agreements. In many areas of legal research this might be taken as an indication that the applicable law in a particular area is both well settled and little-used. State and federal case law examining the question of state competence to enter into international agreements favors a very high degree of protection for the federal government's power to control the conduct of foreign affairs and to preclude state interference with external relations. An excellent overview of this is provided by the United States Court of Appeals for the First Circuit in National Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Circ. 1999). See also Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

More briefly, the U.S. Supreme Court stated the principle of broad federal supremacy over external matters in United States v. Pink, holding that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively"[6]; the Court has emphasized the "oneness" of our nation with respect to transactions with foreign nations[7] and that federal power over foreign relations should "be left entirely free from local interference."[8] The Court in Zschernig v. Miller, for example, determined that a state's detailed inquiries into the judicial processes and policies of a foreign sovereign affected international relations and could adversely affect the federal government's ability to manage international affairs even in the absence of a treaty.[9]

Statutes and the consent of Congress

However, notwithstanding the federal government's preeminence in the field of foreign relations, the Constitution appears to recognize that the states have a natural interest in matters extending across national boundaries: "No State shall, ***without the Consent of the Congress*** . . . enter into any Agreement or Compact with another State, or with a foreign Power" [emphasis added].[10] Some U.S. Supreme Court opinions have been interpreted to suggest that the federal government may acquiesce in a state's encroachment into foreign relations and that the importance of federal preeminence in foreign relations does not always and necessarily preclude state action affecting it.[11]

A federal statute or joint resolution expressing Congress' approval that states enter into foreign relations would appear to be a sufficient manifestation of congressional consent to survive constitutional scrutiny – but there is no such statute readily identifiable regarding emergency preparedness.

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[5] U.S. v. Curtiss-Wright Export Corporation, 299 U.S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936).
[6] U.S. v. Pink, 315 U.S. 203,233, 62 S.Ct. 552, 86 L. Ed. 796 (1942).
[7] Chae Chan Ping v. United States, 130 U.S. 581, 606, 9 S.Ct. 623, 32 L. Ed. 1068 (1889).
[8] Hines v. Davidowitz, 312 U.S. 52, 63, 61 S.Ct. 399, 85 L. Ed. 581 (1941).
[9] Zschernig v. Miller, 389 U.S. 429, 441, 88 S.Ct. 664, 19 L. Ed. 683 (1968).
[10] USCA Const. Art. I §10, cl. 3. *See also* The Restatement (Third) of Foreign Relations Law of the United States §201.
[11] *See* Barclays Bank PLC v. Franchise Tax Board, 512 U.S. 298, 114 S.Ct. 2268, 129 L. Ed.2d 244 (1994); Wardair Canada Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986).

Federal legislation does provide that

> [t]he Director [FEMA] shall give all practicable assistance to States in arranging, through the Department of State, mutual emergency preparedness aid between the States and neighboring countries.[12]

In this section Congress speaks to "mutual emergency preparedness aid", not "emergency aid". Arguably "emergency preparedness aid" refers to pre-event planning and resource exchange and, therefore, perhaps to cross-border arrangements.[13] Following this line of reasoning, it suggests Congress' anticipation that states may pursue forms of cooperation across national borders (i.e., "neighboring countries"). Whether or not states must seek the assistance of FEMA under these circumstances is unclear.

Non-binding "commitments" remain the simplest option for cross-border cooperation and may be the most politically expedient choice. As a general matter, states wishing to enter into "non-binding", cross-border emergency preparedness agreements are free to do so. Even for these initiatives, however, the federal government prefers that officials of the Treaty Office of the State Department review the instruments to ensure that they employ non-binding language, do not trigger Constitutional concerns and do not affect other aspects of federal policy.[14]

Further resources

- L. Henkin. Foreign Affairs and the United States Constitution (2nd ed. 1996)
- J. L. Goldsmith. Federal courts, foreign affairs, and federalism, 83 Va. L.Rev. 1617 (1997)
- H.H. Koh. Is international law really state law?, 111 Harv. L.Rev. 1824 (1998)
- CSPS Action-Research Roundtable on Managing Canada-US Relations. Building cross-border links: a compendium of Canada-US government collaboration, Canada School of Public Service (2004)

[12] 42 U.S.C. §5196(a) (2003).
[13] Properly defining "mutual preparedness aid" is essential to the validity of this argument and requires further research.
[14] Compare, 22 CFR §181.4 (Consultations with the Secretary of State), applying to agreements of the United States.

Generic public health annex

Purpose

The purpose of this Annex is to address public health related issues arising within the context of activities undertaken by signatories to the Pacific Northwest Emergency Management Arrangement [PNEMA]. Specifically this Annex addresses the dissemination of individual and population (epidemiological) health data, obligations with respect to persons transferred between signatories and the duties and privileges of health care personnel moving between signatories to render assistance.

When used in this Annex the following terms have the meanings ascribed below:

A "***deadly agent***" is the causative agent of an illness or health condition sufficient to trigger the implementation of emergency response procedures or reporting requirements or requests under the governing law or regulations of any of the signatories' jurisdictions or of the Governments of the United States or Canada; ***or***

an agent which, under the signatories' respective statutes or regulations, must be reported to or by the signatories' health agencies or ministries; ***or***

an agent which, under the governing law or regulations of the Governments of the United States or Canada, must or is requested to be reported to the health agencies or ministries of the United States or Canada;

An "***evacuee***" means a person who by order, direction or request of a signatory, temporarily leaves his or her signatory jurisdiction of residence (the ***sending signatory***) and removes to another signatory (the ***receiving signatory***);

"***Health care personnel***" is any natural person who provides health care services including, but not limited to, dentists, emergency medical personnel, emergency medical technicians, drivers of emergency vehicles, nurses, nurse practitioners, physicians, physician assistants and pharmacists;

"***Health data***" is written, electronic or visual information that relates to an individual's or population's past, present or future physical or mental health status, condition, treatment, service or products purchased and includes, but is not limited to, laboratory test data or samples;

"***Northwest U.S. Labs MOU***" refers to the Memorandum of Understanding between the Alaska Department of Health and Social Services, the Idaho Department of Health and Welfare, the Oregon Department of Human Services and the Washington State Department of Health of August 2004 and associated Attachments;

A "***public health emergency***" is an occurrence or imminent threat of an illness or health condition sufficient to trigger the implementation of emergency health response procedures or reporting requirements or requests under the governing law or regulations of any of the signatories' jurisdictions or of the Governments of the United States or Canada;

A "***receiving signatory***" is a signatory to this Agreement and Annex which requests, receives and/or accepts people, material or information within its jurisdiction from another signatory.

A "***refugee***" means a person who by order, direction or request of his signatory jurisdiction of residence (the ***sending signatory***), temporarily refrains from returning to his jurisdiction of residence and remains within another signatory jurisdiction (the ***receiving signatory***);

A "***sending signatory***" is a signatory to this Agreement and Annex which sends, delivers or transports people, material or information to within the jurisdiction of another signatory with its permission and/or at its request;

Document repository

Each signatory shall provide copies of their respective statutes or regulations related to ***public health emergencies*** and ***deadly agents*** to every other signatory. Each signatory shall ensure that the copies so provided are accurate and current. The signatories shall jointly identify and maintain in common a set of materials which they agree reflect the applicable laws and regulations of the Governments of the United States and Canada.

Dissemination of health data

The signatories recognize that in order to safeguard the health of their populations and facilitate emergency preparedness and response their respective agencies or ministries charged with the protection of public health should exchange individual and/or population-level (epidemiological) ***health data***.

Purpose of disseminating health data

Health data may be exchanged pursuant to the provisions of this Annex only for the purpose of preventing, detecting or responding to public health emergencies.

When health data is to be disseminated

Each signatory undertakes to provide to every other signatory divisible or duplicate ***health data*** relevant to a ***deadly agent*** or ***public health emergency. Health data*** shall be transmitted in the form employed or maintained by the ***sending signatory*** or in such other form as agreed.

Protection of health data

The signatories recognize the importance of safeguarding individuals' privacy in exchanging and using ***health data*** while simultaneously recognizing a compelling interest on the part of the state and provincial signatories to share health data to prevent, detect and respond to ***public health emergencies*** for the protection of public health and safety.

The signatories agree that it would be impractical to attempt to adopt uniform standards for the protection of ***health data*** at this time or to attempt to impose law related to the privacy of ***health data*** of one signatory on another. The signatories therefore agree to transmit ***health data*** subject to the understanding that it will be maintained and kept by receiving signatories according to the laws or regulations by which the receiving signatories are bound. Nothing in this Annex shall be construed so as to require any signatory to transmit ***health data*** in contravention of the laws or regulations under which the sending signatory is bound. The signatories will comply with the ***Northwest U.S. Labs MOU*** where applicable to the exchange of ***health data***.

Transfer of persons

The signatories recognize that optimal management of a ***public health emergency*** may require the movement or retention of ***evacuees*** and/or ***refugees*** into, out of or across their respective jurisdictions. The signatories desire to facilitate such actions subject to the governing laws and regulations by which they are bound. **[PNEMA p. 3, ¶3(c)]**

Transportation

The ***sending signatory*** is responsible for the cost of transportation, the health and safety of ***evacuees*** and/or ***refugees*** while in transit and the cost of supplies and equipment used in transport unless otherwise agreed. Each signatory is responsible for the maintenance of its own supplies and equipment used in transportation unless otherwise agreed. Movements of ***evacuees*** and/or ***refugees*** pursuant to this Annex shall be by the most expeditious means available, including but not limited to the use of a ***sending signatory***'s emergency vehicles not ordinarily authorized for use in the jurisdiction of a ***receiving signatory***.

Housing and care

The signatories agree to use their best efforts to ensure that ***evacuees*** and/or ***refugees*** transported from other signatories to their territories receive emergency health and social services in a manner no less favorable than their own citizens. **[PNEMA p. 3, ¶3(d)]** In addition, the signatories agree that ***evacuees*** and/or ***refugees*** shall be provided safe and adequate shelter, food, clothing and means of communication as necessary, commensurate with the conditions under which the ***receiving signatory***'s citizens are provided-for. A ***sending signatory***'s personnel shall be given access to ***evacuees*** and/or ***refugees***, records relating to them and the premises where they are housed and/or fed on the same basis as the ***receiving signatory***'s personnel.

Costs and expenses

This Annex does not represent a service contract between the signatories. Equipment and supplies used or expended on behalf and/or at the request of a signatory shall be replaced in kind by that signatory unless the signatories involved reach a different understanding. Similarly, if a signatory incurs costs or expenses in the housing and care of ***evacuees*** and/or ***refugees***, the ***sending signatory*** shall reimburse the ***receiving signatory*** at a rate and in a manner to be determined by the signatories. Reimbursement shall not be in excess of the greater of the actual expenditure made or, in the case of consumables, the replacement cost of the goods consumed.

Movement of health care personnel

In the event that a signatory requests the assistance in its jurisdiction of other signatories in making available health care personnel to prevent, detect or respond to a ***public health emergency***, the signatories intend that the following will apply.

Licenses and permits

Health care personnel who hold licenses, certificates or other permits issued by a ***sending signatory*** as evidence of qualification to provide professional, mechanical or other services will be deemed licensed, certified, permitted and competent to provide those services within the jurisdiction of any ***receiving signatory*** requesting their services in preventing, detecting or responding to a ***public health emergency***. Such ***health care personnel*** shall not be subject to civil, criminal or regulatory process within the jurisdiction of the ***sending*** or ***receiving signatory*** on the grounds that they have engaged in the unqualified or unauthorized practice of their regulated service. This section also applies to operators of emergency vehicles engaged in transporting ***evacuees*** and/or ***refugees*** as contemplated in Section V.A.

Liability of health care personnel

Health care personnel from a ***sending signatory*** providing services at the request and within the jurisdiction of any ***receiving signatory*** in order to provide assistance in preventing, detecting or responding to a ***public health emergency*** shall not be held civilly liable or criminally responsible for any act or omission made in providing those services unless the act or omission is the result of willful misconduct, gross negligence or recklessness. In determining whether ***health care personnel*** have acted with willful malice, gross negligence or recklessness while engaged in providing services within and at the request of a ***receiving signatory***, the substantive law of the ***sending signatory*** shall apply.

Health care personnel compensation and benefits

A ***sending signatory*** shall provide, in accordance with its own law, the employment, accident, health and death benefits to ***health care personnel*** providing services pursuant to this Annex in a ***receiving signatory*** to which they would be entitled for the performance of these services in the ***sending signatory***. Signatories may agree upon a formula for reimbursement of expenses incurred in maintaining these benefits for ***health care personnel*** while engaged in service pursuant to this Annex outside the ***sending signatory***.

Continuing efforts

The signatories pledge their commitment to a relationship of continued cooperation and support in emergency planning and management. To this end the signatories agree to undertake the following planning activities within the next 6 months or at such other time as the signatories agree.

Regional cross-border communication and coordination center

The signatories will meet and confer to establish a process and/or location for their joint communication and coordination of resources (personnel, material and information) during ***public health emergencies***.

Logistics

The signatories will meet and confer to establish procedures by which to share information regarding the location, distribution, transportation and maintenance of essential materials necessary for ***public health emergencies***.

Transfer of persons

The signatories will meet and confer to discuss planning for the care of persons transferred at the request of co-signatories. The purpose of such discussion and planning is to offer reassurance to all signatories that each is minimally prepared to offer assistance to its neighbors should it be called upon to do so pursuant to this Annex and Agreement.

This Annex is effective upon its execution or adoption by any two or more signatories. Entry into force of this Annex is subject to the laws of the United States of America and the Government of Canada and the several signatories. The signatories shall enact such legislation as may be necessary to effectuate this Annex. Duly authenticated copies of this Annex in the English and French languages shall be deposited with each of the signatories.

This Annex is to be construed to effectuate the purposes of the Agreement. This Annex is not to be applied in derogation of any superseding law of the United States or Canada. In the event than any provision is declared unconstitutional or unlawful or held inapplicable to any person or circumstance, the signatories intend for the remainder of this Annex to continue with full force and effect.

This briefing paper was researched and written by Jason Sapsin, JD, MPH, Johns Hopkins Bloomberg School of Public Health, and edited by Joshua Bobrowsky, ASTHO Director of Preparedness Policy. ASTHO thanks John Erickson, Special Assistant, Public Health and Hospital Preparedness and Response, Washington State Department of Health, for reviewing the document and sharing his perspective on the legal issues of concern to state public health agencies.

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The Association of State and Territorial Health Officials is the national nonprofit organization representing the state and territorial public health agencies of the United States, the U.S. territories, and the District of Columbia. ASTHO's members, the chief health officials in these jurisdictions, are dedicated to formulating and influencing sound public health policy, and assuring excellence in state-based public health practice.

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