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THESIS

**ASSERTING COLLECTIVE STATE SOVEREIGNTY
TO STRENGTHEN THE NATIONAL NETWORK
OF FUSION CENTERS**

by

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March 2018

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**ASSERTING COLLECTIVE STATE SOVEREIGNTY TO STRENGTHEN THE
NATIONAL NETWORK OF FUSION CENTERS**

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ABSTRACT

The lack of legal uniformity in the National Network of Fusion Centers, or National Network, is not a *simple* problem, and there is no *simple* solution; however, operating in a “network” with 79 fusion centers and 54 different legal frameworks while trying to detect and prevent criminal—and terrorism-related activity—is not a simple task, either. And despite the expenditure of significant federal, state, and local dollars to establish a capable and robust network of fusion centers, insufficient time and energy has been dedicated to the creation of an effective and uniform legal framework for the National Network. Through interviews with leadership from 11 fusion centers, this thesis addresses the complications of non-uniformity and evaluates three legal mechanisms with the potential to create uniformity. This research reveals that a congressionally approved interstate compact would be the most effective legal mechanism to create uniformity within the National Network because it results in state statutory authority in every participating jurisdiction, has the potential to create national legal uniformity, and respects the sovereignty of the states vis-à-vis the federal government.

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LIST OF ACRONYMS AND ABBREVIATIONS

DHS	Department of Homeland Security
DOJ	Department of Justice
EMAC	Emergency Management Assistance Compact
FOUO	For Official Use Only
HSGP	Homeland Security Grant Program
LES	Law Enforcement Sensitive
NEMA	National Emergency Management Association
NFCA	National Fusion Center Association
SHSP	State Homeland Security Program
SLTT	State Local Tribal Territorial
UASI	Urban Area Security Initiative
UCC	Uniform Commercial Code

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EXECUTIVE SUMMARY

The National Network of Fusion Centers, or National Network, is operating at a significant disadvantage; there are 79 fusion centers in the National Network implicating the state and local laws of 50 states, the District of Columbia, and three U.S. territories.¹ In addition, each fusion center that accepts funding from the Homeland Security Grant Program is subject to certain federal laws as a condition of federal funding, which creates a multi-layered, multi-jurisdictional legal framework within the National Network. This research evaluates whether the lack of legal uniformity creates operational challenges that impact the effectiveness of the network, as well as if there is a legal mechanism that would enable the National Network to create legal uniformity in all 50 states, the District of Columbia, and the U.S. territories.

Due to the limited literature addressing the lack of legal uniformity within the National Network, exploratory interviews of fusion center directors, deputy directors, and senior leaders were conducted to gain the perspective of leadership from a variety of state and major urban-area fusion centers across the country. The interviewees were questioned about their fusion center's form of legal establishment and how it impacts day-to-day operations, the impact of existing state laws on information sharing within the state and across state lines, the types of laws that would be most desirable if a national legal framework were developed, and whether the federal or state governments should determine the national legal framework for fusion centers. The interview results suggest fusion center leadership supports the establishment of legal uniformity, indicating three priorities for a legal framework: state statutory authority for fusion center operations, the desire for national legal uniformity, and the assurance of state sovereignty vis-à-vis the federal government.

This thesis presents three legal mechanisms that have the potential to create legal uniformity and examines whether each legal mechanism satisfies the priorities

¹ "Fusion Center Locations and Contact Information," Department of Homeland Security, accessed March 26, 2018, www.dhs.gov/fusion-center-locations-and-contact-information. The National Network includes fusion centers from three U.S. territories: Puerto Rico, the U.S. Virgin Islands, and Guam.

established by fusion center leadership. The first legal mechanism, model laws, are proposed statutory schemes that are developed by a consortium of interested parties attempting to facilitate regional or national legal uniformity on specific issues. The application of the interviewees' criteria reveals that model laws satisfy two of the three priorities expressed by fusion center leadership. Model laws can develop state statutory authority and honor state sovereignty; however, model laws do not create a likelihood of national uniformity.

The second legal mechanism, federal law, is the body of law developed by Congress, signed by the president, and reviewed by the federal courts, as outlined in article 1, section 1, of the U.S. Constitution. The application of the interviewees' criteria reveals that federal law would satisfy one of the three priorities of the interviewees. Although the creation of federal law for the National Network is the only option that guarantees legal uniformity across the network, the remaining two criteria, the creation of state statutory authority and the maintenance of state sovereignty, are not satisfied by the use of this particular legal mechanism. Based on the perspectives provided by the interviewees, state and local governments are in the best position to manage and operate the National Network and the development of federal law to govern the network will likely be met with significant resistance.

The third legal mechanism, an interstate compact, is “an agreement between two or more states established for the purpose of remedying a particular problem of multistate concern.”² An interstate compact is not only a formal legal contract with the related enforcement options; it also shares state legislative adoption authority and enforcement.³ And due to article 1, section 10, clause 3, of the U.S. Constitution, known as the Compact Clause, congressional approval of an interstate compact is required if it affects the balance of power between the federal and state governments or when it encroaches on a

² Kevin J. Heron, “The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements,” *St. John's Law Review* 60, no. 1 (June 2012): 4, <http://scholarship.law.stjohns.edu/lawreview/vol60/iss1/1>.

³ “Understanding Interstate Compacts,” National Center for Interstate Compacts, accessed March 26, 2018, http://www.cglslgp.org/media/1313/understanding_interstate_compacts-csgncic.pdf.

power granted to Congress.⁴ If an interstate compact receives congressional approval, it transforms the compact into federal law.⁵ The application of the interviewees' criteria reveals that a congressionally approved interstate compact has the potential to satisfy all three priorities of the interviewees. First, the enactment of an interstate compact creates statutory authority in every participating state. Second, due to the contractual nature of interstate compacts, every state that enacts the interstate compact has identical or substantially similar laws, alleviating the stress and chaos of non-uniformity among fusion centers in an information-sharing environment.⁶ Last, the ability of fusion center leaders to participate in the development of the legal and operational framework for the National Network satisfies the concerns of the interviewees who feel that the network should remain in the hands of state and local governments.

The comparison of three legal mechanisms with the potential to create legal uniformity leads to the conclusion that an interstate compact is the most beneficial approach to satisfy the reported desires of the policymakers within the National Network. In addition to creating statutory authority within each participating state and territory, an interstate compact has the potential to create legitimate national uniformity for fusion center operations. As reported, the interviews reflect a very low tolerance for federal involvement in the development of the legal and operational framework for the National Network. However, since interstate compacts honor the principles of federalism and state sovereignty vis-à-vis the federal government, the interstate compact development process allows policymakers within the network to determine the most appropriate legal and operational framework to maximize the capabilities of the National Network.

⁴ *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

⁵ *Cuyler v. Adams*, 449 U.S. 433, 438 (1981).

⁶ Non-material changes to the compact language does not necessarily invalidate an interstate compact. As an example of how EMAC handled this issue, § 4 of the Emergency Management Assistance Compact states, "The validity of this compact shall not be affected by any insubstantial difference in its form or language as adopted by the States." Emergency Management Assistance Compact, Public Law 104-321, 104th Cong., 2d sess. (October 19, 1996).

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I. INTRODUCTION

The National Network of Fusion Centers, or National Network, is operating at a significant disadvantage; there are 79 fusion centers in the National Network implicating the state and local laws of 50 states, the District of Columbia, and three U.S. territories.¹ In addition, each fusion center that accepts funding from the Homeland Security Grant Program is subject to certain federal laws as a condition of federal funding. This multi-layered, multi-jurisdictional legal framework causes uncertainty and, ultimately, a lack of trust as to how critical information sharing–related issues will be addressed across state lines. In order to equip the National Network with the tools necessary to be successful in the homeland security environment, fusion centers must establish their existence in law, determine an appropriate legal framework to aid them in their mission, and encourage uniformity from the membership of the National Network.²

A. PROBLEM STATEMENT

State and major urban-area fusion centers are subject to competing legal interests that affect their ability to execute the intended fusion center mission. Fusion centers are not federal entities; rather, they are products of state and local governments and, as a result, are subject to state and local laws, policies, and mission priorities. They were developed to serve as partners to one another—as well as to the federal government—through the U.S. Intelligence Community. Because fusion centers contribute to the national mission, the federal government supports the National Network through funding, personnel support, and sponsored training.³ Therefore, in addition to the state and local laws that may apply to a fusion center, each fusion center must also comply with federal

¹ “Fusion Center Locations and Contact Information,” Department of Homeland Security, accessed March 26, 2018, www.dhs.gov/fusion-center-locations-and-contact-information. The National Network includes fusion centers from Puerto Rico, the U.S. Virgin Islands, and Guam.

² The views expressed in this thesis are those of the author and do not reflect the official policy or position of the Nevada Attorney General’s Office.

³ Offices of Inspectors General of the Intelligence Community, Department of Homeland Security, and Department of Justice, *Review of Domestic Sharing of Counterterrorism Information* (Washington, DC: Department of Justice Office of the Inspector General, March 2017), 42, <https://oig.justice.gov/reports/2017/a1721.pdf>.

laws and regulations associated with federal grant funding. As a result of the multiple laws affecting fusion center operations, fusion centers can experience legal conflict, confusion, and insecurity when addressing issues that cross state lines and implicate conflicting or inconsistent state laws. The lack of legal uniformity impedes the National Network's ability to share information across state lines and to function seamlessly as a network.

The legal non-uniformity in the National Network is a symptom of federalism. Federalism is the shared power between the federal government and the state governments with the respective division of power outlined in the U.S. Constitution. Amendment 10 of the Constitution limits federal authority by stating that any powers not granted to the federal government rests with the states. In practical terms, this provision means that any powers not granted to the federal government within the U.S. Constitution are areas of control left to the state governments. As a result, each state has the authority to create and enforce criminal and civil laws, determine its public policies, and manage its own affairs.⁴ Because every state and territory in the nation has these inherent powers, the National Network is faced with 54 legal frameworks to operate one network, which presents an ongoing operational challenge.

B. RESEARCH QUESTIONS

1. Does the lack of legal uniformity in the National Network of Fusion Centers create operational challenges that limit the effectiveness of the network?
2. Is there a legal mechanism that enables the National Network to create legal uniformity in all 50 states, the District of Columbia, and U.S. territories?

⁴ 96 N.Y. Jur. 2d, *Sovereignty: Relationship to Federal Government* § 2 (2018).

C. SIGNIFICANCE OF THE RESEARCH

This research considers the interview results involving 11 directors, deputy directors, and senior leaders from recognized fusion centers within the National Network.⁵ Understanding the practical impacts of legal and operational non-uniformity, from the perspectives of fusion center leadership, will help to determine whether changes to the National Network are warranted.

The research addresses and evaluates the benefits, issues, and overall viability of three legal mechanisms that could be used to facilitate legal uniformity. The research identifies which legal mechanisms are able to address the described shortcomings of the existing legal framework, as well as which legal mechanisms satisfy the desires of the stakeholders within the National Network. The results provide the National Network a better understanding of the collective concerns of fusion center leaders and allows the National Network to evaluate a course of action that addresses the concerns expressed by its membership.

D. RESEARCH METHODOLOGY

The research method includes a review of various federal and state laws related to intelligence and information sharing, relevant government reports, professional papers, and academic journals. Due to the limited literature addressing the lack of legal uniformity within the National Network, exploratory interviews of fusion center directors, deputy directors, and senior leaders were conducted to understand their perspectives on legal uniformity. The interviews were used to gain insight into the existing state and national legal frameworks that impact the National Network and whether the existing frameworks present problems in the operation of each fusion center. The research also draws on the author's professional experiences as an attorney for a fusion center within the National Network.

Eleven confidential and semi-structured interviews were conducted to explore the research questions. The process for the selection of interview candidates began by

⁵ The Naval Postgraduate School's Institutional Review Board has reviewed this paper: NPS.2017.0046-IR-EP7-A.

requesting interviews from the Executive Board of the National Fusion Center Association (NFCA), a nonprofit organization dedicated to representing the interests of the National Network. The Executive Board of the NFCA consists of 12 fusion center directors, deputy directors, and senior leadership who operate fusion centers within the National Network. Five of the 12 NFCA Executive Board members agreed to be interviewed. Another six interviews were obtained through recommendations of the interviewees and through professional contacts within the National Network. The 11 interviewees participating in this research consisted of seven fusion center directors, three deputy directors, and one member of senior leadership (see Table 1). Interviewee representation came from seven state-run fusion centers and four major urban-area fusion centers, providing a representative sample of leadership perspectives from both state and local government entities. With interviews from 11 different fusion centers, this research sample represents the viewpoints of 13.9 percent of the 79 fusion centers within the National Network.

Table 1. Summary of Interviewee Data

	State or Major Urban-Area Fusion Center	Director, Deputy Director, or Senior Leadership
Interviewee #1	State	Director
Interviewee #2	State	Director
Interviewee #3	State	Director
Interviewee #4	Major Urban Area	Director
Interviewee #5	Major Urban Area	Deputy Director
Interviewee #6	Major Urban Area	Director
Interviewee #7	State	Deputy Director
Interviewee #8	State	Director
Interviewee #9	State	Senior Leadership
Interviewee #10	State	Deputy Director
Interviewee #11	Major Urban Area	Director

The interviewees were questioned about four distinct areas of fusion center operations to determine the impact of non-uniformity: 1) the form of legal establishment of their fusion center and how it affects operations, 2) the impact of existing state laws on information sharing within the state and across state lines, 3) the types of laws that would

be most desirable if a national legal framework were developed, and 4) their opinions as to whether the federal or state governments should dictate the national legal framework for fusion centers, if developed. The results were used to create criteria to evaluate the appropriateness of three legal mechanisms selected by the author based on professional observations, legal research, and interview results.

E. THESIS OVERVIEW

This thesis is organized into five chapters. Chapter II provides an overview of fusion centers, the National Network, and the challenges that the lack of legal uniformity creates within the network from the perspectives of the interviewees. Chapter III evaluates three legal mechanisms that have the potential to achieve legal uniformity in the National Network: 1) the development of model laws, 2) the development of federal laws, and 3) the development of a congressionally approved interstate compact. The exploratory interviews of fusion center directors, deputy directors, and senior leaders were utilized to establish criteria to evaluate each legal mechanism based on the needs and concerns that exist within the National Network. The application of the interviewees' criteria led to the conclusion that an interstate compact would best address the lack of legal uniformity within the National Network. Chapter IV provides an analysis of the advantages and disadvantages of utilizing an interstate compact to create uniformity within the National Network. Lastly, Chapter V presents three recommendations for the National Network and provides concluding thoughts on the results of the research.

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II. THE NATIONAL NETWORK OF FUSION CENTERS TODAY: AN EVALUATION OF THE STATUS QUO

As the United States faces evolving threats from foreign actors and home-grown violent extremists, the National Network serves as a state and local partner to the federal government in combating crime and terrorism-related threats. The National Network, through its 79 strategically placed fusion centers, provides access to more than two million public safety professionals from across the country, offering a unique understanding of their individual communities and providing unprecedented access to local intelligence.⁶ The information gathered from this vast public safety community allows the National Network to address and disseminate information on local threats that otherwise would have been outside the jurisdiction of the federal government. This access serves as a considerable benefit to the federal government in ensuring national security, as intelligence is able to flow up to federal officials from the state and local authorities.⁷

The 9/11 Commission Report made clear that the federal government had access to information related to the terrorists who committed the September 11, 2001, terrorist attacks before they occurred. However, the inability to connect the disparate information among government entities was the true impediment to detection and prevention.⁸ The 9/11 Commission ultimately recommended the creation of information-sharing procedures for enhanced collaboration across all levels of government.⁹ Shortly after the publication of the *9/11 Commission Report* and the creation of the Department of Homeland Security (DHS), DHS in partnership with the Department of Justice (DOJ)

⁶ Justin Lewis Abold, Ray Guidetti, and Douglas Keyer, “Strengthening the Value of the National Network of Fusion Centers by Leveraging Specialization: Defining ‘Centers of Analytical Excellence,’” *Homeland Security Affairs* 8 (June 2012), <https://www.hsaj.org/articles/223>.

⁷ “State and Major Urban Area Fusion Centers,” Department of Homeland Security, accessed March 26, 2018, <https://www.dhs.gov/sites/default/files/publications/Fusion%20Centers%20Handout.pdf>.

⁸ National Commission on the Terrorist Attacks upon the United States (9/11 Commission), *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (New York: Norton, 2004), 416.

⁹ 9/11 Commission, 416–417.

began to fund and foster the development of state and major urban-area fusion centers across the United States.¹⁰ The state and major urban-area fusion centers were designed to operate as a network, contributing state and local intelligence to one another, the federal government, and the U.S. Intelligence Community. The National Network is a “self organizing, self governing network that operates on a foundation of common purpose and trusted relationships.”¹¹ This function provides the tools needed to detect and prevent bad actors from compromising the safety of our nation. No other state or local government agency has the diversity of personnel, the unique access to frontline public safety employees, and the broad mission of protecting the homeland.

A. “IF YOU HAVE SEEN ONE FUSION CENTER, YOU HAVE SEEN ONE FUSION CENTER”

There is no defined model for fusion centers. Many centers are run by state and local public safety entities, such as an intelligence division of a state or local police agency. While some fusion centers focus solely on counterterrorism, many others are considered “all crimes, all hazards” centers, which serve a more integrated role with local law enforcement and public safety entities. The mission areas and budget for each fusion center are dictated by the needs of each community and their state or local government (within the parameters of federal funding and guidance, if applicable). Fusion centers are staffed by state and local personnel but often have a federal presence within the center to facilitate and enhance information sharing across all levels of government. As described by DHS, “Fusion centers operate as state and major urban area focal points for the receipt, analysis, gathering, and sharing of threat-related information between federal; state, local, tribal, territorial (SLTT); and private sector partners.”¹² The ability of fusion

¹⁰ Christopher C. Mitchiner, “Department of Homeland Security and Fusion Centers, an Unfused Network” (master’s thesis, United States Army War College, 2013), 4, <http://www.dtic.mil/dtic/tr/fulltext/u2/a589473.pdf>.

¹¹ National Fusion Center Association, *2014–2017 National Strategy for the National Network of Fusion Centers* (Arlington, VA: National Fusion Center Association, July 2014), 9, <https://nfcausa.org/html/National%20Strategy%20for%20the%20National%20Network%20of%20Fusion%20Centers.pdf>.

¹² “State and Major Urban Area Fusion Centers,” Department of Homeland Security, accessed March 26, 2018, <https://www.dhs.gov/state-and-major-urban-area-fusion-centers>.

centers to provide a local perspective to a statewide, regional, or national homeland security issue fills a security gap that existed before 9/11.

Although law enforcement typically plays a critical role in the administration of fusion centers, law enforcement is not the only discipline contributing to the fusion center mission. In addition to the contributions of law enforcement, fusion centers often include representation from fire services, emergency services, transportation, corrections, information security, parole/probation officers, school districts, and health departments. Such diverse and collaborative relationships position fusion centers to offer varied types of intelligence unlike any other single government entity. As a result, fusion centers use their broad level of expertise to identify and analyze relevant intelligence and disseminate it to local, state, and federal partners with the intention of preventing criminal and/or terrorist activity.

Because there is no defined model for a fusion center's mission and composition, no two fusion centers in the National Network are exactly alike. The resulting diversity among fusion centers has both advantages and disadvantages. One considerable advantage is the ability for each center to serve the specific needs of its individual communities. Some of the disadvantages of non-uniformity include an imprecise and varied mission across the National Network; an assortment of policies and procedures affecting the operation of each center; varied compliance with constitutional requirements; and numerous state laws regarding privacy, public records, open meetings, and law enforcement-related laws. When asked about the varied responsibilities of fusion centers across the country, Interviewee #6 shared, "If you go across the fusion center network, it's a hodgepodge of what each fusion center director has a responsibility of doing. . . . There's no real good definition of what is the role of a fusion center director or deputy director [and] their supervising intelligence analysts."¹³ This variation creates operational inconsistencies within the National Network and has the ability to impact the functionality of services across state lines, as well as the level of predictability and trust between fusion centers.

¹³ Interviewee #6 (major urban-area director), confidential interview with author, October 6, 2017.

1. The Value of State Statutory Authority

Interviewees were asked to describe the enabling legislation for their fusion center, if any, and how any existing state law impacts their daily operations. If no state legislation exists, interviewees were asked to describe how their fusion center was created (e.g., executive order, established within an existing agency, or other) and what impact the form of creation has on their daily operations. These questions were asked to gauge how many fusion centers have state laws that explicitly dictate their operations and how the existing laws, or lack thereof, affect the fusion center's ability to carry out its mission to "detect, prevent, investigate, and respond to criminal and terrorist related activity."¹⁴

The interviews and subsequent legal research revealed that approximately 10 percent of the 79 fusion centers are specifically named in state law.¹⁵ It was clear from the interviews that many fusion centers felt they were functioning at a disadvantage because of the lack of specific legal authority for fusion center operations. Although three interviewees felt comfortable with existing state laws and authorities, the other eight expressed concerns over the lack of statutory authority for fusion center activities and records. Interviewee #3 explained that their fusion center has always had an interest in being statutorily created but to date had been unsuccessful in convincing its leadership and the state legislature to enact fusion center-specific laws. When asked to explain the benefits of having a fusion center established in state law, Interviewee #3 stated,

I think any time that you can gain assistance from state law . . . it really solidifies what you're doing and why you're doing it. Whereas opinion . . . it may justify in my mind why I'm doing what I'm doing, but it may not be enough to convince let's say a judge or somebody that's going to matter down the road.¹⁶

¹⁴ Department of Homeland Security and Department of Justice, *Baseline Capabilities for Fusion Centers* (Washington, DC: Global Justice Information Sharing Initiative, U.S. Department of Justice, September 2008), 47–48, <https://it.ojp.gov/documents/d/baseline%20capabilities%20for%20state%20and%20major%20urban%20area%20fusion%20centers.pdf>.

¹⁵ VA. CODE ANN. §§ 52–47 (West 2005); KY. REV. STAT. ANN. § 39G.050 (West 2013); KAN. STAT. ANN. § 48–3702 (West 2017); IND. CODE 10-11-9-2 (West 2010); GA. CODE ANN., § 35-3-201 (West 2016); and TEX. CODE ANN. § 421.082 (West 2011); N.H. REV. STAT. § 651-F:1 (West 2010).

¹⁶ Interviewee #3 (state director), confidential interview with author, September 21, 2017.

Several interviewees expressed that clarity of state law would help guide the policies and practices of the fusion center, ensure funding to support the centers, and limit the liability that fusion centers currently face due to the lack of clear legal guidance as to their day-to-day operations.

Interviewees were asked whether the existing state statutes in their jurisdiction allowed them to feel secure in their operations. Interviewee #3 shared the following:

I believe we can sufficiently operate with what we have now because we have been [here] for almost 10 years. However, do I feel vulnerable? I do feel like we are vulnerable. I feel like . . . more specific statutes relative to exactly what we are doing would definitely benefit us, protect us more, as well as protect our information sharing environment and enable us to be able to share information more efficiently.¹⁷

Similarly, Interviewee #1 shared that there was no loss of sleep over the existing legal framework, but the National Network could be doing a better job with stronger laws for fusion centers, explaining that a couple of areas are weaker than they should be.¹⁸ Interviewee #1 also explained that public records laws are the biggest frustration for their fusion center because the law is unclear, and they are forced to rely on their attorneys, who have varied levels of understanding of the fusion center mission and how to apply existing laws to public records requests.¹⁹ A number of interviewees commented that the amount of time and effort spent determining how to respond to public record requests was due to the lack of clarity in the law.

a. Public Records

State public records laws ensure that each government is open and transparent for its citizens. As a matter of state law, each state government handles public records and any related exceptions and exemptions pursuant to the laws established by each independent state legislature. Public records laws can present unique challenges for the National Network because the laws do not always consider the sensitive nature of the

¹⁷ Interviewee #3.

¹⁸ Interviewee #1 (state director), confidential interview with author, September 14, 2017.

¹⁹ Interviewee #1.

records maintained by fusion centers, as public records laws were codified long before fusion centers were developed. Additionally, since each state follows its own public records law, shared information is treated differently, leaving fusion centers unsure of how information will be treated once it crosses state lines.

Many state public records laws require the disclosure of all government documents absent a specific exception in statute. Since the majority of fusion centers are not established in state law, there is typically no specific exception to the public records law that would apply to a fusion center, leaving fusion centers unsure as to the confidentiality of certain documents generated and/or received by the center. For example, most fusion centers receive suspicious activity reports that contain uncorroborated information describing observed behavior “reasonably indicative of pre-operational planning associated with terrorism or other criminal activity.”²⁰ Suspicious activity reports are not typically considered active criminal investigations under state law, yet they still contain sensitive information related to allegedly suspicious behavior that, if disclosed to the public, would be detrimental to a fusion center’s mission. Furthermore, should the information be made publicly available, it could be potentially damaging to U.S. citizens who are associated with suspicious behavior even though there is insufficient evidence to justify a criminal investigation. There are generally inadequate exceptions in state law to prevent the release of a suspicious activity report, and as a result, fusion centers face considerable uncertainty as to the proper handling of these records when requested in a public records request. The interviews revealed varied approaches to the handling of public records requests related to suspicious activity reports due to inconsistent laws throughout the National Network.

The majority of interviewees expressed that their state public records laws do not contain any specific exceptions for fusion center records, aside from the law enforcement–related statutes that deem active criminal investigations confidential. The lack of public record exceptions in state law leaves fusion centers to make public policy

²⁰ Program Manager for the Information Sharing Environment, *Information Sharing Environment: Suspicious Activity Reporting*, ISE-FS-200, version 1.5.5 (Washington, DC: Office of the Director of National Intelligence, February 2015), 4, https://nsi.ncirc.gov/documents/SAR_FS_1.5.5_PMISE.pdf.

arguments that explain that the risk of releasing the record outweighs the benefits of disclosure. In other words, fusion centers may respond to a specific public record requests by saying that it may result in harm to their mission, their employees, or innocent citizens. Although fusion centers are concerned about the lack of public records exceptions, a majority of the interviewees explained that their fusion center had never been challenged in court to disclose records believed to be confidential; Interviewee #1 stated that they have “lucked out” when it comes to public records requests.²¹ As a result, little is known about how state courts will rule on these issues and the public policy arguments, if and when those cases are ever adjudicated in state court. The absence of legal challenges related to public records also seems to provide a false sense of security to the interviewees when it comes to the vulnerability of each fusion center, given the existing legal framework.

The interviewees were asked whether fusion center records should have public records exceptions in law. Interviewee #3 explained that certain fusion center records should be made confidential: “Anything that has to do with our procedure, our tactics, anything having to do with ongoing investigations, anything that has to do with our partner agencies and their interests regarding those specific things is . . . important.”²² Interviewee #10, agreed, adding that confidentiality of certain fusion center records is important because producing these records “can give out the techniques we utilize to identify suspicious activity or how we vet suspicious activity, which would allow the public to exploit and work around our techniques. The different tools that we have . . . would let certain parts of the public . . . exploit it and work around it.”²³ There were also concerns from interviewees about wanting the ability to protect members of the public who are named in suspicious activity reports when there is no additional evidence of wrongdoing, fearing that the production of those records might harm those individuals in their careers and lives.²⁴

²¹ Interviewee #1 (state director), confidential interview.

²² Interviewee #3 (state director), confidential interview.

²³ Interviewee #10 (state deputy director), confidential interview with author, November 8, 2017.

²⁴ Interviewee #9 (state senior leadership), confidential interview with author, November 1, 2017.

b. Open Meeting Laws

Open meeting laws are state statutes that require public bodies—as defined in state law—to hold their meetings in public, with adequate notice to the public, providing opportunities for the public to speak, and with transcripts that allow the public to inspect meeting minutes. The purpose of open meeting laws is to ensure that the public has access to the actions and deliberations of public bodies and the ability to make their opinions of those body’s actions known. All 50 states, the District of Columbia, and U.S. territories have open meeting laws. The complication of open meeting laws in the fusion center environment relates to whether the content is appropriate for public consumption. Because fusion centers often deal with sensitive information, and their advisory or governance boards are involved in operational guidance, the requirement to meet in public to discuss related issues can be problematic for the board members. Interviewees reported that the public nature of an advisory or governance body meeting quells open discussion of legitimate operational issues and prevents the boards from addressing legitimate issues facing the fusion center for fear of compromising an investigation or disclosing critical law enforcement techniques or strategies.

The 11 interviewees all agreed there would be benefits to allowing fusion centers to meet and discuss their operations in private. There appeared to be a common perception of why public meetings are not appropriate for all fusion center matters: the public nature of the meeting ceases participation and impacts the ability of the governance or advisory body to solve problems. When asked about whether their fusion center advisory body experienced any issues due to the requirement to conduct public meetings, Interviewee # 3 stated,

It would really benefit the fusion center if we were able to have open conversation about sensitive information sometimes. Because we don’t have a governance board, we have an advisory board. So what I’m seeking from them is their advice. I’m asking for them to help me move this fusion center in a positive direction—and help them to help me understand what their needs are too, because they come from different agencies that are partner agencies. Well, we can’t discuss certain cases. We can’t discuss classified information certainly under any circumstances in an open meeting type situation because everything that’s talked about in a meeting

is open to the public. So we have to be very, very guarded as to what kind of information we can talk about with this advisory board.²⁵

In other words, the public nature of the advisory body impacts the productivity of the fusion center because certain information that fusion centers want to discuss with the advisory body cannot be discussed in a public setting and, because of the open meeting law, cannot be discussed in private. As a result of this complication, Interviewee #3 described the need for fusion center exceptions in the state's open meeting law as their jurisdiction's top legislative priority.²⁶ Interviewee #6, whose advisory body meets privately, echoed similar concerns to Interviewee #3, relating to the ability of the advisory body to address fusion center issues in a public setting: "In the fusion center operations, you're dealing with either investigative or intelligence information or data. And no one's gonna want to talk about that in a public session for fear of compromising investigations."²⁷ Although the majority of interviewees felt that fusion center advisory or governance bodies should meet privately, two interviewees had opposing views.

Interviewee #10 shared a different perspective on whether a fusion center's advisory body should meet in public, noting their advisory body meets publicly and it has not caused any productivity issues: "There's nothing being said in these meetings that the public couldn't hear. . . . They are more of an opportunity for the board members to hear [how] some of our staffing is going. I provide a couple examples of success stories that we've done and how intelligence has supported an operation."²⁸ Interviewee #10 went on to say that if the public were to show up at the meetings, remarks would be tailored for the audience.²⁹ Sharing a similar sentiment, Interviewee #1 explained that their fusion center's advisory body meets in public, and nobody from the public has ever attended one of their meetings; as a result, the law does not impact their ability to have open

²⁵ Interviewee #3 (state director), confidential interview.

²⁶ Interviewee #3.

²⁷ Interviewee #6 (major urban-area director), confidential interview.

²⁸ Interviewee #10 (state deputy director), confidential interview.

²⁹ Interviewee #10.

discussions.³⁰ It is noteworthy that most open records laws require that public meetings be recorded and have transcripts available to the public. Therefore, although the public does not attend the meetings in person, the minutes are likely still available to the public if requested, which may be leading to a false sense of confidence about the confidentiality of the comments made at Interviewee #1's and Interviewee #10's advisory or governance body meetings.

The interviews reflect that advisory and governance bodies play varying roles across the National Network. Based on these varying roles as well as the existing state laws or lack thereof, open meeting laws impact each fusion center in different ways. Some fusion centers are permitted to meet privately while others are required to meet in public. Regardless of the existing law in each state, every interviewee understood the need for the fusion center advisory and governance bodies to discuss fusion center operations outside the public's view to address issues and find solutions to sensitive problems.

c. Funding

The National Network is partially funded by the federal government through the Homeland Security Grant Program (HSGP). The HSGP is a preparedness grant that supports state and local activities to “prevent terrorism and other catastrophic events.”³¹ Each state is eligible to receive HSGP funding, and the funding may be allocated to enhance the operation of recognized fusion centers within each state. The funding is ultimately distributed through a process developed by each jurisdiction related to the state's prioritization of funding. HSGP grant guidance is the mechanism used by the federal government to maintain oversight and mandate some uniformity within the National Network, as every eligible recipient of HSGP funding must agree to comply

³⁰ Interviewee #1 (state director), confidential interview.

³¹ Shawn Reese, *Department of Homeland Security Preparedness Grants: A Summary and Issues*, CRS Report No. R44669 (Washington, DC: Congressional Research Service, 2016), 5, <https://fas.org/sgp/crs/homesecc/R44669.pdf>.

with certain laws, regulations, and policies dictated by the federal government.³² Many of the laws required by the HSGP are federal in nature and would not be applicable to state and local governments absent the fusion center's decision to accept federal grant funding and its related requirements. However, it is important to note that a fusion center's agreement to comply with federal laws, regulations, and policies through the HSGP does not excuse state or major urban-area fusion centers from complying with state and local laws in their jurisdictions. The multi-jurisdictional legal requirements may result in legal conflict and confusion related to applicable laws and standards.

Although the federal government has an interest in the success of the National Network, not only as the supplier of significant federal funding but also as a recipient of the intelligence compiled by state and major urban-area fusion centers, the combination of federal and state resources presents challenges related to the management, operation, and the legal authority for most, if not all, of the fusion centers in the National Network. As federal funding available through the HSGP continues to decrease, state and local governments must increase their contributions to support the operation of their fusion centers in order to maintain their level of service.

At least two interviewees expressed that the primary value of state statutory authority is the ability to access state funding.³³ Absent established statutory authority, fusion centers struggle to gain the state funding they need to function without primary reliance on the federal government. Moreover, with the continued reduction of funding coming from the federal government through the HSGP, the ability to access state statutory funding is becoming increasingly more relevant to ensure the survival of each fusion center in the National Network. In defense of this position, Interviewee #5 stated that the ability to gain funding is the most important benefit of state statutory creation:

³² Department of Homeland Security, "Fiscal Year 2017 Homeland Security Grant Program," DHS-17-GPD-067-00-01 (Notice of Funding Opportunity, Department of Homeland Security, 2016), https://www.fema.gov/media-library-data/1496691855715-4d78d65ebb300900ce6c945931eff2c6/FY_2017_HSGP_NOFO_20170601v2014_605.pdf.

³³ Interviewee #5 (major urban-area deputy director), confidential interview with author, September 22, 2017; and Interviewee #6 (major urban-area director), confidential interview.

The [XXXX], along with other fusion centers, operate under federal grants, specifically the Urban Area Security Initiative, the UASI, and the State Homeland Security Grant Program, SHSP, and with fluctuation, obviously, in the economy and funding and moneys towards federal grant[s], we operate on strictly one, on federal grants, and second, on in-kind donations, meaning local participating agencies provide bodies through their in-kind funds for their personnel. And we have seen a decrease in federal funding, and essentially having a codified law would actually provide continuous support and funding.³⁴

Interviewee #3 shared a similar explanation for the value of state law in funding the fusion center, stating that state law provides “more footing when it comes to seeking funding for your fusion center. . . . It also helps with your decision-making as far as coming to the table with how you see the fusion center moving forward in a positive direction.”³⁵ In other words, Interviewee #3 feels having a statute that establishes a center in law will make it easier to request and justify funding from the state legislature. Considering the significant reductions in fusion center funding from the HSGP over the last 10 years, the ability to acquire state funding may become more important, justifying additional attention to develop state statutory authority for the long-term survival of the National Network.

2. The Impact of Non-uniformity within the National Network

One of the purposes of the exploratory interviews was to understand how the lack of national legal uniformity impacts information sharing within the National Network, since fusion centers are expected to effectively and efficiently share information and intelligence across state lines. Information sharing is the process by which fusion centers share relevant information with one another and the federal government on matters of local or national concern.³⁶ The basic information-sharing process includes the receipt of information, the analysis of the information, and the dissemination of threat-related

³⁴ Interviewee #5 (major urban-area deputy director), confidential interview.

³⁵ Interviewee #3 (state director), confidential interview.

³⁶ National Criminal Intelligence Resource Center, *National Strategy for Information Sharing: Successes and Challenges in Improving Terrorism Related Information Sharing* (Washington, DC: Department of Justice, October 2007), 1, <https://www.hsdl.org/?view&did=480495>.

information.³⁷ The interviewees shared many of the same concerns related to record management since every state defines public records and designates sensitive documents differently. Although the National Network is deemed a “network” by name, there is no reported predictability as to how confidential or sensitive records will be handled across state lines, absent taking the time to research the laws in other states before sending information or intelligence to another fusion center.

When asked about the importance of uniformity, Interviewee #8 explained that the National Network is not a traditional network but rather a unique interrelationship between numerous sovereign governments: “To be a network, we have to operate like one, but it’s not like the network of the Department of Defense intelligence. I mean, it’s always going to be a network comprised of 79 separate state governments and in some cases local governments. That is, in fact, what we are going to have to contend with.”³⁸ The majority of interview responses support the concept of creating uniformity among fusion centers for the ease and speed of information sharing within the National Network. Interviewee #6 summarized the goal of the National Network: “We’re trying to all work as a network, not as individuals all trying to swim together.”³⁹ In order to improve information sharing, the interviewees discussed the following areas that need to be addressed in the information-sharing environment to improve effectiveness and efficiency within the National Network.

a. *Non-Uniformity in Public Records Laws*

An emerging area of concern within the National Network includes the disposition of fusion center records outside their originating state. Since every state has different public records laws that impact government and fusion center records, there is uncertainty as to how one state’s records will be handled once the records are sent to

³⁷ Government Accountability Office, *Information Sharing—DHS Is Assessing Fusion Center Capabilities and Results, but Needs to More Accurately Account for Federal Funding Provided to Centers*, GAO-15-155 (Washington, DC: Government Accountability Office, 2014), 8–9, <http://www.gao.gov/assets/670/666760.pdf>.

³⁸ Interviewee #8 (state director), confidential interview with author, October 17, 2017.

³⁹ Interviewee #6 (major urban-area director), confidential interview.

another state. Interviewee #5 explained that a particular state fusion center uses a disclaimer on emails to inform other fusion centers that once it receives records from them, the records are considered public under state law.⁴⁰ When asked whether they believed that the inability for the particular state to protect information shared from other fusion centers affected the National Network, Interviewee #5 acknowledged that the disclaimer did cause hesitation from fusion centers when sharing information: “I remember their director told us specific [sic], all of us, like, I’ll tell you right now that what you’re sending me is going to go public. So, now many centers are very hesitant and cognizant of what they are sending over to them.”⁴¹ Other interviewees were asked whether public record disclaimers were affecting the way fusion centers share information. While none of the interviewees said it changed their willingness to share information, many said it caused hesitation and insecurity.

Interviewee #6 explained that for a fusion center to be fully informed of all public records laws applicable within the National Network, it would have to know the public records requirements in all 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands, as well as any local ordinance that affects each major urban-area fusion center.⁴² The interviewees believed that understanding the national public records framework would be too complicated and too time consuming for the National Network to learn while conducting its mission in an effective and efficient manner.⁴³ When asked about the impact of non-uniformity in public records laws, Interviewee #6 stated, “It’s too damn confusing to figure out because besides the state laws, they have local ordinances. And trying to keep up with 78 different state statutes, local ordinances, or whatever they’re following, it’s a mess.”⁴⁴

Interviewee #1 acknowledged that a fusion center should probably know the state laws of information-sharing recipients but admitted that it slows down the process too

⁴⁰ Interviewee #5 (major urban-area deputy director), confidential interview.

⁴¹ Interviewee #5.

⁴² Interviewee #6 (major urban-area director), confidential interview.

⁴³ Interviewee #5; and Interviewee #6.

⁴⁴ Interviewee #6.

much.⁴⁵ Other interviewees were more dismissive of questions related to whether they research laws in other states before sending records across state lines, implying the absurdity of the expectation that fusion centers have the time to do legal research while conducting their mission. Interviewee #9 stated,

No, we do not research [laws] and it does not concern us. We're gonna share the information with them and hope that they would not release our information without talking to us, but if they're required to do so under their state law, then that's just the way it is. We're not gonna concern ourselves with the 49 states' laws because it'd be impossible to do that and then you would restrict the flow of information.⁴⁶

In an information-sharing environment where time can be of the essence, the non-uniformity of law creates complexities for fusion centers that cannot be easily or quickly addressed. While many of the interviewees described the consequences of information sharing in 54 legal frameworks as the “risk of doing business,” consideration of the legal implications seemed non-consequential since very few of the interviewees' fusion centers have been legally challenged in the appropriateness of their handling of public records.

b. Non-Uniformity in Data Classification

Another area of concern from the standpoint of national uniformity is related to the use of document designations like Law Enforcement Sensitive (LES), For Official Use Only (FOUO), and Classified. These designations are also utilized at the federal government level and serve as internal controls to easily identify sensitive information and quickly determine the permissible recipients. The interviews revealed that the document designations are used by every fusion center represented in the interview sample, and the designations assist the fusion centers in classifying records based on who should have access to each record. Every interviewee explained that the document designations were not established in state law, but defined in policy. When asked about the meaning of LES in their fusion center's jurisdiction, Interviewee #6 shared,

⁴⁵ Interviewee #1 (state director), confidential interview.

⁴⁶ Interviewee #9 (state senior leader), confidential interview.

It doesn't mean anything anywhere...other than [XXXXXX] law; there are no statutes out there that give any bearing to LES data. It is just a made-up thing even in the federal system. So, just because we call it LES, which to us means something that's PII [we] don't want to get [it] out into the non-law enforcement world. There is no standardization.⁴⁷

The lack of standardization proves difficult for the National Network when trying to understand how a shared record should be treated when it crosses state lines. If every state has different definition of LES, FOUO, or Classified, Fusion Center A may handle a record quite differently than Fusion Center B. It was explained that some states allow non-law enforcement employees to view LES information based on their responsibilities within the fusion center while other states exclude non-law enforcement employees from seeing LES records.⁴⁸ Furthermore, some fusion centers within the National Network are not run by law enforcement agencies, complicating the ability of fusion centers to share information with them based on document designation definitions.⁴⁹ When asked whether it would be valuable for the National Network to have the terms LES, FOUO, and Classified defined in national law, Interviewee #6 responded,

Oh, absolutely. It has to be. We have to one day get to that point where it is, because without it, you're left in this chaotic situation where you're not sure [what] you can share. And you're also left in a position where there are people that, in the mindsets of folks, should not have this data, but they have got it in their hands and how do you pull it away from them.⁵⁰

The interviewees explained that because every state defines these classifications differently, a document classified as LES in one state may be made available to non-law enforcement entities and their employees in another state.⁵¹ As the interviewees suggested, in some states, the ability to access information is more about professional title rather than work responsibility, which Interviewee #6 believes is responsible for the

⁴⁷ Interviewee #6 (major urban-area director), confidential interview.

⁴⁸ Interviewee #6.

⁴⁹ Interviewee #5 (major urban-area deputy director), confidential interview.

⁵⁰ Interviewee #6.

⁵¹ Interviewee #6.

degradation of the information-sharing environment since the National Network is comprised of both law enforcement and non-law enforcement entities:

When you talk about the classification of data, that's one piece. The other piece is how you classify the groups that received the data. . . . on the law enforcement side, it's become at least fairly easy, but we still have those anomalies like the five fusion centers in the country that don't have direct law enforcement telecommunication, national criminal information center data access. Those are problematic because we don't define this as a class of people based on their need and right to know that should have this data. We think that fusion centers should be one of those groups.⁵²

Interviewee #6 emphasized the importance of ensuring that information is shared with the right people, regardless of position or title, providing another argument for uniformity across the National Network. Data classification and data access are inconsistent due to the variation in fusion center roles and responsibilities throughout the National Network, as well as varying definitions of document classifications, creating a challenging environment for effective information sharing.

c. Non-Uniformity and Its Impact on Trust

In a network environment, trust among the participants is critical to information sharing. For example, Fusion Center A needs to trust that Fusion Center B will handle its records lawfully and appropriately when sharing information across state lines. But in a network that consists of 54 different legal frameworks, trust is difficult to establish and maintain because of the ongoing uncertainty of how fusion centers outside the originating jurisdiction will handle sensitive information and intelligence. Many of the interviewees mentioned that trust is critical to the National Network's success. When asked about the impact of non-uniformity in the National Network, Interviewee #6 stated,

It's all built on trust. So, you can't be effective without a huge amount of trust with each other because we are coordinating highly sensitive data [and] people's lives are at risk. And it's hard to be effective if there's any hesitation, and we have that. We have states say, well, I can't send you this unless you sign this five page agreement every time I send you something. And that is the craziest thing I've ever seen in my life, but it's going on right now where there are these agreements that are going back

⁵² Interviewee #6 (major urban-area director), confidential interview.

and forth, non-disclosure agreements every time you ask for something, which isn't efficient or effective at all.⁵³

There may be some question as to how effective a non-disclosure agreement would be when the terms of the agreement are inconsistent with state law, but the interviewees revealed that these agreements are frequently used within the National Network. In addition to having questionable application, the interviewees seem frustrated by the inefficiency of the process.

Interviewee #3 stated that, within the National Network, "trust is ultimately the name of the game," expressing concerns and vulnerability about how fusion center data would be handled when sent across states lines.⁵⁴ But Interviewee #3 also spoke about how trust in the National Network is bigger than the issue between two disparate fusion centers; the issue of trust also impacts the local law enforcement agencies that contribute information to each fusion center:

We are going to these people, and we're going to these agencies, and we're saying, yes we're an information sharing environment, we are part of the intelligence community . . . you can trust us. If you give us information, you can trust us with that information. And we want to be able to make sure that they in fact can trust us with that information.⁵⁵

In other words, Interviewee #3 highlights that in addition to the trust needed between state and major urban-area fusion centers, trust is also relevant to each fusion center's relationship with local law enforcement agencies. Fusion centers depend heavily on the local law enforcement's input into the information-sharing environment, and Interviewee #3 shared that the local law enforcement entities need to trust how their information is handled within the National Network once it is shared with their fusion center. Therefore, uniformity in law would not only benefit fusion centers directly; it would also benefit the local law enforcement agencies that contribute critical information to each center. The more local law enforcement agencies trust their fusion centers, the more likely they will be to share valuable information and intelligence.

⁵³ Interviewee #6 (major urban-area director), confidential interview.

⁵⁴ Interviewee #3 (state director), confidential interview.

⁵⁵ Interviewee #3.

Interviewee #7 expressed similar concerns about the impact of sharing information obtained from law enforcement partners without the security in law to protect their information. The result may be an uncomfortable conversation with a contributing jurisdiction, explaining that its records will be released in a public records response.

So, when we get information from our law enforcement partners, they give us the information, we write up products, then we disseminate it. They have this level of trust that we're not going to give it to the public. Then we get an open records request, and we do. So I don't always get a say in it, but I tell them, I say, please call the Chief or Sheriff of that department and explain the situation because we don't want to destroy that trust with this agency where they're never gonna give us information again.⁵⁶

Interviewee #7 went on to say “if people don't trust you, you're not gonna be part of the network.”⁵⁷ The interviews reflect that the expectation of the law enforcement partners is not always consistent with the legal protections granted to each fusion center. This uncertainty appears to concern the interviewees, since law enforcement agencies are a critical partner in the information-sharing environment. Interviewee #8 stated,

The bottom line is that we've been operating off of gentlemen's agreements. . . . There is a sense of duty that we're giving to one another to try to ensure that we protect each other's information and we protect the network's ability to reliably share information back and forth, but there's also a realization that there are certain states that if somebody goes after your information in another state, chances are there is nothing—all the well intentions that fusion center might have, there's really nothing that you can do to stop that release.⁵⁸

The interviews reflect a sense of responsibility to protect the information received from other fusion centers and law enforcement partners, but also a lack of certainty as to whether they can fulfill their obligations to one another under existing law. Absent predictability within the National Network, the ability to maintain trust with each other, as well as critical local law-enforcement partners, remains uncertain.

⁵⁶ Interviewee #7 (state deputy director), confidential interview with author, October 12, 2017.

⁵⁷ Interviewee #7.

⁵⁸ Interviewee #8 (state director), confidential interview.

B. STATE OR FEDERAL CONTROL OF THE NATIONAL NETWORK

The second theme derived from the research interviews is related to the importance of state and local control of the National Network. In order to evaluate the appropriate structure of governance, one must consider the principles of federalism and how it impacts this analysis. Federalism is the shared power between the federal government and the state governments with the respective division of power outlined in the U.S. Constitution.⁵⁹ Amendment 10 of the Constitution reads, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” As a result of the enumerated powers outlined in the U.S. Constitution and the Supreme Court’s interpretation of those powers, the states generally retain control over local concerns and the federal government retains control over national concerns.⁶⁰ Although national security falls within the purview of the federal government, local police powers typically fall within the authority of the state governments.⁶¹ As a result, within the National Network a combination of national security issues and local police power issues create uncertainty as to whether state or federal laws apply in a variety of circumstances.

The interviewees were asked whether they believed the National Network is better served by state and local government control or whether the National Network would be more successful under federal government oversight. This series of questions were designed to demonstrate the tolerance of federal government involvement in the National Network, which could limit the options available to create legal uniformity. Every interviewee expressed some level of concern related to federal government control of the National Network. The majority of the interviewees were adamant that the state and local governments were in the best position to operate the National Network due to their relationships with, and duties to, their local communities, highlighting that the

⁵⁹ *Gregory v. Ashcroft*, 501 U.S. 452, 458–459 (1991).

⁶⁰ *United States v. Lopez*, 514 U.S. 549, 567 (1995).

⁶¹ *United States v. Morrison*, 529 U.S. 598, 618–619 (2000).

concerns of the federal government are different than those of the state and local governments.⁶²

This [network] needs to remain in the hands of the state and locals, doing work that is critical to the senior executives for these law enforcement agencies, the public health, the emergency preparedness—and not driven and guided by any federal oversight or statutes. . . . I don't want to be derogatory about anybody, everyone has their purpose and different mission, but you know . . . the framers had a great idea in separation of powers and states' rights . . . and I think we need to stick with that.⁶³

The desire for state and local control of the network was consistent throughout all of the interviews with the exception of two of the interviewees, who explained that although they believed that state and local governments are the appropriate entities to run the National Network, they were also open to federal involvement if there was no other way to achieve national uniformity. When asked about a hypothetical federal law to create uniformity, Interviewee #6 stated,

We're at a point where if we don't get to the next level of coordination where there is some federal law, that there is something across the board, then pieces of this network are going to fall off because people aren't able to meet even minimum standards of what we think they should be able to do in their operation.⁶⁴

Interviewee #6 seemed to believe that national coordination is critical, but the only way to create national uniformity is through federal law. Coming from a similar perspective, Interviewee #10 admitted that choosing whether state and local governments or the federal government should run the National Network would be difficult but highlighted there are benefits to both formats.⁶⁵ One benefit of federal control shared by Interviewee #10 was the ability for fusion centers to utilize the federal Freedom of Information Act exemptions related to their fusion center records.⁶⁶ Although Interviewees #6 and #10

⁶² Interviewee #5 (major urban-area deputy director), confidential interview.

⁶³ Interviewee #11 (major urban-area director), confidential interview with author, November 20, 2017.

⁶⁴ Interviewee #6 (major urban-area director), confidential interview.

⁶⁵ Interviewee #10 (state deputy director), confidential interview.

⁶⁶ Interviewee #10.

expressed a guarded interest in the creation of federal laws for the National Network, they presented the concept as the only perceived way to create true legal uniformity among fusion centers.

Considering whether the network should remain under state and local government control or whether the National Network should cede to the federal oversight, Interviewee #6 explained the dilemma facing the National Network:

It's a hard balance because you want state and local buy-in and federal coordinated support, but you don't want to put everything under the federal government. The reason that fusion centers are . . . successful is because they're quick and adaptive. They can move to whatever the threat is, whatever the situation is more quickly than federal agencies can, they just can't move that fast. And the threat moves faster than any of us.⁶⁷

The majority of interviewees believe that state and local governments are in the best position to manage and operate the National Network based on their intimate knowledge of their communities and the needs of their state and local partners. In response to a question about whether the National Network would be better served by federal control, Interviewee #5 stated, "What the federal government is looking at is completely different to what state and locals—you know, we have unique ... needs. I think it's important that we continue to operate at the state and local level."⁶⁸

Interviewee #1 expressed concern that federalization of the National Network would lead to too much uniformity in the operation and mission of each center, which would ultimately lead to degradation of the partnerships and collaborative relationships established since 9/11 in each individual jurisdiction.⁶⁹ Instead, Interviewee #1 expressed interest in having the individual fusion centers take more control, stating that the National Network needs to take "more ownership of our own destiny instead of letting DHS think we're the child and they are our parent."⁷⁰ While Interviewee #2 agreed that state and local governments should address the lack of uniformity and related concerns, there was

⁶⁷ Interviewee #6 (major urban-area director), confidential interview.

⁶⁸ Interviewee #5 (major urban-area deputy director), confidential interview.

⁶⁹ Interviewee #1 (state director), confidential interview.

⁷⁰ Interviewee #1.

hesitation as to whether the state and local governments have the capacity and endurance necessary to accomplish those meaningful changes: “The best way would be [for] state and locals to do it but I don’t know that state and locals have the horsepower to get it done.”⁷¹

Interviewees #3 and #11 viewed this issue from the perspective of the U.S. Constitution and the powers granted within it. Interviewee #11 shared that the National Network is meant to serve more than just the needs of the federal government, emphasizing the role each fusion center has with its state and/or local government. The constitutional framework was mentioned in multiple interviews, and Interviewee #3 shared the sentiment of wanting to preserve constitutional intentions. When asked whether federalization of the National Network was problematic, Interviewee #3 explained the following:

Obviously, it raises concerns for me . . . It’s important that each state does retain its sovereignty. The problem, as I see it with federalization, is what’s best for each entity no longer applies. [The only thing that applies] is whatever the federal government says is best. So it’s kind of like having an umbrella decide whether you’re dry or not . . . and not you deciding [whether] to move the umbrella left or right because [you are] not staying out of the rain.⁷²

The theme of responses to this portion of the research represented the desire by the majority to have state and local governments maintain their control of the National Network; however, palpable frustration and helplessness stems from the complex, overwhelming, and time-consuming problem of creating uniformity across 50 sovereign states, the District of Columbia, and U.S. territories.

C. THE NATIONAL FUSION CENTER ASSOCIATION

Although no single government entity has oversight or control over the National Network as it is self-governing, the National Network does receive support and collaboration from the National Fusion Center Association (NFCA). The NFCA in a non-

⁷¹ Interviewee #2 (state director), confidential interview with author, September 19, 2017.

⁷² Interviewee #3 (state director), confidential interview.

profit association that “represent[s] the interests of state and major urban area fusion centers.”⁷³ The NFCA was established in 2007 and exists to promote the value of fusion centers, serve as a consolidated voice to the federal government, enhance relationships across disparate government agencies, provide input on policies and procedures for fusion center operations, and advocate on behalf of the National Network to ensure that fusion centers receive the resources needed to be successful.⁷⁴ The NFCA has an executive board consisting of 12 members who serve as directors, deputy directors, and senior leaders of recognized fusion centers within the National Network. Additionally, the NFCA employs an executive director and supports the association president, who is elected by the membership. The NFCA membership includes fusion center leadership from across the nation and provides a consolidated voice to support the network. As a service to the National Network, the NFCA hosts an annual training event each year that brings together fusion center employees from across the network to address complicated issues facing fusion centers.

Over the years, the NFCA has expended considerable effort to enhance the capability of the National Network, including the development of a three-year strategy to serve as a guide to the network and contributions to the development of annexes to the *Baseline Capabilities of State and Major Urban Area Fusion Centers*.⁷⁵ The executive leadership of the NFCA reported that uniformity is very important to the organization, and one interviewee said that it has tried to create uniformity where it does not require changes to the law.⁷⁶ When asked whether the NFCA wants uniformity in the National Network, Interviewee #10 stated,

I believe they do. They are continually pushing to get uniformity amongst different program and work groups. . . . They’ve been trying to get uniformity across [the nation]—they just did a project on a uniform way to

⁷³ “The Mission,” National Fusion Center Association, accessed March 26, 2018, www.nfcausa.org.

⁷⁴ National Fusion Center Association.

⁷⁵ Interviewee #6 (major urban-area director), confidential interview; and Interviewee #8 (state director), confidential interview.

⁷⁶ Interviewee #6 (major urban-area director), confidential interview.

request information . . . across the network. That is one example of . . . the steps taken as an association to get uniformity.⁷⁷

Interviewee #8 explained that the NFCA has created uniformity in its analytical tradecraft and operational capabilities through policies and guidelines but has fallen short of changing law to create uniformity due to the complexity of legislative amendments.⁷⁸ According to the interviewees, the NFCA continues to push uniformity in whatever form it is able to promote. As Interviewee #6 stated, uniformity is the primary focus of the NFCA, explaining that it is critical to get “everyone on the same page.”⁷⁹

⁷⁷ Interviewee #10 (state deputy director), confidential interview.

⁷⁸ Interviewee #8 (state director), confidential interview.

⁷⁹ Interviewee #6 (major urban-area director), confidential interview.

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III. CREATING LEGAL UNIFORMITY: A COMPARISON OF OPTIONS

The interplay of federal, state, and local law, federal guidelines, and state and local government administration of fusion centers can lead to complex considerations when it comes to the access, maintenance, and storage of criminal intelligence within the National Network. The ability to navigate these complicated and—at times—conflicting laws and policies is critical to the health and viability of the National Network and the foundational protections to which citizens are entitled in the U.S. Constitution. The exploratory interviews reflect the desire for legal uniformity, and the purpose of this chapter is to examine three legal mechanisms that have the potential to create legal uniformity to determine if they will satisfy the requirements of the stakeholders within the National Network.

The legal mechanisms evaluated are model laws, federal laws, and a congressionally approved interstate compact. This chapter describes each method of establishment and discusses the advantages and disadvantages of each option, as well as evaluates how each mechanism coincides with the criteria determined through interviewee responses. The criteria established by interviewees include the enactment of state statutory authority for their fusion center, the development of national uniformity within the National Network, and the continuation of state and local control of the National Network. The criteria are used to evaluate the legal mechanisms in this chapter to determine the most beneficial option for the National Network in the event that the network chooses to pursue legal and operational uniformity.

In order to provide context to the interviewees' criteria, the following descriptions characterize each category of evaluation. The first evaluation criterion, state statutory authority, is achieved when a bill is taken through the state legislative process and enacted into state law. The resulting state law has limited application, as it only applies in the state it was enacted. The benefits of state law, from the interviewees' perspective, include the specific legal authority for fusion centers to conduct their mission in the state, the needed guidance on expectations for public records and open meeting laws in the

state, and the ability to secure state funding to support the existence of the center. The second evaluation criterion, national uniformity, is achieved when all states and territories operate under the same legal framework to address a shared issue. Although federal laws with national application are the most common example of uniformity, model laws and interstate compacts also have the potential to achieve uniformity, with varying degrees of success. The benefits of national uniformity for the National Network from the interviewees' perspective include consistency in operations and predictability of each fusion center's handling of issues that cross state lines. The last evaluation criterion, state sovereignty, is achieved when state governments are in control of their government and related local powers, as dictated by the U.S. Constitution and the enumerated powers granted to the federal government. As explained by the interviewees, the National Network believes that maintaining state sovereignty vis-à-vis the federal government in the realm of fusion center operation is not only appropriate but also constitutional. The cited benefits include the ability for each fusion center to serve the needs of its communities rather than having the majority of focus on federally dictated laws and policies.

A. MODEL LAWS

Model laws are proposed statutory schemes that are developed by a consortium of legal experts to facilitate regional or national legal uniformity on specific issues. The purpose of proposing a model law is to encourage standardization of laws across state lines by proposing a "best practice" for legislating a particular area of interest.⁸⁰ Once model laws are researched, developed, and published, they serve as a legislative proposal that states may attempt to codify through their legislatures; however, model laws do not become actual laws until they have been enacted into a state statutory scheme. The state legislature has complete discretion to determine whether to enact a model law in its entirety, reject it, or choose to enact portions of it. A state legislature's decision to enact only a portion of a proposed model law may be due to an existing state law that conflicts

⁸⁰ Mary Whisner, "There Oughta Be a Law—A Model Law," *Law Library Journal* 106, no. 1 (2014): 125.

with the proposed model law, which would require legislative amendment, or due to other state-specific concerns like the political tolerance of elected officials.

Hundreds of model laws have been proposed by organizations like the American Law Institute, the American Bar Association, and the Uniform Law Commission, each with varied levels of success; these organizations invest significant time and effort to determine which areas of law are most appropriate for legal uniformity.⁸¹ One of the most recognizable model laws, the Model Penal Code, attempted to standardize the criminal code across the nation in 1962.⁸² To date, the complete Model Penal Code is not law in any single jurisdiction within the United States although three states have enacted nearly all of the proposed provisions.⁸³ The Model Penal Code continues to serve as a guide to state legislatures that are evaluating their criminal statutes, but it cannot be credited with creating true legal uniformity within the United States. Also, the Uniform Commercial Code (UCC), which was published in 1952, serves to standardize commercial transactions within the United States.⁸⁴ The UCC has been adopted by all 50 states but with variations in the law.⁸⁵ It has been reported that the laws related to commercial transactions have become less uniform over the years since state legislatures continue to carve out exceptions to the model law, and many states have failed to update the UCC as changes have been recommended.⁸⁶

Because there is no requirement to enact a model law and no legal consequence to changing the text of a model law, there is no legal mechanism to require uniformity,

⁸¹ Whisner, 126–131.

⁸² Paul H. Robinson and Markus D. Dubber, “The American Model Penal Code: A Brief Overview,” *New Criminal Law Review* 10, no. 3 (2007): 320.

⁸³ Markus D. Dubber, *An Introduction to the Model Penal Code*, 2nd ed. (New York: Oxford University Press, 2015), 3–4.

⁸⁴ Jesse M. Brush, “Mixed Contracts and the U.C.C.: A Proposal for a Uniform Penalty Default to Protect Consumers” (scholarship paper, Yale Law School, July 2007), 2, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1047&context=student_papers.

⁸⁵ Gerald T. McLaughlin, “The Evolving Uniform Commercial Code: From Infancy to Maturity to Old Age,” *Loyola of Los Angeles Law Review* 26, no. 3 (1993): 692, <http://digitalcommons.lmu.edu/llr/vol26/iss3/14>.

⁸⁶ Michael L. Buenger et al., *The Evolving Law and Use of Interstate Compacts*, 2nd ed. (Chicago: American Bar Association, 2016), 37–38.

resulting in a patchwork of varying state laws addressing similar issues.⁸⁷ Since uniformity is not guaranteed with the development of a model law, model laws are not likely desirable in circumstances where absolute uniformity is critical to the success of the proposed statutory scheme.

1. Application of Interviewee Criteria to Model Laws

Model laws have the potential to create state statutory authority. After publication of a model law, it is up to each state to determine whether it wants to pursue the enactment of the model law through the state legislative process. If a model law or a version of it is enacted by a state legislature, it will have the same force of law as any other statute in the state.

In theory, national uniformity through the use of model laws is possible if every state and territory proposes and passes the exact same model law. However, this outcome is unlikely due to the voluntary nature of model laws and the legislative process that must occur in each sovereign state and territorial government to enact legislation. The process tends to have legal and political ramifications that have historically prevented uniformity, as evidenced by the Model Penal Code and the UCC. These popular model laws have been published for well over 50 years and have not created legal uniformity across the nation. Therefore, while national uniformity is technically possible with model laws, history demonstrates that it is unlikely.

Last, since the absolute power of choice as to whether to enact a model law into a state statutory framework—in whole, in part, or not at all—rests with each state and territorial government, there is no obligation to enact a model law, and there is no penalty if not enacted. Therefore, each state is truly autonomous and unencumbered to serve its own needs. Model laws respect state sovereignty and provide the benefit of state control. Table 2 provides a summary of interviewee criteria applied to model laws.

⁸⁷ Buenger et al., 37–38.

Table 2. Summary of Interviewee Criteria Applied to Model Laws⁸⁸

	State Statutory Authority	National Uniformity	State Sovereignty
Model Law	Yes	Unlikely	Yes

2. The Application of Model Laws to the National Network

The application of the interviewees’ criteria reveals that model laws clearly satisfy two of the three priorities of the interviewees. First, model laws may result in the development of state statutory authority if a model law is successfully taken through the legislative process and signed into law. Second, model laws respect state sovereignty by leaving the choice to enact a model law with each state. However, model laws realistically fail to fulfill one of the critical criteria asserted by the interviewees; model laws do not necessarily create national uniformity. Rather, each state has the option to enact the model law in whole, part, or not at all. The resulting variation of law would likely result in a similar scenario to what exists in the National Network today—a patchwork of state laws that are inconsistent and largely unknown to the other members of the network. Absent the predictability afforded by national uniformity, the investment of time and effort devoted to the development of a model law may not make a significant impact on the operational challenges currently faced by the National Network.

The interviewees expressed concern over the complexity and political implications of attempting to create legal uniformity within the National Network. The development of a model law takes significant time and research by a group of individuals who are invested in the project. However, the complexity of developing the model law is directly related to the process. Typically, the individuals assigned to draft a model law are legal experts chosen to pursue the project, rather than a national collective of interested parties, likely resulting in a less personal process. Furthermore, since it is not mandatory to enact a model law, national buy-in is not a requirement, preventing delays based on individuals who are dissatisfied with the proposed model law. As a result, the difficulty in

⁸⁸ Adapted from responses from Interviewees #1–11.

developing a model law is somewhat limited by its voluntary nature, since national consensus is not required to publish it for state legislative consideration.

Model laws have one distinct complication worth noting. A proposed model law may conflict with existing state laws in jurisdictions across the country, requiring adjustments to the model law or possible amendments of existing state laws prior to enactment. The process of amending a proposed model law is easier than amending existing state law but has a legitimate impact on whether national uniformity is achieved. Although legislative amendments may seem like a simple issue on paper, amending existing state law has numerous complexities, including political desires of state legislatures and the subsequent approval of each governor. The development of any law is a highly political process. It has not only the potential to impact a state's ability to successfully enact a model law but also the ability to impact national uniformity.

B. FEDERAL LAW

Article 1, section 1, of the U.S. Constitution grants exclusive legislative powers to Congress. In other words, Congress is responsible for the enactment of federal law. However, it is critical to examine the U.S. federal system of government to fully explore the process of creating federal law for application to this research. The concept of federalism, which divides power between the federal and state governments, is a cornerstone of the U.S. system of government.⁸⁹ Amendment 10 of the U.S. Constitution serves to limit federal government authority over the states, and, therefore, areas of governance not explicitly outlined within the U.S. Constitution—or determined by the U.S. Supreme Court as being areas of governance under federal authority—are the responsibility of state governments. As a result, the states tend to retain control over local concerns, and the federal government tends to retain control over national concerns.

Article 1, section 7, of the U.S. Constitution outlines the process of creating federal law, which begins with the development of a bill. A bill is essentially an idea that develops into the text containing a proposed law. A bill can be introduced by any member of Congress, who becomes its primary sponsor. Although the path of each bill varies,

⁸⁹ *Gregory v. Ashcroft*, 501 U.S. 452, 458–459 (1991).

generally it is sent to the appropriate committee for research, edits, and a vote to determine whether the committee will move the bill forward in the legislative process. Once a bill passes through committee, the bill may be sent to subcommittee for further action or to the House of Representatives and the Senate for consideration. Both the House of Representatives and the Senate must agree on the exact same language of the bill by majority vote. If a bill successfully passes through Congress, it is then sent to the president. The president may sign the bill into law, veto the bill, or take no action on the bill, in which case it becomes law after 10 days. If the president vetoes a bill, the House of Representatives and Senate, by two-thirds vote, can override the president's veto and the bill becomes law. Once a federal law is passed, it has national authority due to the Supremacy Clause found in article 6, clause 2, of the U.S. Constitution:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Supremacy Clause demands that federal laws be made consistent with the powers granted by the U.S. Constitution and ensures that federal laws are superior to state and local laws when in conflict. However, if it is felt that a federal law is inconsistent with article 6, clause 2, of the U.S. Constitution, the judiciary, pursuant to article 3 of the U.S. Constitution, will be left to determine whether the federal law is constitutional.

1. Application of Interviewee Criteria to Federal Laws

The enactment of federal law does not create any state statutory authority. Rather, the federal law preempts any state law that conflicts with the federal law where concurrent powers exist.⁹⁰ Federal laws prevent not only the use of existing and conflicting state laws but also the state government from developing any future state laws that conflict with an area of governance.

⁹⁰ Stephan A. Gardbaum, "The Nature of Preemption," *Cornell Law Review* 79, no. 4 (1994): 770–771.

Unlike model laws, federal laws ensure national uniformity. Federal law serves as the “supreme law of the land” in the particular area of governance, applying in every state and territory within the United States.

Last, the creation of federal law does not maintain state sovereignty vis-à-vis the federal government, as it eliminates the state’s power of choice to develop and enforce laws in a particular area of governance. Instead, the federal law is dictated by federal policymakers rather than through the input of state and local stakeholders. A summary of interviewee criteria as applied to federal law appears in Table 3.

Table 3. Summary of Interviewee Criteria Applied to Federal Laws⁹¹

	State Statutory Authority	National Uniformity	State Sovereignty
Federal Law	No	Yes	No

2. Application of Federal Laws to the National Network

The application of the interviewees’ criteria reveals that the development of federal law for the National Network would satisfy one of the three priorities of the interviewees. The creation of federal law for the National Network is the only option that ensures legal uniformity across the network, which is a high priority for the majority of the interviewees. However, the remaining two criteria, the creation of state statutory authority and the maintenance of state sovereignty, are not met by the use of this particular legal mechanism. Based on interviews, the resulting lack of state statutes and the loss of state sovereignty will likely be unacceptable to the majority of the fusion centers within the National Network. And although the legal and operational guidance requested by the interviewees may be achievable through the proposed federal law, the ability for fusion centers to acquire state funding through state statutory authority will not be realized through the creation of federal law.

⁹¹ Adapted from responses from Interviewees #1–11.

Since the majority of interviewees believe that state and local governments are in the best position to manage and operate the National Network based on a constitutional analysis and their intimate knowledge of their communities, the creation of federal law to govern the National Network will likely be met with significant resistance. Furthermore, any federal law proposed for the National Network may be met with constitutional challenges related to the authority of the federal government to govern the National Network.

It is noteworthy that there are several challenges to developing federal law in the area of fusion centers and the National Network. First, the proposed federal law would have to be considered constitutional, taking into consideration the powers provided to the federal government by the U.S. Constitution. Second, the proposed bill for the development of a federal law would need a primary sponsor and would likely require support from not only the federal government but also the National Network. Based on the exploratory interviews, it appears that it would be difficult to gain support from the National Network based on the belief that the National Network should remain under state and local government control. The majority of interviewees were passionately opposed to federal government involvement, and the primary sponsor would likely face considerable pushback from the state governments as well as possible constitutional challenges to a proposed federal law.

C. CONGRESSIONALLY APPROVED INTERSTATE COMPACT

According to Kevin Heron, “An interstate compact is an agreement between two or more states established for the purpose of remedying a particular problem of multistate concern.”⁹² States face many issues that do not start and stop at the state border, like homeland security–related issues that may benefit from uniform regional and national procedures to successfully manage operational and legal concerns. Interstate compacts offer a tool to manage multi-state issues since states are able to negotiate and agree on the

⁹² Kevin J. Heron, “The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements,” *St. John’s Law Review* 60, no. 1 (June 2012), <http://scholarship.law.stjohns.edu/lawreview/vol60/iss1/1>.

framework that will be applied to specific multi-state issues and take collective action to ensure the most favorable outcome for all the participating states.

Once an interstate compact is negotiated by the states, it is then signed by the respective governors of each participating state. The interstate compact typically becomes effective once at least two states codify the compact in state law through the traditional legislative process, providing state legislative authority for the terms of the agreement. The interstate compact development process provides participating states the authority to influence the terms of the compact, which provides control over the content of the agreement as well as the terms of the states' relationships with one another. If the interstate compact is determined to need congressional approval, approval by Congress provides authority for the interstate compact in federal law. Article 1, section 10, clause 3, of the U.S. Constitution, known as the Compact Clause, states in part, "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State." Although the language of the clause seems to require that all interstate compacts be approved by Congress, the Supreme Court has determined that congressional consent is only required when the resulting agreement impacts the balance of power between the federal and state governments or when it encroaches on a power granted to Congress.⁹³ Congressional consent can happen expressly, implicitly, or pre-emptively.⁹⁴

Explicit approval occurs after the adopted compact is submitted to Congress and Congress has consented to the terms.⁹⁵ Implicit approval relies on actions of state and federal governments to presume consent.⁹⁶ And pre-emptive approval occurs in advance of any interstate compact adoption, when the federal government passes legislation empowering states to enter an interstate compact for a specific policy issue.⁹⁷ There is no

⁹³ *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

⁹⁴ "Congressional Consent and the Permission for States to Enter into Interstate Compacts," Council of State Governments, accessed March 26, 2018, <http://knowledgecenter.csg.org/kc/content/congressional-consent-and-permission-states-enter-interstate-compacts>.

⁹⁵ Council of State Governments.

⁹⁶ Council of State Governments.

⁹⁷ Council of State Governments.

bright line rule provided by the U.S. Constitution, or even the Supreme Court, on how to determine when congressional consent is required, aside from the analysis related to whether it affects the balance of power between federal and state governments and/or it encroaches on power granted to the federal government by Congress.⁹⁸ Therefore, each interstate compact must be individually evaluated to determine what form of consent, if any, is appropriate.

One benefit of utilizing an interstate compact for state-to-state uniformity is that it leaves considerable control in the hands of sovereign state governments to collectively manage their multistate, regional, and national issues. The article titled “Congressional Consent and the Permission for States to Enter into Interstate Compacts” published by the National Center for Interstate Compacts, explains that interstate compacts empower the state parties to develop and dictate the terms of their relationship with one another, without federal interference or control.⁹⁹ The ability of states to work together to develop the most advantageous relationship to handle their interstate issues can result in a meaningful and effective agreement since it is reasoned and negotiated by the states that are affected by it. Caroline Broun et al. explain, “Compacts enable the states to, in their sovereign capacities, act jointly and collectively, generally outside the confines of the federal legislative or regulatory process, while concomitantly respecting the view of Congress on the appropriateness of joint action.”¹⁰⁰ Rather than asserting individual state sovereignty, an interstate compact relies on the collective sovereignty of multiple states to establish control of state, regional, and national issues related to governance and responsibility. Interstate compacts empower the state governments to address their needs without the federal government imposing its will.

There are more than 200 interstate compacts in existence today; 22 of them are national compacts, meaning that every state in the nation is a party to the agreement.¹⁰¹

⁹⁸ Buenger et al., *The Evolving Law and Use of Interstate Compacts*, 68–69.

⁹⁹ National Center for Interstate Compacts, “Understanding Interstate Compacts.”

¹⁰⁰ Caroline N. Broun et al., *The Evolving Use and Changing Role of Interstate Compacts: A Practitioner’s Guide*, 1st ed. (Chicago: American Bar Association, 2006), 26–27.

¹⁰¹ “Interstate Compacts Fact Sheet,” National Center for Interstate Compacts, accessed March 26, 2018, <https://www.csg.org/knowledgecenter/docs/ncic/FactSheet.pdf>.

Examples of national compacts include the Emergency Management Assistance Compact, concerning mutual aid during times of emergencies and disasters, and the Interstate Agreement on Detainers, providing a mechanism for detaining incarcerated individuals for return to another state for trial.¹⁰² Additionally, 30 interstate compacts are regional in nature involving eight or more participating states, and numerous interstate compacts exist between fewer than eight states.¹⁰³ Interstate compacts cover a variety of interstate issues including border disputes, water allocations, child welfare, and driver's license reciprocity, to name a few.

1. Application of Interviewee Criteria to a Congressionally Approved Interstate Compact

An interstate compact is not only a formal legal contract with related enforcement options; it also shares state legislative adoption authority and enforcement.¹⁰⁴ In order for a state to join an interstate compact, it must first enact the text of the interstate compact into state law. As an example, the text of the Emergency Management Assistance Compact contains the following language: "This compact shall become effective immediately upon its enactment into law by any two states. Thereafter, this compact shall become effective as to any other state upon enactment by such state."¹⁰⁵ Therefore, as each state legislature adopts the interstate compact within its statutory scheme, the state becomes a participant within the compact.¹⁰⁶ The result is the enactment of the compact language as state statutory authority in each participating state.

Since the enacted state statutory authority in every state and territory that joins the interstate compact is identical or substantially similar, a congressionally approved interstate compact has the potential to create national uniformity if all 50 states, the District of

¹⁰² Buenger et al., *The Evolving Law and Use of Interstate Compacts*, 305, 445.

¹⁰³ National Center for Interstate Compacts, "Interstate Compacts Fact Sheet."

¹⁰⁴ National Center for Interstate Compacts, "Understanding Interstate Compacts."

¹⁰⁵ Emergency Management Assistance Compact, Public Law 104-321, 104th Cong., 2d sess. (October 19, 1996).

¹⁰⁶ Emergency Management Assistance Compact.

Columbia, and U.S. territories are willing to enact the compact.¹⁰⁷ In contrast to a model law, state legislatures are not able to substantially adjust the text of the interstate compact in state law without breaching the contract between parties, ensuring uniformity among participants. Since national uniformity through a congressionally approved interstate compact has occurred in 22 different interstate compacts, national uniformity is possible.¹⁰⁸

Last, congressionally approved interstate compacts are an “expression of state sovereignty” vis-à-vis the federal government.¹⁰⁹ The only caveat is that interstate compacts are accomplished through the application of shared or collective sovereignty with other participating states rather than individual state sovereignty. Interstate compacts provide a sovereign state or territory the opportunity to participate in the negotiation of the compact and then the choice to enact the compact in its jurisdiction. Due to the contractual nature of an interstate compact, once it is enacted, changes to the law cannot occur absent consent of the participating states, ensuring consistency of law across state lines.¹¹⁰ A summary of interviewee criteria applied to an interstate compact is outlined in Table 4.

Table 4. Summary of Interviewee Criteria Applied to an Interstate Compact¹¹¹

	State Statutory Authority	National Uniformity	State Sovereignty
Interstate Compact	Yes	Possible	Yes, collective

¹⁰⁷ Non-material changes to compact language do not invalidate an interstate compact. As an example of how EMAC handled this issue, § 4 of the Emergency Management Assistance Compact states, “The validity of this compact shall not be affected by any insubstantial difference in its form or language as adopted by the States.” Emergency Management Assistance Compact, Public Law 104-321.

¹⁰⁸ National Center for Interstate Compacts, “Interstate Compacts Fact Sheet.”

¹⁰⁹ Buenger et al., *The Evolving Law and Use of Interstate Compacts*, 50–52.

¹¹⁰ Buenger et al., 43.

¹¹¹ Adapted from responses from Interviewees #1–11.

2. Application of a Congressionally Approved Interstate Compact to the National Network

The application of the interviewees' criteria reveals that a congressionally approved interstate compact has the potential to satisfy all three priorities of the interviewees. First, the enactment of an interstate compact would create statutory authority for fusion centers—and their relationship with one another—in every participating state. The resulting state law could provide the operational guidance as well as a path to state funding that the interviewees requested. Second, due to the contractual nature of interstate compacts, every state that enacts the interstate compact will have identical, or substantially similar, laws, alleviating the stress and chaos of non-uniformity among fusion centers in an information-sharing environment. It is noteworthy that national uniformity is not guaranteed, as each state has the power of choice to join and enact an interstate compact—although national uniformity has been achieved in 22 other situations—distinguishing an interstate compact from model laws. Since interstate compact law, which is written by participating states, has standing as federal law upon congressional approval, any conflicting state statutes from participating states are trumped by the interstate compact law. This feature would eliminate the inconsistencies of existing state laws across the National Network by allowing record management laws to be developed without having to amend existing state laws.

Last, the fusion center leadership will be able to remain in control of the National Network, which was identified as a top priority to the interviewees. The ability for fusion center leaders to participate in the development of the legal and operational framework for the National Network should satisfy the concerns of the interviewees who believe the network should remain in the hands of state and local governments.

The complexity of developing an interstate compact is worth mentioning. Since the intent of an interstate compact is to create regional or national uniformity, regional or national buy-in is critical to the success of the interstate compact. In the case of the National Network, national uniformity would likely be the end goal; therefore, the negotiations between the interested parties in all 50 states, the District of Columbia, and the participating U.S. territories would be complex to say the least. The exploratory

interviews reflect a belief that some of the terms of the compact would be easier to negotiate than others, with the majority of interviewees believing that consensus on terms of the interstate compact is possible. The interview responses also reflect a misunderstanding by many of the interviewees about how interstate compacts work and their standing when in conflict with existing state laws. Many interviewees felt that existing state laws would prevent agreement on the negotiated terms of an interstate compact because amending state law is too political and time consuming. However, since a congressionally approved interstate compact—as federal law—would trump existing state law in the area of fusion center operation, confidence in the use of an interstate compact should grow with a better understanding of the legal mechanism. Interviewee #11 offered an interesting perspective when he stated that an interstate compact would probably interest 75 percent of the states, with a willingness to participate and agree to compact language, putting the National Network in a better position than it is now with no consistency across state lines.¹¹²

D. CONCLUSION

The comparison of three legal mechanisms with the potential to create legal uniformity leads to the conclusion that an interstate compact is the most beneficial approach to satisfy the reported desires of the policymakers within the National Network. In addition to creating statutory authority within each participating state and territory, interstate compacts have the potential to create national uniformity for fusion center operations. As reported, the interviews reflect a very low tolerance for federal involvement in the development of the legal and operational framework for state and local agencies that comprise the National Network. But since interstate compacts honor the principles of state sovereignty vis-à-vis the federal government, the interstate compact development process allows policymakers within the network to determine the most appropriate legal and operational framework to maximize the capabilities of the National Network.

¹¹² Interviewee #11 (major urban-area director), confidential interview.

Furthermore, the contractual nature of interstate compacts distinguishes the legal mechanism from model laws in a significant and meaningful way. The binding contractual relationship developed through the negotiation, acceptance, and codification of an interstate compact prevents substantive alteration by a state legislature once signed by the governor, without breaching the agreement between the participating states. This contractual relationship ensures that an interstate compact, and state and federal law created by it, will not be unilaterally changed in the future. Rather, the participating states are required to make the collective decision to alter the existing agreement if change to the legal and operational framework is desired. The predictability and longevity of the legal relationship between states as a result of an interstate compact provide assurances that are critical to handling complicated and/or sensitive interstate legal issues.¹¹³ A summary of interviewee criteria applied to model laws, federal laws, and an interstate compact appears in Table 5.

Table 5. Summary of Interviewee Criteria Applied to Model Laws, Federal Laws, and an Interstate Compact¹¹⁴

	State Statutory Authority	National Uniformity	State Sovereignty
Model Laws	Yes	Unlikely	Yes
Federal Laws	No	Yes	No
Interstate Compact	Yes	Possible	Yes, collective

¹¹³ Interviewee #11 (major urban-area director), confidential interview.

¹¹⁴ Adapted from responses from Interviewees #1–11.

IV. ASSERTING COLLECTIVE STATE SOVEREIGNTY TO STRENGTHEN THE NATIONAL NETWORK OF FUSION CENTERS

The exploratory interviews revealed that nearly all of the interviewees were concerned about their fusion centers' operational and legal compliance but felt there was no reasonable solution to create legal uniformity since the National Network consists of 79 fusion centers from 50 sovereign states, the District of Columbia, and three U.S. territories. The *Fusion Center Guidelines*, which were developed to serve as foundational guidance for fusion center operation, addressed the need for uniformity in the National Network as early as 2006, yet 12 years later, no legal framework has been formed to address the operational inconsistencies within the network.

Although each fusion center will have its unique characteristics, it is important for centers to operate under a consistent framework—similar to the construction of a group of buildings where each structure is unique, yet a consistent set of building codes and regulation are adhered to regardless of the size and shape of the building.¹¹⁵

This research leads to the conclusion that the majority of fusion center leaders interviewed want uniformity within the National Network as many feel uncertain and insecure about the legality of their operations. As Interviewee #1 explained, “I feel like there are a lot of states that are in the same boat as I am where they’re just winging it.”¹¹⁶ Fusion centers should not be expected to “wing it”; fusion centers deserve to have confidence in the legality and appropriateness of their operations given the important role they play in the homeland security enterprise. And due to the multi-jurisdictional nature of the National Network, legal uniformity is critical to providing a working environment that cultivates predictability and trust among all members of the network.

¹¹⁵ Department of Homeland Security and Department of Justice, *Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era* (Washington, DC: Global Justice Information Sharing Initiative, U.S. Department of Justice, August 2006), https://it.ojp.gov/documents/d/fusion_center_guidelines.pdf.

¹¹⁶ Interviewee #1 (state director), confidential interview.

In order to fully evaluate interstate compacts for use by the National Network, there are numerous advantages—as well as a few disadvantages—to consider when contemplating the legal relationship. The following sections in this chapter address the advantages and disadvantages of utilizing an interstate compact.

A. ADVANTAGES OF INTERSTATE COMPACTS

There are five specific benefits to the utilization of an interstate compact: 1) the fortification of state sovereignty, 2) the establishment of an enforceable legal agreement, 3) state and federal legislative authority, 4) uniform judicial interpretation, and 5) the preemption of federal interference.

1. Fortification of State Sovereignty

Since every state and territory has the ability to create its own laws, an issue that crosses state lines and imputes laws of other states, proves to be a great challenge because it involves the laws and policies of more than one sovereign government. However, interstate compacts allow states to come together to address the inconsistencies in law that impact their multistate operations. The article titled “Understanding Interstate Compacts” published by the National Center for Interstate Compacts, explains that interstate compacts empower the state parties to develop and dictate the terms of their relationships with one another, without federal interference or control.¹¹⁷ The ability of states to work together to develop the most advantageous relationship to handle their interstate issues can result in a meaningful and effective agreement since it is reasoned and negotiated by the states that it impacts, allowing the states to ensure they are able to effectively operate under the terms of the agreement. As explained in *The Evolving Use and the Changing Role of Interstate Compacts*, “Compacts enable the states to, in their sovereign capacities, act jointly and collectively, generally outside the confines of the federal legislative or regulatory process, while concomitantly respecting the view of Congress on the appropriateness of joint action.”¹¹⁸

¹¹⁷ National Center for Interstate Compacts, “Understanding Interstate Compacts.”

¹¹⁸ Buenger et al., *The Evolving Law and Use of Interstate Compacts*, 26–27.

Rather than asserting their individual state sovereignty, an interstate compact relies on the collective or shared sovereignty of multiple states to establish control of state, regional, and national issues related to governance and responsibility. Interstate compacts empower the state governments to come together to address their needs without the federal government imposing its will on the states. Of course, article 1, section 10, clause 3, of the U.S. Constitution demands the consent of Congress to formalize its interstate relationship but falls short of allowing the federal government to dictate the terms thereof. In a scenario in which national uniformity is desired but federal government control is disfavored, interstate compacts present a legal mechanism that honors state sovereignty by empowering the states to determine the most effective legal and operational framework.

2. Enforceable Legal Contract

An interstate compact is a valid contract and must be interpreted consistently with the tenets of contract law, which includes an offer, acceptance, mutual consent of the parties, and consideration.¹¹⁹ Courts have routinely found interstate compacts to be valid contracts.¹²⁰ The offer is extended once the first participating state enacts an interstate compact into state law through the legislative process, and a contract is accepted once any other state enacts the same, or substantially similar, interstate compact into state law through its legislative process.¹²¹ As noted, no material changes to an interstate compact are permitted through the legislative process without calling into question the validity of the interstate compact.¹²² And absent uniformity in state law, there will remain a question as to whether there has been a meeting of the minds for the purpose of contract validity.¹²³ In general contract terms, *consideration* is often understood to include an exchange of money, but it may also include mutual promises made between the

¹¹⁹ 17A Am. Jur. 2d *Contracts* § 18 (2018); and *Kansas v. Colorado*, 533 U.S. 1 (2001).

¹²⁰ Buenger et al., *The Evolving Law and Use of Interstate Compacts*, 33–36; and *Kansas v. Colorado*, 533 U.S. 1 (2001).

¹²¹ Buenger et al., *The Evolving Law and Use of Interstate Compacts*, 44.

¹²² Buenger et al., 44–47.

¹²³ Buenger et al., 44–47.

parties.¹²⁴ In the case of an interstate compact, mutual promises are made between the participating states to perform obligations under the terms of the compact. Since an interstate compact is an approach to solving an existing multistate issue, consideration includes the agreement to abide by the operational and/or legal frameworks established by the compact. Additionally, in order to enact an interstate compact, each party state exchanges its individual state sovereignty in the area(s) dictated by the interstate compact to solve a joint issue through the use of collective state sovereignty.¹²⁵ The exchange of individual state sovereignty for the greater good of the participating states is also a form of consideration, as each party must decide to surrender individual state sovereignty in an area of governance to participate in the compact.¹²⁶

The contractual nature of an interstate compact is significant in the analysis of interstate compact benefits. Since interstate compacts are contracts, they are binding legal agreements on each party state, their courts, and even their political subdivisions.¹²⁷ As a result, an interstate compact may not be changed or altered without collective approval of all party states, ensuring the longevity of the established relationships. Therefore, the contractual nature of an interstate contract provides all participating states “a predictable, stable, and enforceable mechanism for policy control and implementation.”¹²⁸

3. State and Federal Legislative Authority

In addition to serving as a valid and enforceable legal agreement, interstate compacts also create state law as well as federal law, if congressionally approved.¹²⁹ When an interstate compact has standing as federal law, it provides additional benefits to the participating states.

¹²⁴ *Storm v. United States*, 94 U.S. 76, 83 (1876).

¹²⁵ Buenger et al., *The Evolving Law and Use of Interstate Compacts*, 51–52.

¹²⁶ Buenger et al., 51–52.

¹²⁷ Buenger et al., 49–50.

¹²⁸ Buenger et al., 26.

¹²⁹ *Cuyler v. Adams*, 449 U.S. 433, 434 (1981).

a. Interstate Compact Law Trumps Existing State Law

When an interstate compact receives congressional approval, it has no impact on the legal nature of contractual relationship between states; it does, however, transform the interstate agreement into federal law.¹³⁰ In *Cuyler v. Adams*, the court stated,

Where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause.¹³¹

One implication of the transformation of an agreement into federal law is that federal law can trump existing state law where there is a conflict, absent the reservation of power within the interstate compact. Only a few interstate compacts have specifically stated that the federal law developed by a congressionally approved interstate compact does not supersede existing state law or preserves only specific state laws; however, when an interstate compact lacks a specific reservation of state authority, the courts have found that the federal interstate compact law supersedes conflicting state law.¹³²

While a majority of the interviewees had limited knowledge concerning the legal implications of a congressionally approved interstate compact, Interviewee #11 had considerable experience with another interstate compact that garnered national participation. When asked about the impact of the federal standing of an interstate compact for the National Network and the ability for the compact to trump conflicting state law, Interviewee #11 described it as “a game changer,” explaining that reaching a consensus for state public records laws would be nearly impossible given the existing and varied public records laws across the United States.¹³³ The fact that existing state laws do not need to be changed to enact an interstate compact is a significant benefit for state participants.

¹³⁰ Buenger et al., *The Evolving Law and Use of Interstate Compacts*, 94.

¹³¹ Buenger et al., 95.

¹³² Buenger et al., 54–56.

¹³³ Interviewee #11 (major urban-area director), confidential interview.

b. Uniform Judicial Interpretation

The ultimate interpretation of any dispute resulting from the terms of an interstate compact would be through the federal judiciary and the U.S. Supreme Court, based on the original jurisdiction and/or the existence of a federal question.¹³⁴ Original jurisdiction occurs in a lawsuit whereby a state is a party and a federal question exists in a dispute concerning federal law.¹³⁵ Since interstate compacts not only exist between states but are also subject to federal law due to congressional consent, jurisdiction generally exists with the federal judiciary rather than state courts, resulting in a more consistent legal interpretation across participating states. The federal judiciary jurisdiction results in predictability and stability in the law, related policy, and the resulting enforcement of the terms of the interstate compact.

However, it is important to note that the nature of an interstate compact as federal law does not preclude the involvement of state courts.¹³⁶ An interstate compact could conceivably dictate state court jurisdiction in its text, or a case may involve a particular state law that results in a state court review of the interstate compact.¹³⁷ Even if a state court is ultimately determined to have jurisdiction over a matter related to an interstate compact, the state court is required to interpret the interstate compact as federal law.¹³⁸ Absent an explicit designation of state court jurisdiction, parties to an interstate compact may disagree on which state laws apply to the dispute, creating a complicated problem. For the purposes of consistency and predictability, federal court interpretation has significant advantages because it prevents conflicting judicial interpretations across state lines.

¹³⁴ *Kansas v. Nebraska*, 135 S. Ct. 1042, 1051–52 (2015).

¹³⁵ U.S. CONST. art. 3, § 2; and 28 U.S.C.A. § 1331 (West 2018); 28 U.S.C.A. § 1251(a) (West 2018).

¹³⁶ Buenger et al., *The Evolving Law and Use of Interstate Compacts*, 74–176.

¹³⁷ Buenger et al., 175.

¹³⁸ Buenger et al., 174–75.

c. Preventing Federal Interference

Another benefit of the interstate compact is the prevention of federal interference on state-related issues that may have regional or national significance.¹³⁹ Unregulated or poorly regulated areas that have national significance can be at risk for federal oversight or interference; however, if the states collaboratively and effectively manage the state-to-state issues and the related national issues, it may deter the federal government from possible overreach.¹⁴⁰ The literature suggests that interstate compacts provide flexibility in regulation, as compared to a national-level policy that dictates the requirements for every state.¹⁴¹ Most significantly, the development of an interstate compact stays in the hands of the states, allowing states to collaboratively develop a law and the resulting policy, which is in the best interest of affected states. Despite the states' control of the compact relationship, the requirement of congressional consent demands federal consideration and buy-in as well as the determination by Congress that the mission of the interstate compact is consistent with congressional power in that area.¹⁴² This process ultimately provides for the appropriate balance of power designed by the U.S. Constitution through the Compact Clause.

Nearly every interviewee was adamant that the control of the National Network should stay with the state and local governments rather than be ceded to the federal government. Although some interviewees admitted that allowing the federal government to control the National Network may be easier, none were convinced that it was the right thing to do. When Interviewee # 3 was asked about the federalization of the National Network, he preferred the “multistate collective . . . over federalization,” explaining that when the federal government takes control, the needs of the states no longer apply.¹⁴³ Admittedly, the makeup of the National Network is a complicated problem considering

¹³⁹ Buenger et al., 24–25.

¹⁴⁰ “Interstate Compacts vs. Uniform Laws,” National Center for Interstate Compacts, accessed March 27, 2018, http://www.cglslgp.org/media/1302/compacts_vs_uniform_laws-csgncic.pdf.

¹⁴¹ National Center for Interstate Compacts.

¹⁴² Buenger et al., *The Evolving Law and Use of Interstate Compacts*, 85.

¹⁴³ Interviewee #3 (state director), confidential interview.

the desire for legal and operational uniformity, but one way to ensure that control stays in the hands of state and local governments is for them to take the responsibility of creating an operational and legal framework necessary to make the network successful.

B. DISADVANTAGES OF AN INTERSTATE COMPACT

Interstate compacts are very powerful tools available to state governments seeking to manage multistate issues for the collective good of multiple states; however, interstate compacts have some disadvantages, too, which should be addressed prior to determining the value of the legal mechanism to the National Network. The reported disadvantages include the time-consuming and challenging process of developing and negotiating an interstate compact, the perceived loss of individual state sovereignty, and the cost and complexity of judicial enforcement.

1. Complexity of Negotiations

An agreement on the terms of an interstate compact from all 50 states, the District of Columbia, and U.S. territories would be a time-consuming and challenging project. Political interests of each potential participating state may have a negative impact on the negotiation of the interstate compact; those political interests may also prevent the ultimate adoption of an interstate compact, which would have regional or national benefits.¹⁴⁴ It took nearly 10 years before all 50 states, the District of Columbia, and all U.S. territories had adopted the Emergency Management Assistance Compact (EMAC).¹⁴⁵ Additionally, the national adoption of the EMAC was believed to have been impacted by the tragedy on 9/11, motivating at least New York, a holdout state, to join the interstate compact.¹⁴⁶ Due to its time commitment and complexity, developing an

¹⁴⁴ Frederick L. Zimmerman and Wendell Mitchell, *The Law and Use of Interstate Compacts* (Lexington, KY: Council of State Governments), 54, <http://www.csg.org/knowledgecenter/docs/ncic/LawAndUse.pdf>.

¹⁴⁵ Emergency Management Assistance Compact, Public Law 104-321; and Buenger et al., *The Evolving Law and Use of Interstate Compacts*, 445.

¹⁴⁶ Phil Lynn, *Mutual Aid: Multijurisdictional Partnerships for Meeting Regional Threats*, NCJ 210679 (Washington, DC: Bureau of Justice Assistance, 2003), 2, <https://www.ncjrs.gov/pdffiles1/bja/210679.pdf>; and “EMAC and Mutual Aid History,” National Emergency Management Association, accessed January 2, 2017, <http://www.emacweb.org/index.php/learnaboutemac/history/mutual-aid-history>.

interstate compact does not present an immediate solution to the problem as it requires extensive negotiation, state legislative adoption, and congressional approval.

When discussing the use of an interstate compact to help create legal and operational uniformity in the National Network, Interviewee #4 expressed concerns about the legal mechanism due to the complexity of negotiations. Interviewee #4 explained that getting 50 governors engaged in the negotiation would involve too many different opinions: “I don’t see the need for it. In fact, I think that it would cause more problems than it’s worth.”¹⁴⁷ In contrast, a number of interviewees felt that a basic structure for a compact would be a reasonable goal, asserting that the majority of states could agree on a broad mission, sensitive document classifications, and public records exceptions.¹⁴⁸ Interviewee #2 stated, “It’s been done for other things, why can’t it be done for something similar in fusion centers? I mean, we’re not building a rocket ship here; we’re just trying to share information and keep everybody safe.”¹⁴⁹

2. Perceived Loss of Individual State Sovereignty

Another reported disadvantage of an interstate compact is the perception by states that they are surrendering their individual state sovereignty.¹⁵⁰ The literature suggests that many state legislatures are reluctant to cede state sovereignty, especially where the interstate compact creates administrative bodies that assume governing power and control over the party states.¹⁵¹ According to Buenger et al., “This sharing of traditional state sovereignty to supra-state administrative bodies effectively means that individual states lose direct policy control over the issue that sparked interest in the compact.”¹⁵² Losing individual state sovereignty, or the perception of it, may discourage participation of states

¹⁴⁷ Interviewee #4 (major urban-area director), confidential interview with author, September 22, 2017.

¹⁴⁸ Interviewee #1 (state director), confidential interview; and Interviewee #2 (state director), confidential interview.

¹⁴⁹ Interviewee #2.

¹⁵⁰ Buenger et al., *The Evolving Law and Use of Interstate Compacts*, 27–28.

¹⁵¹ Buenger et al., 27–28.

¹⁵² Buenger et al., 27–28.

in the negotiation of an interstate compact, fearing the loss of individual control of their states' needs. Furthermore, once a state joins an interstate compact, it is unable to unilaterally revoke or amend the compact due to the contractual nature of the interstate compact, preventing any quick or unilateral changes to the relationship.¹⁵³ Rather, any changes to an interstate compact would require agreement by all party states, as well as Congress, unless the interstate compact explicitly allows for unilateral termination by a party state.¹⁵⁴

The permanence of the interstate compact relationship can be a deterrent to a state's willingness to become a party to the agreement, although the permanence is also seen as one of the benefits due to the predictable operational and legal framework it creates in state and federal laws. Alternatively, in *The Evolving Law and Use of Interstate Compacts*, Buenger et al. explains the decision to enter an interstate compact is actually an "expression of state sovereignty" since each state independently chooses to join and enact the terms of a compact.¹⁵⁵ Due to the varied perspectives related to the impact of individual versus collective state sovereignty, a state's willingness to enact an interstate compact may be swayed by the desire to maintain individual and unencumbered control over state law and policy in the area of fusion centers.

3. Enforcement and Its Costs

Interstate compacts rely on the willingness of participants to comply with the agreement negotiated by the states, and any failure of a participant to comply with the interstate compact leaves the remaining states to encourage participation or take the case to the federal judiciary to enforce the terms of the compact.¹⁵⁶ The process of litigating an issue related to a congressionally approved interstate compact would be time consuming and expensive, in comparison to a dispute that could be litigated in state court. As a result, the "effectiveness of a compact continues to rest upon the willingness of the

¹⁵³ Zimmerman and Mitchell, *The Law and Use of Interstate Compacts*, 55.

¹⁵⁴ Zimmerman and Mitchell, 55.

¹⁵⁵ Buenger et al., *The Evolving Law and Use of Interstate Compacts*, 50.

¹⁵⁶ Buenger et al., 28.

member states to actually abide by the terms and conditions of the agreement notwithstanding its contractual nature.”¹⁵⁷ Absent willing compliance by the party states, the benefits of the interstate compact may be jeopardized by the time and cost to enforce the agreement.

**C. A SUCCESSFUL NATIONAL INTERSTATE COMPACT:
THE EMERGENCY MANAGEMENT ASSISTANCE COMPACT**

EMAC is an example of a congressionally approved interstate compact that has garnered participation from all 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.¹⁵⁸ The purpose of EMAC is to establish an operational and legal framework to enable the sharing of resources during a governor-declared emergency or disaster to enhance public safety.¹⁵⁹ “EMAC acts as a complement to the federal disaster response system, providing timely and cost-effective relief to states requesting assistance from assisting member states who understand the needs of jurisdictions that are struggling to provide life, the economy, and the environment.”¹⁶⁰ It also provides a legal foundation and mechanism for states wishing to help other states in need through a legally binding agreement that provides, in part, for reimbursement responsibility, liability provisions, and cross-border licensing terms.¹⁶¹

The legal protections contained in EMAC are a large part of what make the compact so critical to emergency management response and recovery. The benefits of EMAC include the creation of predictability and uniformity among member states when determining how costs are allocated, how disputes are resolved, who covers insurance for personnel crossing state borders, and which parties are responsible for liability based on

¹⁵⁷ Buenger et al., 28.

¹⁵⁸ “Emergency Management Assistance Compact,” National Emergency Management Association, accessed January 5, 2017, <https://www.emacweb.org>; and Buenger, et al., *The Evolving Law and Use Interstate Compacts*, 448–455.

¹⁵⁹ National Emergency Management Association, “Emergency Management Assistance Compact.”

¹⁶⁰ National Emergency Management Association, “Emergency Management Assistance Compact”; and “Emergency Management Assistance Compact (EMAC),” Federal Emergency Management Agency, accessed March 22, 2018, <https://www.fema.gov/pdf/emergency/nrf/EMACoverviewForNRF.pdf>.

¹⁶¹ National Emergency Management Association, “Emergency Management Assistance Compact”; and Federal Emergency Management Agency, “Emergency Management Assistance Compact (EMAC).”

the performance of out-of-state resources and personnel.¹⁶² EMAC allows states, in times of extreme need and when time is of the essence, to get the help they need to protect their citizens without wasting time and energy worrying about legal agreements and details.

EMAC is administered by the National Emergency Management Association (NEMA), a “nonpartisan, nonprofit 501(c)(3) association dedicated to enhancing public safety by improving the nation’s ability to prepare for, respond to, and recover from all emergencies, disasters, and threats to our nation’s security.”¹⁶³ NEMA is an affiliate of the Council of State Governments, and its board of directors is comprised of the state emergency management directors from all 50 states, the District of Columbia, and eight U.S. territories.¹⁶⁴ Its staff provides support for the EMAC mission on behalf of the states and facilitates the sharing of resources when the need arises.¹⁶⁵ EMAC has been utilized to assist states in their response to, and recovery from, numerous emergencies and disasters, including the 9/11 terrorist attacks, Hurricane Katrina, Superstorm Sandy, and many more.¹⁶⁶ EMAC serves as an example of a public safety–driven interstate compact that has garnered national participation and the consent of Congress.

¹⁶² Emergency Management Assistance Compact, Public Law 104-321.

¹⁶³ “EMAC Administration,” National Emergency Management Association, accessed March 22, 2018, <https://www.emacweb.org/index.php/emac-administration>.

¹⁶⁴ National Emergency Management Association, “EMAC Administration.”

¹⁶⁵ National Emergency Management Association, *Emergency Management Assistance Compact: EMAC Operations Manual*, version 3.0 (Washington, DC: National Emergency Management Association, 2013), 12, <https://mil.wa.gov/uploads/pdf/LogisticsResources2/EMACOperationsManual2013.pdf>.

¹⁶⁶ “EMAC’s History: EMAC Timeline of Select Events and Historical Landmarks,” National Emergency Management Association, accessed March 22, 2018, <https://www.emacweb.org/index.php/learn-about-emac/emac-history>.

V. RECOMMENDATIONS AND CONCLUSION

This research evaluated whether the lack of legal uniformity within the National Network creates operational challenges for fusion centers. The interview results from 11 fusion center directors, deputy directors, and senior leaders demonstrated that the existing multi-jurisdictional legal framework adversely impacts the effectiveness and efficiency of information sharing. Based on the criteria set by the interviewees, three legal mechanisms with the potential to create legal uniformity were evaluated to determine which, if any, would be appropriate to address the lack of legal uniformity within the National Network. The results of this research conclude that the implementation of an interstate compact is the optimal legal mechanism to create legal uniformity.

A. RECOMMENDATIONS

This section presents three recommendations based on review of relevant literature, legal doctrine, and interview results.

1. **The National Network of Fusion Centers Should Attempt to Negotiate an Interstate Compact and Seek Congressional Approval**

A congressionally approved interstate compact provides a very powerful and unique legal mechanism for sovereign states to collectively conceive of, negotiate as a group of interested parties, and enact law as a unified network of fusion centers. The power of this legal mechanism is twofold. First, it institutes identical or substantially similar state law in every participating jurisdiction leading to fusion center establishment and operational guidance in each state's statutory scheme, as well as predictability as to how each fusion center will operate regardless of its jurisdictional location. Second, if congressionally approved, the state law will also have standing as federal law, which ensures that the law created by the interstate compact trumps any conflicting law in each participating state. The federal law status is exceptionally important in the fusion center environment where states may already have robust public records laws, open meeting laws, or investigation-related statutes that currently apply to fusion centers but conflict with the terms of the proposed interstate compact. Practically speaking, fusion centers can negotiate

laws in an interstate compact that conflict with their state’s existing laws, without having to go through the legislative process of amending them, which is arduous and time consuming. An interstate compact provides the best of both worlds. If states want to create uniformity within the National Network while maintaining the independence and sovereignty afforded them by the drafters of the U.S. Constitution, an interstate compact is the ideal legal mechanism to affect that change.

2. The Interstate Compact Should Include Laws Related to Information Sharing (Public Records, Open Meeting Laws, Sensitive Document Designations, and 28 CFR Part 23)

Effective information sharing is critical to the mission of every fusion center within the National Network. Currently, fusion centers do not have assurances related to the treatment of their information and intelligence when it is shared outside their fusion center. Any hesitation to share information across state lines due to uncertainty or legal liability only undermines the effectiveness of the National Network’s ability to conduct its principle mission to “detect, prevent, investigate, and respond to criminal and terrorist related activity.”¹⁶⁷ The exploratory interviews revealed that if an interstate compact were negotiated by the National Network, nearly every interviewee would want the interstate compact to focus on the development of information-sharing laws. The interviewees expressed that standardization of information-sharing concerns, such as definitions, public records exceptions, and document designations, would resolve a number of issues that currently exist within the National Network, including the lack of predictability and trust among fusion centers.

A number of interviewees believe that a consensus—although an admittedly complicated task—for the interstate compact could be reached to address many of the basic information-sharing concerns, especially regarding document designations. In addition to the development of uniform document designations, the inclusion of 28 C.F.R. Part 23 in the proposed interstate compact is a relatively simple addition since all fusion centers receiving homeland security grant funding are currently required to comply with this

¹⁶⁷ “National Network of Fusion Centers Fact Sheet,” Department of Homeland Security, accessed March 27, 2018, <https://www.dhs.gov/national-network-fusion-centers-fact-sheet>.

federal regulation in the operation of multi-jurisdictional criminal intelligence systems.¹⁶⁸ The federal regulation provides guidance on how to operate criminal intelligence systems within a legal framework and is designed to ensure protection of privacy and the other constitutional rights of individuals through operating principles that require a reasonable suspicion standard for data collection and retention.¹⁶⁹ The focus on citizens' constitutional and privacy rights within the interstate compact will likely contribute to the willingness of Congress to approve the compact and provide U.S. citizens with the assurances, and clarity in state law, needed to feel comfortable with fusion center operations.

The interview results reflect a consistent negativity toward the possibility of creating public record exceptions for fusion center-related documents through a congressionally approved interstate compact. It seems, however, that the negativity of the proposal stems from a misunderstanding of how a congressionally approved interstate compact would interact with existing laws in each state. It appears there is a belief that existing state laws would have to be changed for the National Network to create a public records exception for certain fusion center records through the use of an interstate compact, which would likely be an arduous and unsuccessful mission. However, interstate compacts do not require state legislative changes to existing laws. Rather, the law created by a congressionally approved interstate compact would become a supplemental piece of state legislation that only applies to the subject matter of the compact, which in this case would be the operation of fusion centers. Therefore, any existing state public records laws would not have to change to enact an interstate compact.

3. The National Fusion Center Association Is Perfectly Positioned to Lead the Negotiation of an Interstate Compact for the National Network

The National Fusion Center Association (NFCA) is responsible for representing the interests of state and major urban-area fusion centers within the National Network. Since each member of the National Network belongs to the NFCA, the NFCA provides an opportunity for a consolidated voice from the membership as well as access to the fusion

¹⁶⁸ Department of Homeland Security, "FY 2017 Homeland Security Grant Program," 56–57.

¹⁶⁹ "28 CFR Part 23: A Guide to Criminal Intelligence Policies," Department of Justice, accessed March 27, 2018, <https://www.iir.com/Documents/28CFR/28cfrpart23overviewbrochure2015.pdf>.

center leaders in each state. According to the interviewees, the NFCA has already put an emphasis on uniformity through the creation of a three-year strategy for the National Network, which presented “a vision, a mission, goals, objectives, and initiatives that are needed for the National Network of Fusion Centers to systematically improve intelligence information sharing.”¹⁷⁰ The NFCA has also participated in the development of every annex of the *Baseline Capabilities for State and Major Urban Area Fusion Centers*, which sets forth operational standards for fusion centers.¹⁷¹ Since the NFCA has taken the initiative to recommend and work toward uniformity within the National Network, and has working relationships with every fusion center in the National Network, the NFCA has conducted much of the operational research necessary to lead in the negotiation of an interstate compact. As Interviewee #7 explained, the NFCA’s job is to “lobby for the fusion centers in terms of legislation,” describing the association as the logical entity to pursue the negotiation of the interstate compact.¹⁷²

B. CONCLUSION

The lack of legal uniformity in the National Network is not a *simple* problem, and there is no *simple* solution. But operating in a “network” with 79 fusion centers and 54 different legal frameworks while trying to detect and prevent criminal- and terrorism-related activity is not a simple task either. And the lack of legal challenges related to fusion center operations, as well as the lack of published court opinions, may be giving the members of the National Network a false sense of security in their daily fusion center operations. There is considerable ambiguity in the law related to fusion centers, so—in order for this important aspect of the public safety community to be capable of operating at its fullest potential—they need guidance and authority to carry out their mission. State governments, with the input of local governments, should take the lead role in determining the National Network’s ideal operational and legal framework.

¹⁷⁰ National Fusion Center Association, *2014–2017 National Strategy*.

¹⁷¹ National Fusion Center Association.

¹⁷² Interviewee #7 (state deputy director), confidential interview.

While it may be easier on the National Network if it were to cede its control to the federal government to take advantage of existing federal laws, in doing so, the National Network would be surrendering the authority that the framers of the U.S. Constitution afforded state governments to manage the affairs of their states. The desire for a simple solution to uniformity in the National Network is not worth sacrificing the sovereignty of state governments. Instead, the National Network should come together to work toward the optimal solution for the network, one that provides state and local governments the control and authority needed to dictate the breadth of their operational capabilities, as well as to set achievable expectations that federal government and the U.S. Intelligence Community can count on from the network. A congressionally approved interstate compact places the future of the National Network in the hands of state and local governments—where it belongs.

This position is not intended to be viewed as anti-federal; rather, it is pro-state sovereignty. The federal government plays an absolutely critical role in the productivity of the National Network, as a contributor of substantial funding as well as an essential partner in the mission of public safety. However, segments of the federal government have been highly critical of the National Network over the years, often suggesting that the network fails to make an adequate contribution to the homeland security enterprise. However, given the inadequacies of the existing legal and operational framework within the National Network, it actually highlights how successful fusion centers have been in an uncertain environment. Furthermore, the federal government, as a contributor of funding and a recipient of critical fusion center intelligence, would also be a beneficiary of uniformity within the National Network.

A 2017 report by the House Homeland Security Committee titled *Advancing the Homeland Security Information Sharing Environment: A Review of the National Network of Fusion Centers* describes the negative impact of state legislation on fusion centers' ability to share information and coordinate with the federal government: "The Committee is concerned these changes could undermine the significant progress made since the

September 11, 2001, terror attack.”¹⁷³ An interstate compact that eliminates variation in state law related to information sharing while ensuring legal coordination with the federal government would not only eliminate this concern for the federal government in the future but also enhance information-sharing capabilities across all levels of government. The result could be a clear mission, delineated responsibilities, and consistent contributions from fusion centers across the network. And, by creating consistency in state legislation, it will increase the flow of information between participating states and the federal government. The ability to provide the federal government predictability and clear expectations from the National Network will improve satisfaction and encourage the longevity of the critical relationship between the federal and state governments. Therefore, the creation of legal uniformity is not just a benefit for the states; it has the potential to benefit federal government partners as well.

A tremendous amount of federal, state, and local funding has been expended to establish a capable and robust network of fusion centers; however, despite the financial investment, insufficient time and energy has been dedicated to the creation of an effective legal and operational framework for the existence of the National Network. Absent an effective framework, the National Network will remain unable to reach its maximum operational capability due to legal uncertainty among fusion centers and the resulting lack of trust within the network. A congressionally approved interstate compact can fulfill the desires of the National Network’s leadership by developing state statutory authority for fusion centers, creating national uniformity of fusion center related laws, and allowing the state and local governments to determine the framework that will position the National Network for success.

¹⁷³ House Homeland Security Committee, *Advancing the Homeland Security Information Sharing Environment: A Review of the National Network of Fusion Centers* (Washington, DC: Homeland Security Committee, November 2017), 4, <https://homeland.house.gov/wp-content/uploads/2017/11/Committee-on-Homeland-Security-Fusion-Center-Report.pdf>.

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