Opening Statement of the Honorable John Shimkus
Subcommittee on Environment and the Economy
Hearing on "Constitutional Considerations: States vs. Federal Environmental Policy Implementation"
July 11, 2014

(As Prepared for Delivery)

Today's hearing gives us an opportunity to discuss some important questions we face as lawmakers. When we create policies to protect human health and the environment, when should we defer to states? When should policy be set at the national level but implemented at the state level? When should it be implemented at the national level?

At first, different provisions of the U.S. Constitution seems to offer different answers. But our job is to reconcile those provisions.

That harmony will not come if we take the easy way out and say, on the one hand, that all these decisions are up to the states or, on the other hand that what the federal government determines should rule, even right down to the most local level, thus making the states mere area offices of the federal government.

The Commerce Clause confers enormous potential power on Congress. Our friend, Rob Meltz, a leading Constitutional scholar, will tell us just how sweeping it is and just how broad our options are. But Rob will also help us remember that there is a Tenth Amendment in our Constitution's Bill of Rights which 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."

Let's not forget: the Bill of Rights was the states' price of ratification. In fact, the states themselves created the federal government, but in doing so, the states did not dissolve themselves.

So what did the states want from a national government that the Articles of Confederation did not give them? For one, they wanted open interstate trade or "regular commerce." Their vehicle for achieving this was Congress' power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes."

During the 1930's this commerce power was read so broadly by the Supreme Court that it seemed to have no bounds. In fact, a loaf of bread baked and consumed by a farmer using his own wheat was said to be in interstate commerce for purposes of Congress' power to regulate it.

But by the late 1990's the Supreme Court began to rediscover some limits on the Commerce Clause. The Lopez decision, which we'll ask Rob Meltz to explain, seemed to focus on Congress' purpose under the law more than on its reach. That case established that only economic activity may have a substantial effect on interstate commerce to be regulated by the Commerce Clause.

So when we look at environmental policy and commerce regulation we see an interesting mosaic. If someone tosses litter out his window, the punishment is entirely between him and his county sheriff applying state or local law.

But when the sheriff records the time of the offense on the citation he uses a time set by the Federal government under the Standard Time Act of 1918 – a law our Committee amended in 2005 for daylight savings.

Drugs and medical devices, among many other goods, are regulated at the national level, in part because they are important, but also because, once approved, they need to flow freely in interstate commerce. Consumers and the whole economy benefit enormously from a single market for these and other products that are made in one state, sold in another, and used in still others.

Professor Revesz describes this as capturing economies of scale. Mass production, which makes so many of our everyday goods more economical, is pretty hard to do if each State demands its own custom batch.

Free trade among states leads also to free trade with foreign countries. When we work out international trade agreements that give our producers, such as corn growers, access to foreign markets, part of the deal sometimes includes allowing those countries access to our markets. That access is hollow if States have the option of closing off trade on their own. As a prior witness put it, the price of admission to international trade negotiations is “one country, one voice.”

So, in my view, where states have the inherent capability to protect health and the environment, we in Congress should defer to them. We in Congress must also have a rationale to step in where a state is not constituted to take the steps it needs to achieve that protection. And I believe we have a basis to step in where impacts are multi-state or doing so will facilitate trade in goods and services among states and internationally.

And then there is the middle ground where either leaving the job entirely to the federal or state government is not warranted: sometimes Congress sets national standards to be fair among the states, but leaves implementation of those national standards to the states.

How stringent such federal standards should be, and whether benefits should outweigh the costs, are all questions for another hearing. For today, we are only asking when should Congress consider acting and who should be the regulator?

At our next hearing on July 23 we invite EPA, the states, and others to discuss steps to modernize state and federal cooperation. Today, we will focus on the Constitutional underpinnings of those basic decisions.

We appreciate all our witnesses appearing today and look forward to your testimony.

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