

Testimony of State Senator Howard (Luke) Kenley III before the Judiciary Committee of the United States House of Representatives on November 30, 2011:

Thank you Chairman Smith, Ranking Member Conyers and Members of the Judiciary Committee for the invitation to talk to today about one of the most serious issues facing state authority over their taxes and also one of the most challenging issues in retailing.

Introduction:

I am a Republican State Senator from Indiana. I chair of the Senate Appropriations Committee and I am a long-time retailer. I come before you today in my role as someone responsible for producing a balanced state budget and as the president of the country's most successful business tax simplification initiative.

Background:

I appreciate the title of today's hearing: "Constitutional Limitations on State's Authority to Collect Sales Taxes on E-Commerce." When I studied the Bellas Hess case in Harvard Law School a few years after the Supreme Court's decision I never imagined I would be testifying before Congress about that Court's interpretation of the Constitution's limitations on state taxes. Unfortunately the intervening years have made this issue even more ominous for state budgets and for retailers. When the Court decided Bellas Hess this was a catalog issue and while catalogs offered greater variety than many stores, catalogs could not compete with local customer service and immediate availability. Today one day and two day delivery are normal and same day delivery is possible. On top of near immediate and almost complete hassle-free delivery local retailers must compete against near limitless variety and in many cases a 6-10% government mandated price difference.

In Quill, the US Supreme Court made it clear that a state's ability to employ an effective sales tax was going to depend on the authority granted by Congress under the Commerce Clause. I come before you today to ask you to exercise that authority.

E-commerce Sales:

According to the Department of Commerce e-commerce sales in 2005 were \$87 billion. This year they will total more than twice that amount. The quarterly e-commerce sales in 2011 increased on average 17% more than the same quarters in 2010, while total sales increased less than 8%. While that difference may seem great, it is actually below normal for e-commerce sales. Prior to this year e-commerce sales increased at a much greater rate than did total sales. If e-commerce sales are increasing at a rate greater than total sales the difference must be sales that would have otherwise gone to a local retailer. Retailers across this country often find themselves acting as the display case for consumers who come in and try out the product but then go home and buy it on-line. The amazing power of mobile phones allows consumers to scan product codes, check prices and buy a product from another business before they even leave the first business.

Collecting is too complex:

Some will actually argue that it is impossible to collect. Every retailer today looks to automate everything that can be automated. Sales tax collection software exists, it works and it is

affordable. Computer technology and supply chain management have radically changed retailing. In many ways the Internet is the perfect environment in which to collect sales taxes because sales tax collection can be automated.

Impact on small business:

Some opponents will argue against placing another burden on businesses and especially on small business. Unfortunately, today the burden is on those retailers who are trying to compete against someone who isn't collecting the tax. That 6-10% government mandated price advantage is the real burden on small business. However, all of the bills introduced in this Congress protect small businesses by excluding the smallest, by requiring states to simplify their laws and processes, and by requiring states to provide software.

Collecting is a tax increase:

Some opponents will tell you these bills are a tax increase. It is not true that paying a tax you owe, but were not paying, is a tax increase. If this theory were taken to its logical extreme every audit assessment would be a tax increase since someone is being forced to pay a tax they hadn't paid. The obligation to pay exists today. Asking one retailer to collect without asking the same of all retailers doesn't seem like equal protection under the law.

States have not done enough to collect the tax owed today:

Some opponents will say the states don't do a good enough job collecting the use tax. There are only two ways to collect this tax: have the retailer collect it or educate and then audit consumers. There is nothing more inefficient than conducting an audit and I disagree with those who argue that states should engage in more audits.

States have not simplified enough:

Some opponents will say the states have not simplified their tax systems enough to warrant Congressional authority. In 1967 the Supreme Court said that with the various sales tax systems and the very limited technology that then existed was too much to allow states to require everyone to collect. What the Supreme Court didn't answer was how much simpler the sales tax system would have to be and what technology would have to exist to rule differently. Technology has changed in every possible way since 1967. The debate since the Supreme Court's decision is how much simplification must be done, and that is a decision best left to Congress to decide.