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**COMMENTS ON H.R. 980
The Public Safety Employer-Employee Cooperation Act of 2007**

STATEMENT OF R. THEODORE CLARK, JR.

Today, I am speaking on behalf of the **National Public Employer Labor Relations Association (NPELRA)**. The National Public Employer Labor Relations Association (NPELRA), established in 1970, is the professional association for practitioners of labor and employee relations employed by federal, state and local governments, school and special districts.

H.R. 980, the so-called Public Safety Employer-Employee Cooperation Act of 2007, is predicated on the apparent assumption that federally mandated solutions in the labor relations area are better than those arrived at by state and local governments. The needs of state and local government in the area of employer-employee relations, however, can best be determined on a state and local basis rather than by resort to federal legislation.

Lest there be any mistake about my position, let me emphatically state that I wholeheartedly support collective bargaining in the public sector where a majority of the employees in an appropriate bargaining unit have opted to be represented for the purposes of collective bargaining. I have participated in the negotiation of literally

hundreds of public sector collective bargaining agreements covering police officers and firefighters over the years. At last count, I have represented public employers with respect to collective bargaining and employment law issues in over 30 states, from the State of Minnesota to the State of Louisiana and from the State of Washington to the State of Florida. Moreover, I worked for many years in support of the enactment of public sector collective bargaining legislation in Illinois,¹ something that finally occurred in 1983, when the Illinois General Assembly enacted the two basic public sector labor laws that cover public employees in Illinois. As a result, my opposition to federal collective bargaining legislation such as H.R. 980 is not because I oppose public sector collective bargaining, but rather because of my firm belief that the enactment of a federal collective bargaining law would severely limit the demonstrated innovative and creative abilities of the states and local jurisdictions to deal in a responsible manner with the many complex issues that public sector collective bargaining poses.

H.R. 980 WOULD DISPLACE STATE AND LOCAL OPTIONS IN DETERMINE HOW EMPLOYMENT RELATIONS SHOULD BE STRUCTURED FOR POLICE OFFICERS AND FIREFIGHTERS EMPLOYED BY STATES AND UNITS OF LOCAL GOVERNMENT

The apparent premise upon which H.R. 980 has been drafted is that there should be one monolithic model for how employment relations for police officers and firefighters should be handled at the state and local level. Thus, if the Federal Labor Relations Agency (“FLRA”) determines that a state law does not “substantially provide for the rights and responsibilities described in Section 4(b) of the Act,” then that state is

¹ See Shaw & Clark, “The Need for Public Employee Labor Legislation in Illinois,” 59 Ill. B.J. 628 (1971).

subjected to the labor relations scheme established pursuant to rules issued and administered by the FLRA.²

At the outset, it is important to note that the standard by which state legislation is to be judged by the FLRA is quite similar to a provision in the National Labor Relations Act (“NLRA”) that gives the NLRB the authority to cede jurisdiction to state agencies as long as the State’s legislation is not “inconsistent” with the provisions of the NLRA.³ Although several states, including New York, Wisconsin and Michigan, have private sector legislation that closely parallel the NLRA, the NLRB has repeatedly refused to cede jurisdiction to the state boards in those states. Given the unwillingness of the NLRB to find state statutes to be consistent with the NLRA, it is clearly open to substantial doubt as to whether the FLRA would be willing to find that a state public sector collective bargaining statute “substantially provides” for the rights and responsibilities set forth in H.R. 980. Nor do you have to just take my opinion on this very important issue. When Congress held hearings in 1972 on proposed federal public sector collective bargaining legislation that would be applicable at the state and local level, Arvid Anderson, a former member of the Wisconsin Employment Relations Commission and the then Chairman of the Office of Collective Bargaining in New York City, testified as follows:

² Inexplicably, the standards upon which such rules are to be based do not include any Landrum-Griffin-like provisions concerning the regulation of internal union affairs. This omission is especially puzzling given the widely reported financial mismanagement of several major unions that represent public sector unions.

³ 29 U.S.C. § 160(a).

“[T]he experience of the administration of the Labor Management Relations Act by the National Labor Relations Board throughout its entire history demonstrates conclusively that a Federal administrative agency will, if left to its own discretion, refuse to cede to any competent state authority administration over any phase of its statute.”⁴

Given Arvid Anderson’s observations, it is probable that most, if not all, state enactments covering police officers and firefighters would not meet the “substantially provides” test.

Several examples illustrate the problem.

Perhaps the best examples of the impact of H.R. 980 on existing state laws is the likely interpretation of the term “hours, wages, and terms and conditions of employment,” i.e., the scope of mandatory bargaining specified in Section 4(b)(3). Take the issue of pensions. Normally, the pensions are considered a form of compensation and thus fall within the mandatory scope of bargaining.⁵ Because of the enormous costs that have ensued as a result of negotiations over public sector pensions, a number of states have specifically excluded pensions from the scope of bargaining. For example, the New York Taylor Law specifically provides that the scope of negotiations “shall not include any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries” and that “[n]o such retirement benefits shall be negotiated pursuant to this

⁴ Statement of Arvid Anderson, Hearings on H.R. 12532, H.R. 7684, & H.R. 9324 before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess., 404 (1972).

⁵ For example, under the NLRA it is firmly established that pension and retirement provisions are mandatory subjects of bargaining. *See, e.g., Inland Steel Co. v. NLRB*, 77 N.L.R.B. 1, *enf’d* 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960, 69 S. Ct. 887, 93 L. Ed. 1112 (1949). Similar rulings have been made under public sector collective bargaining laws. *See, e.g., Detroit Police Officers Ass’n v. City of Detroit*, 319 Mich. 44, 214 N.W.2d 803 (1974).

Article, and any benefits so negotiated shall be void."⁶ It was the near bankruptcy of New York City and several other New York cities in the late 1970's, brought on in part by overly generous negotiated increases in pension benefits, that prompted the New York legislature to adopt this ban on negotiations over pensions. Under H.R. 980, however, the federal law would presumably preempt inconsistent state law.

Like New York, virtually every state collective bargaining statute provides for some limitation on the scope of bargaining. The following are but a few of the numerous examples that could be provided:

- The Illinois statute covering police and firefighters specifically excludes from the mandatory scope of negotiations residency requirements in the City of Chicago, “the type of equipment, other than uniforms [and turnout gear for firefighters] issued or used,” “the total number of employees employed by the department,” and “the criterion pursuant to which force, including deadly force, can be used.” In addition, for police the subject of manning is removed from the mandatory scope of negotiations.⁷
- The Maine statute covering state employees provides that negotiations over the state’s compensation system for such things as the “number of and spread between pay steps within pay grades” and the “number of and spread between pay grades with the system” “may not be compelled by either the public employer or the bargaining agents sooner than 10 years after the parties’ last agreement to revise the compensation system pursuant to a demand to bargain.”⁸
- The Michigan Constitution specifically excludes the subject of promotions from the scope of bargaining for state police troopers and sergeants and provides instead that promotions “will be determined by competitive examination and performance on the basis of merit, efficiency and fitness.”⁹

⁶ N.Y. Civil Service Law, ch. VII, Art. XIV, § 201(4). Either explicitly or implicitly most states have removed pensions from the scopy of negotiations.

⁷ Illinois Public Labor Relations Act, 5 ILCS 315/14(i)

⁸ Maine State Employees Labor Relations Act, Title 26, Ch. 9-B, Section 1.E (4)(c).

⁹ Michigan Constitution, Article XI, Section 5.

- The Nevada statute excludes numerous subjects from the mandatory scope of bargaining and provides instead that they “are reserved to the local government employer without negotiation,” including the right to “assign or transfer an employee” for non-disciplinary reasons, “[t]he right to reduce in force or lay off any employees because of lack of work or lack of money,” “[a]ppropriate staffing levels,” and the “means and methods of offering” services to the public.”¹⁰
- The Wisconsin statute covering state employees prohibits bargaining over many topics, including “the policies, practices, and procedures of the civil service merit system relating to” such things as “promotions” and the state’s “job evaluation system,” as well as “compliance with the health benefit plan requirements” that are specified elsewhere in state law. In addition, this Wisconsin statute excludes from the mandatory scope of negotiations most of the statutorily specified management rights, as well as “matters related to employee occupancy of houses or other lodging provided by the state.” Finally, the director of the state’s office of collective bargaining is directed to try to negotiate contracts that “do not contain any provision for the payment to any employee of a cumulative or noncumulative amount of compensation in recognition of or based on the period of time an employee has been employed by the state,” i.e., longevity pay.

With H.R. 980’s very broad definition of what must be negotiated, efforts by these states--all of which should be viewed as “labor friendly” states--and many others to carefully exclude certain subjects from the mandatory scope of bargaining would, in all likelihood, be preempted. The potential consequences of such a limitation on the right of states and local units of government to deal with their own unique circumstances would be devastating. Moreover, it heightens the probability that there will be frequent clashes between federal government on the one hand and state and local government on the other over policy judgments that should, in reality, be made at the state and local level. Such likely clashes would undermine federal-state relationships in an entirely unnecessary way. Since the terms and conditions of employment for police officers and firefighters

¹⁰ Nevada Revised Statutes, Ch. 288.150(3)(a)-(c).

are so uniquely local in nature, the scope of negotiations over them should not be mandated by federal law.

Another very real problem with respect to H.R. 980 is the conflict between its defined scope of bargaining and the existence of civil service systems in most states and in a substantial number of units of local government as well. One of the primary principles of civil service is the merit principle for the employment and advancement of public employees. If H.R. 980 were enacted, however, there is no specific exclusion from the otherwise broad scope of bargaining to protect the merit principle. As a result, union proposals to make promotions based entirely or substantially on seniority would probably fall within the mandatory subject of bargaining, even though such proposals are outside the scope of mandatory bargaining under many state and local collective bargaining laws, some of which were discussed above, as well as under the Civil Service Reform Act of 1978. Interestingly, when then Secretary of Labor Arthur Goldberg recommended to President Kennedy that federal employees be given the right to organize and bargain collectively, he made the following cautionary comment:

The principle of entrance into the career service on the basis of open competition, selection on merit and fitness, and advancement on the same basis, together with a full range of principles and practices that make up the Civil Service System govern the essential character of each individual's employment. Collective dealing cannot vary these principles. It must operate within the framework.¹¹

¹¹ 1961 Task Force Report on Employee-Management Cooperation in the Federal Service, in Labor-Management Relations in the Public Service, Part I, at 14 (H. Robert ed. 1968).

Simply stated, H.R.980 would, in all likelihood, result in the invalidation of existing state laws that protect the merit principle from encroachment through the collective bargaining process.

One could take virtually any of the 38 state statutory provisions providing collective bargaining rights for police officers and/or firefighters and come to the conclusion that there is something in each law that likewise does not meet the “substantially provides” test.¹² This fact illustrates the fundamental problem with H.R. 980, i.e., it is based on a federally prescribed, “one-size-fits-all” formula for establishing what rights and responsibilities firefighters and police officers should have at the state and local level. It totally ignores the political and practical policy judgments made by numerous state legislatures concerning what is best for police officers and firefighters in their states.

Under our system of federalism, the fact that there are many different solutions and approaches to these issues is not only expected but it is also encouraged. While the IAFF, FOP, and other unions that represent firefighters and police officers would undoubtedly like one uniform national law because it would make their job easier, that is hardly a valid reason for federal legislation. The diversity of state and local legislation

¹² In making this determination, H.R. 980 provides that “the authority shall consider and give weight, to the maximum extent practicable, to the opinion of affected employee organizations.” H.R. 980, Section 4(a)(1). Since it is state laws that may well be invalidated, one can only wonder why are the views of states are being subordinated to the views of organized labor. And, to make matters worse, H.R. 980 provides that “any final order of the Authority with respect to questions of fact or law shall be found to be conclusive unless the court determines that the Authority’s decision was arbitrary and capricious.” H.R. 980, Section 5(c)(1). To suggest that the deck is being stacked again states and local units of government under H.R. 980 is to only state the obvious.

with respect to police officers and firefighters is not something to be overridden by federal law but rather is something that should be encouraged and promoted. As the Advisory Commission on Intergovernmental Relations observed many years ago, “. . . experimentation and flexibility are needed, not the standardized, Federal, preemptive approach.”¹³

The chilling effect that Federal legislation along the lines of H.R. 980 would have on such experimentation seems clear. When Congress was last considering such legislation in the early 1970s, Dr. Jacob Seidenberg, the then Chairman of the Federal Services Impasse Panel, observed that the enactment of Federal legislation would curtail necessary experimentation since “there is an aspect of permanency and inflexibility in Federal legislation.”¹⁴ If H.R. 980 were enacted, it would, in the words of Justice Oliver Wendell Holmes, “prevent the making of social experiments . . . in the isolated chambers afforded by the several states . . .”¹⁵

States and local units of government should have the right to make policy decisions with respect to whether police officers and firefighters should be granted the right to engage in collective bargaining and, if so, under what terms and conditions as opposed to having all such matters mandated by federal law. Relevant in this regard are

¹³ Advisory Commission on Intergovernmental Relations, Labor Management Policies for State and Local Government 113 (1969).

¹⁴ Remarks of Dr. Jacob Seidenberg at the symposium on “Equity and the Public Employer,” Washington, D.C., May 10, 1974, p. 24.

¹⁵ Truax v. Corrigan, 257 U.S. 312, 344 (1921) (dissenting opinion).

the following comments in an article on federalism that appeared the ABA Journal several years ago:

Given real choices, citizens who are not satisfied with state government "can vote with their feet as well as at the ballot box," and go pursue their happiness in another state, he points out. People "get to choose among different sovereigns, regulatory regimes, and packages of government services," he says. This freedom disciplines the states.¹⁶

SINCE THE VAST MAJORITY OF STATES HAVE COLLECTIVE BARGAINING LAWS COVERING POLICE OFFICERS AND/OR FIREFIGHTERS AND THE VAST MAJORITY OF ALL POLICE OFFICERS AND FIREFIGHTERS ARE UNION MEMBERS, THERE IS NO SUBSTANTIAL NEED FOR FEDERAL LEGISLATION

By my count, 34 states have enacted public sector collective bargaining laws covering both police officers and firefighters.¹⁷ An additional four states have enacted laws covering firefighters only.¹⁸ And while some states such as Arizona have opted not to enact collective bargaining laws covering police officers and firefighters, local ordinances have been adopted in such cities as Phoenix that grant such employees the right to engage in collective bargaining. Moreover, in many of the states that have not enacted laws collective bargaining is legally permissible and, as a result, there are many

¹⁶ France, "Laying the Groundwork," ABA Journal, May 2000, at 40, 42. The person quoted in the excerpt is Michael S. Greve, the author of the excellent book, Real Federalism: Why it Happens, How it Could Happen (AEI Press, 1999).

¹⁷ Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Washington, and Wisconsin. While most of these state laws cover both police officers and firefighters who are employed at both the state and local level, several are more limited in their coverage. The Nevada law, for example, only covers police officers and firefighters employed by units of local government and does not cover such employees who are employed by the State.

¹⁸ Alabama, Georgia, Idaho, and Wyoming.

examples of jurisdictions that have voluntarily agreed to recognize fire and police unions and have negotiated collective bargaining agreements.¹⁹

In addition to the large number of states with public sector collective bargaining laws covering police officers and/or firefighters, the vast majority of police officers and firefighters are already union members. While less than 8 percent of all nonagricultural private sector workers belong to unions, nearly 40 percent of all public employees are union members. The statistics are even more compelling with respect to police officers and firefighters.²⁰ For firefighting occupations, the union density rate is 68.8 percent; for police and sheriff's patrol offers, the union density rate is 58.7 percent.²¹ These statistics strongly suggest that there is absolutely no compelling need to enact federal legislation for police officers and firefighters at the state and local level.

Since the vast majority of states have collective bargaining laws and since the vast majority of all police officers and firefighters are union members, there is no need for federal legislation that would require states to either adopt one monolithic model for collective bargaining prescribed by Congress or be subjected to the jurisdiction of the Federal Labor Relations Authority and the collective bargaining rules prescribed by FLSA. With respect to the few remaining states that do not have public sector collective

¹⁹ Among the states without collective bargaining laws covering either police officers or firefighters but which authorize public employers to grant recognition for purposes of collective bargaining and where such bargaining takes place are Arkansas, Colorado, Louisiana, New Mexico, and West Virginia.

²⁰ Hirsch & MacPherson, Union Membership and Coverage Database from the CPS, Membership, Coverage, Density and Employment by Occupation, 2006, at <http://www.trinity.edu/bhirsch/unionstats>

²¹ Id.

bargaining laws covering police officers and/or firefighters, the political judgment has presumably been made that such laws are not necessary. Police officers and firefighters, like all other public employees, have their First Amendment rights to petition their public employers. Indeed, unlike employees in the private sector, they have the right to participate in the election of their employers and to influence the decisions of those elected officials. From my travels around the country, it is my unequivocal observation that police officers, firefighters, and their unions have considerable political clout in virtually every state legislature. Even though they may not have been successful in getting a given state legislature to adopt a collective bargaining law, there are numerous instances in which they have had a significant impact on changes in pension legislation and other legislation concerning their terms and conditions of employment.

Since police and fire unions have demonstrated their political prowess at the state and local level, it would be my suggestion that they should redirect their efforts to the state and local level, rather than push for federal legislation with all of the attendant problems. In fact, such activity is presently taking place in at least one of states that does not have a public sector collective bargaining law covering public safety officers—North Carolina. Thus, a “Public Safety Employer-Employee Cooperation Act,” with provisions remarkably similar to H.R. 980, has been introduced in the current session of the North Carolina Senate.²² This is where the debate over whether such legislation is needed should take place, i.e., at the state level and not at the federal level.

²² General Assembly of North Carolina, Session 2007, Senate Bill 970 entitled “Public Safety Employer-Employee Cooperation Act.”

THE STATED RATIONALE FOR H.R. 980 IS DIRECTLY AT ODDS WITH WHAT CONGRESS AND EVERY PRESIDENT SINCE JIMMY CARTER HAS DETERMINED TO BE APPROPRIATE FOR LARGE NUMBERS OF PUBLIC SAFETY EMPLOYEES EMPLOYED BY THE FEDERAL GOVERNMENT

The primary rationale for H.R. 980, as set forth in the Act's Findings and Declaration of Purpose, is that "the settlement of issues through the processes of collective bargaining" is in "the National interest" since "State and local public safety officers play an essential role in the efforts of the United States to detect, prevent, and respond to terrorist attacks," as well as "other mass casualty incidents."²³ If that is the case, then one must wonder why Congress and every President since Jimmy Carter have decided to exempt untold numbers of federal employees who would be deemed to public safety officers under H.R. 980. Consider for example, the following:

- The Federal Bureau of Investigation ("FBI"), the Central Intelligence Agency ("CIA"), the National Security Agency ("NSA"), and the United States Secret Service, and the United States Secret Service Uniformed Division are totally exempt from coverage under the collective bargaining provisions of the Civil Service Reform Act of 1978 ("CRA") and, as a result, tens of thousands of employees employed by these agencies have no enforceable right to engage in collective bargaining.²⁴
- The CRA also permits the President to issue an order suspending any provision of the CRA with respect to any federal agency or activity if "the President determines that the agency or subdivision has a primary function intelligence, counter-intelligence, investigative, or national security work" and that the provisions of the CRA "cannot be applied to that agency or subdivisions in a manner consistent with national security requirements and considerations." 5 U.S.C. § 7103(b). In Executive Order 12171, President Carter excluded literally hundreds of federal agencies or subdivisions from being covered by the CRA.²⁵ Significantly,

²³ H.R. 980, Section 2.

²⁴ 5 U.S.C. § 7103(a)(3) (B), (C), (D), and (H).

²⁵ Executive Order 12171, 44 F.R. 66565 (Nov. 19, 1979).

Executive Order 12171 has been amended and extended by every subsequent President, including President Clinton, to exclude additional federal employees from coverage under the Federal Labor-Management program.²⁶ For example, in Executive Order 12632, ". . . all domestic field offices and intelligence units of the Drug Enforcement Administration" were excluded.²⁷

Separate and apart from the two diametrically opposed standards for determining whether collective bargaining is appropriate for public safety employees, it also must be emphasized that the law enforcement officers and firefighters employed by the Federal government who are covered by the Civil Service Reform Act of 1978 have no right to negotiate over wages, pensions, and many other significant terms and conditions of employment. Rather, Congress has decided, and rightfully so, that certain issues ought to be decided by Congress itself and not be subject to collective bargaining. Thus, the CRA provides for negotiations over "conditions of employment," but it specifically excludes any matters like wages and pensions that "are specifically provided for by Federal statute."²⁸ That being the case, one would think that the state legislatures should be given the same discretion to make similar policy determinations.²⁹

It is more than ironic that the federal government's own collective bargaining statute would not even come close to meeting the standards specified in H.R. 980 that state

²⁶ Executive Order 13039, 62 F.R. 12529 (Mar. 11, 1997).

²⁷ Executive Order 12632, 53 F.R. 9852 (Mar. 23, 1988).

²⁸ 5 U.S.C. § 7103 (14)(c).

²⁹ For federal employees covered by the Civil Service Reform Act of 1978 and postal employees covered by the National Labor Relations Act, unions are prohibited from negotiating union shop or fair share clauses, but under H.R. 980 the negotiation of such union security clauses would presumably be a mandatory subject of bargaining in states that do not have applicable right-to-work laws

collective bargaining statutes must meet in order to remain in effect and not be preempted by the substantive provisions of H.R. 980.

H.R. 980 IS RATHER CLEARLY UNCONSTITUTIONAL AS APPLIED TO STATES AND IN ALL LIKELIHOOD IT WOULD BE HELD UNCONSTITUTIONAL AS APPLIED TO UNITS OF LOCAL GOVERNMENT

Finally, there is a substantial question concerning whether H.R. 980 passes constitutional muster. In my judgment, it does not. H.R. 980 defines the terms “employer” and “public safety employer” to “mean any State, political subdivision of a State, the District of Columbia, or any territory or possession of the United States that employs public safety officers.”³⁰ From the text of H.R. 980, it is clear that the purported constitutional basis for enacting H.R. 980 is the Commerce Clause. However, the Supreme Court in a series of decisions starting with the Seminole Tribe of Florida v. Florida³¹ has unequivocally held that Congress does not have the authority to abrogate the Eleventh Amendment immunity of states under the Commerce Clause. There is absolutely no doubt in my mind that the Supreme Court today would hold that Congress does not have the constitutional authority under the Commerce Clause to enact H.R. 980 vis-à-vis states and thereby abrogate their Eleventh Amendment immunity.³²

³⁰ H.R. 980, §3(9).

³¹ 517 U.S. 44, 116 S.Ct. 1114 (1996). See also Kimel v. Florida Board of Regents, 145 L.Ed.2d 522, 120 S.Ct. 631 (2000).

³² Although Section 5(c) of H.R. 980 provides for enforcement “through appropriate State courts,” that does not make any difference in terms of a state Eleventh Amendment immunity from suits. In Alden v. Maine, 119 S.Ct. 2240 (1999), the Supreme Court held that Congress did not have the authority under the Commerce Clause to subject nonconsenting states to private suits in state courts, noting that “the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . .” Id. at 2246-2247.

Moreover, even if H.R. 980 were amended to specifically provide that Congress was unequivocally abrogating the Eleventh Amendment immunity of states pursuant to the Enforcement Clause of the Fourteenth Amendment, it is nevertheless quite clear that the Supreme Court would hold that Congress would not be acting pursuant to a valid grant of constitutional authority. In Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank,³³ the Court held that the authority of Congress under the Fourteenth Amendment is “to enforce, not the power to determine what constitutes a constitutional violation.”³⁴ Thus, under the test articulated by the Supreme Court, Congress would only have the authority under the Fourteenth Amendment to enact public sector collective bargaining legislation such as H.R. 980 if its objective is the “carefully delimited remediation or prevention of constitutional violations.”³⁵

The right of public employees to be represented for the purpose of bargaining collectively with their public employers, however, has never been recognized as a constitutional right. To the contrary, the courts have uniformly held that it is not a violation of the constitutional rights of public employees for public employers to refuse to engage in collective bargaining.³⁶ Indeed, the Supreme Court in its unanimous 1979 per curiam decision in Smith v. Arkansas State Highway Employees, Local 1315³⁷

³³ 119 S.Ct. 2199 (1999).

³⁴ 119 S.Ct. at 2206.

³⁵ College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Board, 119 S.Ct. 2219, 2224 (1999).

³⁶ See, e.g., Alaniz v. City of San Antonio, 80 L.R.R.M. 2983 (W.D. Tex. 1971).

³⁷ 99 S.Ct. 1826 (1979).

rejected a claim that the Arkansas State Highway Commission violated the constitutional rights of highway department employees when it refused “to consider or act upon grievances when filed by the Union rather than by the employee directly.”³⁸ In rejecting the employees’ constitutional claims, the Court noted that while a “public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so, . . . the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.”³⁹

Since there is no constitutionally recognized right to engage in collective bargaining or to require public employers to grant recognition for the purposes of collective bargaining, it is clear that Congress does not have the authority under Section 5 of the Fourteenth Amendment to enact legislation such as H.R. 980. To paraphrase from the Supreme Court’s decision in Kimel v. Florida Board of Regents, “. . . the substantive requirements . . . [that H.R. 980] imposes on state and local governments are disproportionate to any constitutional conduct that conceivably could be targeted by the Act.”⁴⁰

While the unconstitutionality of H.R. 980's coverage of units of local government is not as unequivocal as it is with respect to states, the coverage of units of local government would raise serious constitutional issues. Given the expressed views of the

³⁸ Id. at 1828.

³⁹ Id. at 1827-1828.

⁴⁰ 120 S.Ct. at 645.

majority in all of the Supreme Court cases cited above, it is entirely probable that this five-member majority will some day return to the principles articulated in National League of Cities v. Usery⁴¹ in which the Supreme Court held that Congress did not have the authority to extend the provisions of the Fair Labor Standards Act to states and units of local government under the Commerce Clause. In his plurality decision for the Court, then Justice Rehnquist emphasized “the essential role of the States in our Federal system of government,”⁴² and noted:

One undoubted attribute of state sovereignty is the States’ power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those employees will work, and what compensation will be provided when these employees may be called upon to work overtime. . . .⁴³

Justice Rehnquist also noted that the FLSA’s “congressionally imposed displacement of State decisions may substantially restructure traditional ways in which the local governments have arranged their affairs.”⁴⁴ There is absolutely no doubt in my mind that the effect and impact that the Court found to be beyond the power of Congress under the Commerce Clause in National League of Cities would be magnified many times over if H.R. 980 were enacted.

⁴¹ 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed. 2d 245 (1976).

⁴² 96 S.Ct. at 2474.

⁴³ Id. at 2471.

⁴⁴ Id. at 2473.

While National League of Cities was overruled in 1985 in Garcia v. San Antonio Metropolitan Transit Authority,⁴⁵ the strongly worded dissenting opinions of both Justice Rehnquist and Justice O'Connor suggest that the Supreme Court may well return to the constitutional principles articulated in National League of Cities. Since the constitutional rationale espoused by the Supreme Court majority in cases such as Seminole, Lopez, and Kimel is very close to Justice Rehnquist's rationale in National League of Cities, it is surely not unreasonable to suggest that the Supreme Court may well find H.R. 980's extension of coverage to units of local government to be beyond the power of Congress under the Commerce Clause.⁴⁶ Indeed, with H.R. 980's massive displacement of the legislative policy decisions made by state and local governments, only some of which have been discussed above, it would be difficult to find a better vehicle for the Supreme Court to reinstate the rationale of National League of Cities as

⁴⁵ 469 U.S. 528, 105 S.Ct. 1005 (1985).

⁴⁶ In 1942, the same year in which the Supreme Court issued what many consider to be its most far reaching decision on the authority of Congress under the Commercial Clause, Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942), the National War Labor Board (NWLB), in the course of deciding that it had no jurisdiction over municipal employees, made the following observation in an opinion authored by Wayne Morse:

It has never been suggested that the Federal Government has the power to regulate with respect to the wages, working hours, or conditions of employment of those who are engaged in performing services for the states or their political subdivisions Any directive order of the National War Labor Board which purported to regulate the wages, the working hours, or the conditions of employment of state or municipal employees would constitute a clear invasion of the sovereign rights of the political subdivisions of local state government.

Among the prestigious members of the NWLB who concurred in this unanimous decision were George Meany, the future President of the AFL-CIO, and George Taylor, the future author of the New York Taylor Law.

Chief Justice Rehnquist and Justice O'Connor prophesized the Supreme Court would do someday.⁴⁷

While the Supreme Court has the unquestioned power to determine the limits of the authority of Congress to enact legislation under the Commerce Clause in order to maintain the appropriate balance between federal and state authority, it is important to emphasize that all three branches of government have the responsibility to try to insure that the principles of federalism embodied in the Constitution are maintained and upheld. As Justice Kennedy noted in his concurring opinion in United States v. Lopez, “. . . it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance” and that “[t]he political branches of the Government must fulfill this grave Constitutional obligation if the democratic liberty and the federalism that secures it are to endure.”⁴⁸ In upholding the Constitution and the principles of federalism upon which it is based, it is incumbent on Congress to consider the tremendous adverse impact a bill such as H.R. 980 would have on Federal-State relationships.

⁴⁷ In his dissent in Garcia Chief Justice Rehnquist stated that he did “not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.” 105 S. Ct. at 1033. Similarly, Justice O'Connor in her dissent in Garcia said that she shared “Justice Rehnquist’s belief that this Court will in time again assume its constitutional responsibility.” 105 S. Ct. 1037.

⁴⁸ United States v. Lopez, *supra*, 115 S.Ct. at 1639. In this same concurring opinion, Justice Kennedy further noted that “the federal balance is too essential a part of our Constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene when one or the other level of government has tipped the scales too far.” Id.

CONCLUSION

Given the substantial constitutional and practical issues posed by H.R. 980, coupled with the overwhelming lack of evidence of any compelling need for Congress to mandate collective bargaining for police officers and firefighters at the state and local level, Congress should not enact legislation in this sensitive area. The existence of 38 state collective bargaining laws at the state and local level covering police officers and/or firefighters, virtually all of which go substantially beyond what Congress has deemed appropriate for police officers and firefighters employed by the federal government, demonstrates that there is absolutely no need for the proposed legislation.

