Committee on Education and Labor
Subcommittee on Health, Employment, Labor and Pensions
U. S. House of Representatives

Hearing: Ensuring Collective Bargaining Rights for First Responders: H.R. 980
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My name is William Banks. I am a professor of law and professor of public administration at Syracuse University, and I direct its Institute for National Security and Counterterrorism (INSCT). I have expertise in the areas of national and homeland security and counterterrorism, and constitutional law, developed during my thirty years of teaching, writing, and speaking in these fields. I appreciate the invitation to speak to the Subcommittee today, and I will focus on the constitutionality of H.R. 980, the Public Safety Employer-Employee Cooperation Act of 2007.

Narrowly, the Constitution reserves to the states the authority to manage labor relations within their borders. Indeed, the virtue of our federal system is on display in the rich variety of approaches to managing labor relations in the fifty states. For public sector state and local workers, however, the federal system has denied their full protection and in some twenty-one states their rights to collectively bargain are not fully recognized. Although a principal value of our federal system is to encourage states to find new and creative solutions to policy problems in their state legislative laboratories, all of us know that, at times, that discretion for states to shape their own approaches to policy problems has stood in the way of the protection of important individual rights. In such situations, the federalism value of state creativity can and should be subordinated to the more compelling federalism value of protecting individual liberties.

In my opinion, Congress has the constitutional authority to enact HR 980 under the Commerce Clause, and its enactment would not violate the Tenth Amendment. It has been clear since 1937 that Congress may regulate labor/management relations in employment in or affecting interstate commerce.[1] Beginning in the same Supreme Court era, the Court acknowledged that Congress has considerable discretion to determine what activities affect interstate commerce, to the extent that it permitted a purely intrastate economic problem, such as local working conditions, to be subject to Commerce Clause regulation, on the theory that the aggregate number of such local incidents might affect interstate commerce.[2]

When Congress extends its commerce-based regulations to public employees and employers, the Tenth Amendment has presented an obstacle only when Congress attempts to "commandeer" state or local regulatory processes, by requiring states and/or cities to adopt and implement a federal regulatory program. The Supreme Court's 1985 decision in Garcia v. San Antonio Metropolitan Transit Authority[3] allowed Congress to extend wage and hour protections to state and local workers, over the Tenth Amendment objections of the city, for two reasons that have significance in your consideration of HR 980. First, the Court noted that federalism values are especially well protected by the structural guarantees of our government – state and local interests are well represented in our Congress, particularly in the House of Representatives. In other words, if Congress determined that wage and hour protections should be extended to public sector workers in

[1] NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act).
[2] U.S. v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act as applied to a local employer); Wickard v. Filburn, 317 U.S. 111 (1942)(upholding federal limits on farm production as applied to a local farmer who grew wheat for family consumption).
[3] 469 U.S. 528 (1985).

the states and cities, the Representatives from those districts followed their constituents' policy preferences – that public-sector workers should enjoy the minimum wage/maximum hour protections afforded those in the private sector workforce. Second, the Court recognized that one of the most important purposes of our federal system – ensuring individual liberty – would be advanced by permitting Congress to extend the wage and hour protections.

The Court's decisions since Garcia do not call into question Congress's authority to apply generally applicable federal protections, such as wage and hour or collective bargaining rights, to state and local governments. The "commandeering" problem that caused the Court to strike down radioactive waste legislation and the Brady Act extending handgun controls does not taint HR 980. This bill does not require state or local governments to enact or implement a federal regulatory program. Instead HR 980 places the onus on federal implementation through the Federal Labor Relations Authority (FLRA). If a state chooses not to enact a program that meets federal requirements, the FLRA steps in. In the radioactive waste and Brady Act settings, the legislation did not afford the states with any such choice. Instead they were obligated to regulate through state and local mechanisms to achieve the federal policy goals.

Summing up the Commerce Clause and Tenth Amendment concerns expressed by some, there is no reason to expect that the enactment of HR 980 would be stricken down on either of these grounds. It is true that Congress's Commerce Clause limits and state and local protections enshrined in the Tenth Amendment are two sides of the same coin. As the Court has recognized, the doctrines in both areas are designed to assure that the values of our federal system are honored. HR 980 is emblematic of federal legislation

that furthers the values of federalism by protecting the individual rights of public sector workers. At the same time, the bill does not commandeer state or local government processes. It affords those governments that do not yet provide full collective bargaining rights for public sector workers a reasonable choice – provide the protections in your own way, or step aside and allow the FLRA to do so.

I will note briefly one other constitutional objection that has been raised to HR 980 -- the states' sovereign immunity protected by the Eleventh Amendment. Recent decisions of the Supreme Court protect states from suits brought in federal court by citizens of their state or of other states. HR 980 creates no right of action for individuals and thus the bill does not confront those limitations. In addition, under HR 980, in states where the FLRA regulates to ensure collective bargaining, any eventual enforcement of state recalcitrance would be initiated by the FLRA, not by any individual. Federal agencies are not affected in their litigation against states or cities by the Eleventh Amendment.

Allow me to conclude by reminding the Subcommittee of the lessons learned from Hurricane Katrina. The 2006 congressional *Failure of Initiative* report found widespread lack of unity, poor coordination and cooperation, and delayed and duplicative efforts by responders immediately prior to and after landfall of that brutal storm. Command and control was impaired at all levels of government, and state and local emergency response personnel lacked the cohesion across jurisdictions to organize their response activities effectively. The collective bargaining envisioned by HR 980 would help level the playing field for these public sector workers. Although this new benefit would not be a panacea for emergency preparedness and response, it would enhance the

cohesion among agencies and across jurisdictions that may well improve the delivery of their critical services.

When National Guard personnel from many different states were deployed to assist in the aftermath of Hurricane Katrina, administration of their work became a major headache for state Governors. Because their forces were activated on state active duty and subject to the rules and entitlements authorized by their home states (including pay and health care benefits, for example), coordination and cooperation among Guard units from different states was soon compromised by the complexities of administration and by the animosity and distrust among some that developed because of their variable economic and health-care situations. In this instance, there was a federal fix: The governors requested that the Secretary of Defense invoke so-called "Title 32 status" for National Guard personnel deployed for Katrina relief, effectively permitting uniform pay and benefits out of the U.S. Treasury, while assuring continuing operational command and control by the governors. In this instance Title 32 is a sort of administrative compromise – deployed personnel are made more uniform in pay and benefits, yet the operation is not federalized in the sense of bringing command under the President as Commander in Chief. HR 980 is, in part, a way to do for first responders what Title 32 does for the National Guard.

Thank you. I will be happy to answer any questions that you may have.