TESTIMONY

of

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on

the Implementation of the "Law Enforcement Officers Safety Act of 2004" (Pub. L. No. 108-277) and Additional Legislative Efforts Aimed at Expanding the Authority to Carry Concealed Firearms

before the
House Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary

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Good morning, Mr. Chairman and distinguished members of the Subcommittee on Crime, Terrorism and Homeland Security. My name is Tom Penoza, and I am here this morning at the request of Chuck Canterbury, National President of the Fraternal Order of Police, the largest law enforcement labor organization in the United States, representing more than 325,000 members in every region of the nation. I am the National Treasurer of the FOP and the longest-serving member of its Executive Board.

I want to begin by thanking you, Mr. Chairman, for holding this hearing and giving the FOP an opportunity to talk about the implementation of the Law Enforcement Officers' Safety Act, or LEOSA, and the need to amend it by adopting H.R. 2726, a bill that goes by the same name. This legislation, authored by Representative Forbes, makes needed improvements to the provisions to the Federal statute which exempts qualified active and retired law enforcement officers from State and local prohibitions on the carriage of firearms.

Since this Subcommittee considered and approved the original bill three years ago, the FOP has identified some issues with the way the law has been implemented–issues which we believed at the time to have been adequately answered during the full Committee mark-up in June 2004, but which regrettably persist in several States and jurisdictions. These implementation problems have created real inequities, especially for retired law enforcement officers, and it is something we need to address legislatively by adopting H.R. 2726.

Under current law, qualified retired law enforcement officers must carry the photographic identification issued by the agency for which they were employed ***and*** documentation which certifies that they have met, within the most recent twelve-month period, the active duty law enforcement standards for qualification for a firearm of the same type as the one they intend to carry. This document must be issued by the retired officer's former agency ***or*** from the State in which he resides. Right now, States which have not or have refused to adopt a procedure or mechanism for retired officers to qualify with their weapon are effectively preventing the ability of these officers to comply with the documentary requirements of Federal law.

During the mark-up of the legislation before the House Judiciary Committee in June 2004, this point was specifically addressed in a colloquy between Representatives F. James Sensenbrenner, Jr. (R-WI), who chaired the Committee at that time and authored the amendment requiring the State or former agency to issue a document certifying that the officer had qualified with the firearm, and Representative Ric Keller (R-FL). The exchange between these two Members made it clear that the amendment was ***not*** intended to be a means by which a State could "get around" the Federal law. I have included below an excerpt from the transcript of the hearing, taken from House Report 108-560:

> ***Mr. KELLER.*** *Mr. Chairman, I want to engage in a little colloquy just to clarify my understanding.*
>
> *The gist of the language as it reads now in the base bill is, during the most recent 12-month period, they have to show that the individual, at his expense, has met the standards for training and qualification for active law enforcement officers to carry firearms. And your*

amendment just says, you have a photo ID proving that?

Chairman SENSENBRENNER. *If the gentleman would yield, the answer is `yes.'*

Mr. KELLER. *It wouldn't, for example, have the effect of gutting the bill by saying that if your State doesn't allow police officers to carry firearms, that they would be exempt, because in that particular case, those States where they are not allowed to require them, they wouldn't be able to get a photo ID saying they met the requirements of using this particular gun and carrying a concealed weapon permit.*

Chairman SENSENBRENNER. *To my knowledge, no.*

Mr. KELLER. *I yield back.*

This was an important exchange on an important point–that being that a State or agency cannot thwart Federal law by refusing to provide a retired officer a document or the opportunity to obtain that document. Unfortunately, despite the clarity of this exchange, there are States and agencies doing exactly this.

To address this issue, H.R. 2726 would provide that a "certified firearms instructor" could conduct and qualify retired law enforcement officers using the active duty standards for qualification in firearms training as established by the State; or if the State has not established or recognized such standards, standards set by any law enforcement agency within that State. This would enable any certified firearms instructor to qualify a retired officer using the standards set either by the State in which the instructor is certified and the officer resides, or, in the absence of such standards (or the recognition of such standards), using the standards of any law enforcement agency in the State. This will ensure that qualified retired law enforcement officers will no longer be prevented from carrying their firearms under the Law Enforcement Officers' Safety Act (LEOSA) over what is simply a paperwork issue.

The legislation also proposes to make a few additional minor changes to the definition of "qualified retired law enforcement officer." The first of these is to strike language requiring that a "qualified retired law enforcement officer" have a "nonforfeitable right to benefits under the retirement plan of the agency." This has been very problematic in agencies which do not offer any retirement benefit plan to their officers and has disproportionately affected deputy sheriffs. The receipt of a retirement benefit after an officer has left the service of his agency should not be determinative as to his authority to carry a firearm, so H.R. 2726 deletes this particular language.

The legislation also proposes to revise language in the definition of "qualified retired law enforcement officer" with respect to the requirement to qualify with the firearm that the officer intends to carry while traveling outside his jurisdiction and make that language consistent with the revisions proposed to 926C(d), which are outlined above.

The legislation would expand the definition of "qualified active law enforcement officer" and "qualified retired law enforcement officer" by including officers who are or were employed by the

Amtrak Police Department. Because Amtrak is, under Title 49, "not a department, agency, or instrumentality of the United States Government," police officers employed by Amtrak do not meet the definition in LEOSA, which requires them to be an "employee of a governmental agency." Yet, the Amtrak Police Department has been, and is in many cases, treated as a Federal law enforcement agency by the Federal government. For instance, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) previously ruled that officers of that department should be exempt from Section 922(w) of Violent Crime Control and Law Enforcement Act of 1994 which prohibited the transfer or possession of large capacity ammunition feeding devices, except by law enforcement officers employed by a governmental agency. The ruling stated, in part that the Amtrak Police Department is "deemed to be a governmental agency for the purposes of 18 U.S.C. 922(w)." These same conclusions which led ATF to deem Amtrak a Federal agency for the purposes of 18 USC 922(w) apply in the case of 18 USC 926B and 926C. I have attached a copy of that ruling to this testimony and ask that it be included in the record.

The Amtrak Police Department, first accredited in 1992, has been reaccredited twice--in 1997 and 2002 by the Commission on Accreditation for Law Enforcement Agencies (CALEA). The department has a K-9 team, a Drug Enforcement Unit, an Aviation Unit, and a Mobile Command Center. Amtrak police officers are assigned to the Federal Bureau of Investigation's (FBI) Joint Terrorism Task Force (JTTF) and Joint Operations Center in Washington, D.C. In 1999, Congress amended the Omnibus Crime Control and Safe Streets Act of 1968 to allow railroad police officers to attend the FBI's National Academy for Law Enforcement Training and, to date, several Amtrak officers have successfully completed that program.

Further, in the most recent report on Federal law enforcement officers available, entitled *Federal Law Enforcement Officers, 2004*, the U.S. Department of Justice, Bureau of Justice Statistics listed the Amtrak Police Department as a Federal law enforcement agency.

Given all of this information, it seems clear that the officers of the Amtrak Police Department are treated for all intents and purposes as Federal law enforcement officers and, but for the language in Title 49, would clearly meet the definition in LEOSA. It is for this reason that H.R. 2726 would expand the definitions in 926B and 926C to include the officers employed Amtrak Police Department. I want to emphasize that this is the only expansion of the current law that the FOP supports at this time.

In addition to the Amtrak Police Department, certain law enforcement agencies within the Executive Branch of the Federal government are uncertain as to whether or not the civilian law enforcement officers meet the definition of "qualified active law enforcement officer" and "qualified retired law enforcement officer" in current law. The FOP feels this is an area that requires further clarification because, in our view, all Federal law enforcement officers who are classified by the Office of Personnel Management (OPM) as GS-0083, the "Police Series," should be included in the LEOSA definitions.

In support of this view, I offer the OPM publication, *Grade Evaluation Guide for Police and Security Guard Positions in Series GS-0083/0085*, which states the following:

> *This series includes positions the primary duties of which are the performance or supervision of law enforcement work in the preservation of the peace; the prevention, detection, and investigation of crimes; the arrest or apprehension of violators; and the provision of assistance to citizens in emergency situations, including the protection of civil rights. The purpose of police work is to assure compliance with Federal, State, county, and municipal laws and ordinances, and agency rules and regulations pertaining to law enforcement work.*

In further describing the nature of "police work," the aforementioned publication states the following:

> *The primary mission of police officers in the Federal service is to maintain law and order. In carrying out this mission, police officers protect life, property, and the civil rights of individuals. They prevent, detect, and investigate violations of laws, rules, and regulations involving accidents, crimes, and misconduct involving misdemeanors and felonies. They arrest violators, assist in the prosecution of criminals, and serve as a source of assistance to persons in emergency situations.*
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> *Police services are provided in Federal residential areas, parks, reservations, roads and highways, commercial and industrial areas, military installations, Federally owned and leased office buildings, and similar facilities under Federal control. Within their jurisdictions, police officers enforce a wide variety of Federal, State, county, and municipal laws and ordinances, and agency rules and regulations relating to law enforcement. They must be cognizant of the rights of suspects, the laws of search and seizure, constraints on the use of force (including deadly force), and the civil rights of individuals.*
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> *Police officers are commissioned, deputized, appointed, or otherwise designated as agency and/or local law enforcement officers by statute, delegation, or deputization by local governments, or other official act. Arrest and apprehension authority includes the power to formally detain and incarcerate individuals pending the completion of formal charges (booking); requesting and serving warrants for search, seizure, and arrest; testifying at hearings to establish and collect collateral (bond); and/or participating in trials to determine innocence or guilt.*
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> *Police officers carry firearms or other weapons authorized for their specific jurisdictions. They wear uniforms and badges, use military style ranks (private, sergeant, lieutenant, etc.), and are commonly required to refamiliarize themselves with authorized weapons periodically and demonstrate skill in their use.*

It has come to the attention of the FOP that certain Federal law enforcement agencies within DoD have informed the GS-0083 Federal law enforcement officers in their employ that they do not meet the definition of "qualified active law enforcement officer" and "qualified retired law enforcement officer" because they do not have statutory powers of arrest. As a matter of law, it is not clear that Federal law enforcement officers employed by the DoD have powers of arrest or apprehension, nor is it clear that there is any legal difference between these two terms. It is, however, certain that these

officers can and do take suspected offenders into custody, book them, investigate the suspected offenses, and participate in court proceedings seeking to convict those whom they took into custody for the suspected offense. All that is it at issue is whether this authority is that of "arrest" or that of "apprehension" and whether a distinction exists. If there is such a distinction, then it is up to Congress to make clear that it was their intent in passing the LEOSA that Federal law enforcement officers designated as GS-0083 employees (or any subsequent successor to that series) do meet the definitions in that law.

To provide further information on this point, the Committee offers that, in the Manual for Courts-Martial, Rule 302(a)(1) defines "apprehension" as "the taking of a person into custody." The Discussion under this definition reads as follows:

> *Apprehension is the equivalent of "arrest" in civilian terminology. (In military terminology, "arrest" is a form of restraint. See Article 9; R.C.M. 304.)*

Rule 302(b)(1) states that apprehensions can be made by:

> *persons designated by proper authorities to perform military criminal investigative, guard, or police duties, whether subject to the code or not, when in each of the foregoing instances, the official making the apprehension is in the execution of law enforcement duties;*

The Discussion under Rule 302(b)(1) states that:

> *Whenever enlisted persons, including police and guards, and civilian police and guards apprehend any commissioned or warrant officer, such persons should make an immediate report to the commissioned officer to whom the apprehending person is responsible.*

This information seems to indicate that the distinction between "arrest" and "apprehension" is largely one of usage within the DoD and military community and not a distinction with a factual or legal basis. The suspect, after all, is in taken into custody by a lawful authority and whether that suspect was arrested or apprehended seems to be an issue of semantics, not of substance.

In further support of this interpretation, the Committee would offer that the DoD issued a Directive, DoD Directive 5210.56, on 24 January 2002 which clearly presumes that GS-0083 law enforcement officers employed by the Department of Defense do have the authority to make arrests or apprehensions. Specifically, E2.1.2.3.6. of that document authorizes the use of deadly force against any individual if it "reasonably appears to be necessary to arrest or apprehend a person who, there is probable cause to believe," has committed one of the offenses specified in the Directive.

The Department of the Army implements the entirety of DoD Directive 5210.56 in Army Regulation 190-14, paragraph 3-2(*f*)(5) and the Department of the Navy implemented the entirety of DoD Directive 5210.56 by issuing SECNAV INSTRUCTION 5500.29C, on 27 August 2003. Like the DoD Directive, both AR 190-14 the SECNAV INSTRUCTION authorizes its GS-0083 law

enforcement officers to use deadly force if it is "reasonably necessary to arrest, apprehend, or prevent the escape of a person who, there is probable cause to believe," has committed one of the offenses specified in the regulation.

The language included in H.R. 2726 clarifies that any Federal law enforcement officer classified as a GS-0083 (or any successor to that series) who is employed by the Executive Branch also be deemed to meet the definitions of "qualified active law enforcement officer" and "qualified retired law enforcement officer" in the current statute without addressing the issue of defining the difference, if any, between the terms "arrest" and "apprehend" with the Defense Department. This is merely the exercise of common sense, as the FOP believes that the difference in these two terms is one of usage and not one of fact or law. Further, the legislation would also add the words "or apprehension" in both 926B and 926C in the definitions for "qualified active" and "qualified retired law enforcement officer[s]."

When the FOP was working with Congress and the Administration to enact LEOSA, we made it our top priority because it is an officer safety issue. It remains an officer safety issue, and the problems that we have encountered in its understanding and implementation are matters of equitable treatment regardless of duty status and the attitudes of an individual State or agency toward the existing Federal law.

In conclusion, I would like to thank Representative Forbes for his leadership on this issue and to you, Mr. Chairman, for holding this hearing. I would now be pleased to answer any questions that members of the Subcommittee may have.