NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS
317 South Patrick Street, Alexandria, VA 22314
info@napo.org • www.napo.org
(800) 322 - NAPO

NAPO POSITION ON LEGISLATIVE POLICE REFORM PROPOSALS

NAPO, as the representative of rank-and-file officers, has grave and serious concerns with many provisions of the George Floyd Justice in Policing Act (H.R. 1280).

We have supported many provisions of the JUSTICE Act, as introduced by Senator Tim Scott (R-SC) and Congressman Pete Stauber (R-MN), which addresses many of the same issues as the George Floyd Justice in Policing Act. The biggest difference is that in the drafting of the JUSTICE Act, Representative Stauber and Senator Tim Scott included the law enforcement community at the table and took into consideration the concerns and needs of the practitioners on the streets. It is by gaining the buy-in of the law enforcement community that any reforms will enjoy greater implementation and execution by agencies across the country.

The Elimination of Well-Settled Constitutional Protections and Haphazardly Modifying Section 242 will Decimate Law Enforcement. Our most significant concerns with the George Floyd Justice in Policing Act include amending Section 242 of Title 18 United States Code to lower the *mens rea* standard and the practical elimination of qualified immunity for law enforcement officers. Combined, these two provisions take away all good faith legal protections for officers while making it easier to prosecute them criminally for good faith mistakes on the job, not just criminal acts. No reason is proffered for the sudden and wholesale change to decades of Constitutional jurisprudence. The way H.R. 1280 is written, an officer can go to *prison* for an *unintentional* act that *unknowingly* broke an *unknown*, and *unknowable*, right.

The threat of the elimination of qualified immunity has already caused decent, experienced officers and newly hired officers alike to seek other jobs. Police departments will be decimated, and it will be more difficult than it already is to recruit new officers.

Also, the very real danger of an officer being sent to prison *for a good-faith mistake* will cause officers to hesitate to protect themselves and others when they clearly need to do so. *These provisions will lead to the deaths and injuries of American police officers.*

Moving Away from the Current Use of Force Standard Puts Officers and Our Communities at Risk. The Justice in Policing Act would drastically modify the current standard for the use of force by *federal* officers to require that deadly force may be used *only when judged after the fact to have been absolutely necessary* to prevent imminent death or serious bodily injury. It also provides that any state or locality that does not have a policy similar to the legislation will not be eligible for any federal funding.

No officer wants to use force while on duty. It is the police who try to save lives and protect people from injury while enforcing the laws established by the Congress and state and local governments. Officers do not want the suspect killed or injured, in fact, it is almost always *the officer* who summons medical help for the person who was just resisting, or even trying to kill, the officer. The officer wants to stop the threat, and we rightly expect and need them to do so.

Understanding the need for a cohesive national policy on use of force, NAPO and ten of the largest national law enforcement management and labor organizations worked together to create National Consensus Policy on Use of Force. The Policy reflects the thinking and best practices of both law enforcement practitioners and academics, and it has been embraced across the law enforcement community:

> "It is the policy of this law enforcement agency to value and preserve human life. Officers shall use only the force that is objectively reasonable to effectively bring an incident under control, while protecting the safety of the officer and others. Officers shall use force only when no reasonably effective alternative appears to exist and shall use only the level of force which a reasonably prudent officer would use under the same or similar circumstances.
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> The decision to use force "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."
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> In addition, "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight…the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them."[1]

The National Consensus Policy rests on our Constitution and binding Supreme Court cases that define and shape what officers can and cannot do. The policy explicitly follows the Constitutional requirements in governing use of force by officers, and those requirements have been clearly understood for more than 50 years, since the 1960s Supreme Court case *Tennessee v Garner*, which held that the Fourth Amendment's reasonableness standard is what is required to be used in judging the legality of an officer's use of force, given the circumstances as he or she *believed* them to be *at the time*.

Our courts across the United States, including the Supreme Court, have *never* deviated from this Constitutional standard. The standard by which to evaluate an officer's actions is one of reasonableness at the time the force was used, given what the officer believed. Not 20-20 hindsight.

Subjectively changing the legal standard for holding officers accountable for their actions will have a chilling effect on the men and women in uniform. It undermines their ability to respond in an immediate and decisive manner, and thus creates a hesitation that will threaten the safety of our families, communities, and officers. *Again, make no mistake; H.R. 1280 will lead to the death and injury of American police officers as well as of innocent crime victims who might otherwise have been protected.*

[1] *Graham v. Connor*, 490 U.S. 386 (1989).

Officer Due Process and Confidentiality Must be Safeguarded in a National Decertification Index. NAPO supports ensuring that officers who have proven allegations of serious misconduct against them no longer serve as law enforcement officers. At the same time, we can and must ensure officers have due process before they are decertified. Unfortunately, one of the goals of the Justice in Policing Act is that law enforcement officers should be stripped of the most basic rights to due process that all other citizens enjoy.

Officers' Legitimate Due Process Rights Do Not Stand in the Way of Justice; They Ensure Justice. NAPO does not condone shielding officers who have committed crimes, yet we must remain vigilant in protecting an officer's legitimate due process rights. These rights are crucial and necessary to preserve the integrity of the criminal justice system as a whole, particularly when media and political pressure lead to an irrational rush to judgment aimed at condemning law enforcement before all the facts are known.

We rightfully demand that officers treat others with impartiality, fairness, equity and justice. We expect officers to engage in dialogue and to do their best to consider all sides of a situation before making a judgment. Yet if officers are deprived of this same respect and worth within their own workplaces, we cannot reasonably expect them to exhibit and provide these qualities to the public they serve once they walk out the precinct door.

There is a serious need for the implementation of national standards and procedures to guide both state and local law enforcement agencies and law enforcement officers during internal investigations, administrative hearings, and evaluation of citizen complaints. Too often law enforcement officers are subjected to the whim of their departments or local politics during internal investigations and administrative hearings. The right to basic procedural protections for officers in the complaint investigation and disciplinary process is a right that needs to be uniform and guaranteed to officers throughout the country.

Training Will Go Further in Achieving the Goals of Police Reform than Would the Deprivation of Legal Protections for Officers. NAPO strongly supports federal funding and programs to help agencies train their officers to better respond to and intervene in mental and behavioral health crises. Officers must be given the tools and training they need to support improved responses and outcomes to interactions between police officers and persons affected by mental illness.

Rank-and-file officers, as practitioners, must play a role in developing any national training standards.

Criminalizing Neck Restraints will Put Officers' Lives in Danger. Training on the use of force and de-escalation would also reduce the use of so-called "chokeholds" and carotid restraints, which are already restricted by many law enforcement agencies. However, these restraints are still a necessary means of self-defense in some circumstances when use of force is justified. If the subject poses an immediate threat to the safety of the officer or others and a "chokehold" is the officer's best or only option, it is vital that she is able to use it. We strongly recommend against criminalizing these maneuvers and we oppose making them a *per se* civil rights violation. Instead, we advise any policy regarding these tactics follow the National Consensus Policy cited above.

Officers Cannot Be Made Second Class Citizens in Regards to Workplace Safety and Bargaining Rights. The Justice in Policing Act seeks to curb law enforcement officers' rights to have a say in their own working conditions and safety, and specifically targets the right to bargain over disciplinary actions.

This legislation perpetuates the falsehood that somehow police unions and associations are responsible whenever anything goes wrong in a police-citizen encounter. At a time when police officers are routinely, unfairly, and consistently demonized in the media and public discourse, the right of these fellow citizens to speak up and be heard must be zealously protected, not stripped away because they are currently unpopular.

Independent Investigations and Prosecutors for Deadly Use of Force Cases Must Be Apolitical and Have an Understanding of Officers' Duties. We fully understand and support thorough, fair and timely investigations when officers must resort to the use of deadly force to protect themselves and their communities. However, we believe it is only right that the officer be investigated by someone who is unbiased and not subject to political pressures. The investigator should have an understanding of an officer's duties and be absolutely impartial throughout an investigation.

There are proposals to require an outside entity, from a different jurisdiction, to investigate an officer's use of force, barring the officer's own agency from investigating the incident. In some instances, this is beneficial. For example, some law enforcement agencies are too small or do not have enough experienced investigators to conduct such an investigation.

However, any investigation of an officer's use of force must include an evaluation of the officer's knowledge and observations, and the Constitutional standard recognized by *Graham v. Connor*. The Supreme Court has ruled that the most important factor to consider in evaluating use of force incidents is the objective reasonableness of the force used based upon the totality of the circumstances at the time of the incident.

These concerns must be considered when making decisions to set up a special prosecutor's office. Individuals running this office will be under a great deal of pressure to justify their work. There is a risk that decisions to prosecute will be made based on politics, not on the law and admissible evidence. We fear that an officer will be indicted, even if he or she did nothing wrong, in a special prosecutor's effort to deliver on the demands placed by the public and those who put him or her in that position.

Data Collection on the Use of Force Must Reflect the Entirety of the Situation, Including Use of Force Against Officers. It is important that data collected on the use of deadly force reflect the entirety of the situation: use of force by officers as well as actual and threatened use of force *against* officers, and also not be limited to situations involving firearms. Such data collection should recognize the fact that officers are murdered each year in this country using a wide variety of weapons, vehicles, and even hands and feet.

Data that is collected should also remain anonymous.

Law Enforcement Must Have Access to Defensive Protective Equipment through the 1033 Program. Programs like the Department of Defense's 1033 program have been vital resources in allowing State, local and Tribal law enforcement to acquire items used in search and rescue operations, disaster response, and active shooter situations that they otherwise would not be able to afford. This equipment has not led to the "militarization" of police, but rather has proven to be essential in protecting communities against violent criminals with increasing access to sophisticated weaponry, IEDs, and body armor.

The Justice in Policing Act proposes to severely limit the transfer of surplus equipment to state and local law enforcement. NAPO opposes this and any attempt to curtail state and local law enforcement's access to lifesaving equipment that is otherwise too expensive for many agencies and departments to purchase on their own.

Without Strict Parameters, Federal Consent Decrees Are a Washington, D.C. Takeover, Negatively Effecting Officer Morale and Public Safety. Consent decrees are used to remedy violations of rights and protect the party that faces injury. Consent decrees should not be used to further any policy extraneous to the protection of those rights or be expanded to apply to parties not involved in the litigation.

The Department of Justice should provide state and local governmental entities an adequate opportunity to respond to any allegations of legal violations; require special caution before using a consent decree to resolve disputes with state or local governmental entities; limit the circumstances in which a consent decree may be appropriate; and limit the terms for consent decrees with state and local governmental entities, including terms requiring the use of monitors.

NAPO strongly supports protecting the interests of state and local governments in managing their own affairs and limiting the duration of federal consent decrees to which state and local governments are party. Further, consent decrees should not over-reach in forcing superfluous policies on police departments. We support mandatory time limits for monitoring programs instituted under federal consent decrees.

Body-Worn Camera Policies Must Include the Input of the Officers Wearing the Cameras to Truly Be Successful. Policies regarding the use of body-worn cameras by officers must be developed with the significant input of rank-and-file officers.

With its Body-Worn Camera Toolkit, the Bureau of Justice Assistance has found that best practices for departmental body-worn camera programs include engaging both the community and officers on body-worn camera issues and allowing for a significant degree of officer discretion.

Hiring from within the Communities Being Served Improves Community-Police Relations. To increase community trust, there has been a growing call from community leaders across the nation for police departments to hire more officers from the communities being served and that reflect the makeup of the communities they serve in. The requirement that candidates have a four-year college degree can be a hindrance to achieving that goal. Departments should be more flexible in their education requirements by creating programs that allow individuals to become officers while working towards meeting the education requirement. Departments can also use work experience to augment years in school to help potential candidates meet such requirements, much as they do with individuals who have served our country in the military.

NAPO supports creating a best practices program through the COPS Office to help agencies establish programs to hire from within the communities they serve, including Cadet Programs like that in Los Angeles, and educational programs that provide funding to help candidate officers earn a two or four-year degree. It is important that these programs augment but do not take away much needed funding from the COPS Hiring Program, which must remain focused on its original intent of helping state and local agencies hire, rehire and retain qualified officers. None of the foregoing, however, must ever be used to try to justify hiring or deploying officers based on race or color. Any effort to restrict, for

example, Black officers to Black neighborhoods, Latino officers to Latino neighborhoods, and White officers to White neighborhoods, will only lead to greater fracturing and the isolating compartmentalization of our communities.

State and Local Law Enforcement Grant Programs Must be Used to Incentivize, Not Defund. Data collection, training, and certification, in addition to other reforms such as mandating the use of body worn cameras, all cost a significant amount of money and it is vital that any legislation mandating these policies provide additional funding to help states and localities comply. The Justice in Policing Act penalize states, localities, and law enforcement agencies in order to force compliance by taking away all or part of the Byrne Justice Assistance Grant (Byrne JAG) and the Community Oriented Policing Services (COPS) Grant funding. The consequence of this on all sectors of the criminal justice system would be long lasting. This funding is used to address needs and fill gaps across the entire criminal and juvenile justice systems – in prevention, enforcement, courts, prosecution and indigent defense, corrections, victim assistance, mental health services, and other community support.

Additionally, at a time when it is well known that state and local governments are facing serious budget and revenue holes due to the coronavirus pandemic, it is difficult to understand how governments will have the funding to comply with these expensive mandates. To incentivize compliance with any police reform policies, funding must be provided.

Police Reform Must Not Continue to Demonize Officers and Make Law Enforcement the Enemy. With how it is written and promoted, the George Floyd Justice in Policing Act perpetuates the idea that law enforcement is the enemy. The men and women who serve their communities as police officers must be recognized as a valued and integral part of protecting and enhancing the health, safety and welfare of our towns, cities and states.

It is elected officials' duty at all levels of government to publicly and continuously defend officers when they have correctly carried out their duties, even when the press, social media, and protestors, falsely accuse the officer of misconduct. The officer on the street did not enact the law, she did not assign herself to that precinct or beat, and he did not choose to be dispatched to that disturbance. But he or she is there and must act if the legitimate rights of peaceful and law-abiding citizens are to be secure. This does not mean that we do not recognize and respect the rights of citizens to debate the duties of public servants, to criticize, and make changes when warranted. But, a timely and honest defense of officers who have done the right thing is essential to recruit, keep and develop good officers and leaders.

We must work together to better educate the public about the role and rights of police officers in enforcing the law, including the right to defend themselves and innocent bystanders. A lack of understanding of law enforcement officers' legitimate rights, duties, and responsibilities has perpetuated an environment of mistrust and unease in communities across the nation.