NACDL Testimony

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See also the related ***press release*** regarding H.R. 3168.

Written Statement by Leslie Hagin

on behalf of
National Association of Criminal Defense Lawyers (NACDL)

Regarding H.R. 3168 ("Citizen Protection Act of 1998")

Hearing before the Subcommittee on the Constitution
United States House of Representatives Committee on the Judiciary

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Mr. Chairman, Ranking Member Scott, and Other Distinguished Members of the Subcommittee:

I am pleased to speak to you today on behalf of the National Association of Criminal Defense Lawyers (NACDL), in support of H.R. 3168, the "Citizen Protection Act of 1998."

Our organization has been at the forefront in standing up against law enforcement abuses. It is in this spirit of commitment against such abuses that I speak to you today. Bounty hunter abuses of citizen rights and liberties are law enforcement abuses, plain and simple.

It should matter not that they are employed by private entities, bonding companies, rather than paid for through a government treasury. They are hired to perform core police functions. And they are allowed to do so simply because their work confers a financial benefit upon state criminal justice bail systems.

You will hear from several innocent American citizens who have been victimized by the misconduct of untrained, unregulated, and unlicensed bounty hunters, performing the core police function of arrest for the benefit of state criminal justice systems. The harms suffered by these citizens are real and substantial. So too should be their rights and remedies.

These victims of abuse should not be expected to accept the current legal fiction regarding bounty hunter abuses. They should not be told by public policy makers that their rights are meaningless when violated by privatized, "wannabe" law enforcement officers performing citizen arrests for the state. The current anachronistic law of bounty hunters defies common sense and the American sense of justice. And it flies in the face of the public welfare.

Citizens should not be expected to accept that they will have an appropriate cause of action and remedies only when their fundamental rights and liberties are wrongfully abridged by a *tax dollar-financed* law enforcement officer. They should not be told that when their same rights and liberties are violated by a *privatized* law enforcement officer -- performing the precise same, core police function for the benefit of state criminal justice systems -- they will have *no* civil rights action. In no other area of interstate commerce and civil rights law does the government allow businesses to perform core police functions with such impunity.

The law of bounty hunting is a legal weed, an overlooked remnant of 1800s law. As discussed below, it has slipped through the judicial cracks and has been allowed to grow inconsistent with analogous privatized law enforcement jurisprudence.

H.R. 3168 would correct this anomaly. It would bring this area of privatized law enforcement into the fold of modern civil rights law. To do so, it would sensitively, and sensibly, apply legal and market forces to the bail bond companies employing bounty hunters, to inspire them to make certain their agents abide by Americans' fundamental constitutional rights. This is in keeping with the abiding public interest in protecting innocent Americans from bounty hunter abuses. Yet, it is also in keeping with the need to avoid measures that would bankrupt the generally beneficial bail bond industry.

H.R. 3168 says that fundamental federal constitutional rights and responsibilities will apply to bounty hunters and their employing bail bond companies when, and only when, they are performing essential police functions. That is, they are defined as "state actors" for the limited purposes of the core police functions they perform as part of their jobs. The need for this congressional clarification of the civil rights statutes has never been greater. *See e.g.*, Jonathon

Drimmer, "A Year of Bounty Hunter Misconduct," *Legal Times*, Sept. 15, 1997 (chonicalling the many episodes of *reported* bounty hunter misconduct in just the last year); "Examples of Bounty Hunter Abuses" (attached). *See also* Philip E. Fixler, Jr. & Robert W. Poole, Jr., *Can Police Services be Privatized*, 498 Annals Am. Acad. Pol. & Soc. Sci. 108, 109 (1988) (discussing the "privatization revolution" in police services); Denise Baker, "Cities Fight Crime With Fewer Resources Available," *Nation's Cities Wkly*., July 26, 1993, at 1 (noting rising government expenditures and privatization of government services); *Study*: *Enlist the Private Sector to Deter Crime*, Bus. Wire, Apr. 7, 1994 (relating arguments for the increased use of bounty hunters in law enforcement).

I. Bounty Hunters and Their Bail Bond Company Employers: Above the Law

Like the Subcommittee, we have uncovered numerous examples of abuses by bounty hunters spanning the country. Attached to my statement is a summary of just some of the reported recent cases.

This is a profit-making industry. The bail bond industry, including its bounty hunters, is one that profits from the American criminal justice system. The industry generally performs a valuable function, and it should be allowed to make a profit. But it should not be allowed to make an *unreasonable profit*, at the direct expense of citizen rights.

To become "qualified" to hunt bail skippers, the aspiring bounty hunter need only hop on the Internet, and send off a couple hundred dollars or so to some for-profit Website "training" company. He or she will then have bought the right to earn a good living dressing up like an official state or federal law enforcement officer, and engaging in man hunts and arrests, without any of the "hassle" of the constitutional standards that are supposed to protect Americans from law enforcement misconduct.

As you will hear victims testify, bounty hunters have invaded the homes of innocent Americans and terrorized them in the mistaken belief that a fugitive was present. They have dangerously impersonated police officers or federal agents, and held guns to the heads of unsuspecting victims. They have kidnaped individuals, ignoring clear evidence that they "arrested" the wrong person. They have manhandled innocent pregnant women, forcing one in Texas to miscarry her unborn child. Just a few weeks ago, they shot an innocent bystander on the streets of Los Angeles through the chest. As last reported, he was in "grave" condition. In short, these private law enforcement, Website Wonders routinely violate the most fundamental civil rights of innocent citizens, including the right to be free from unreasonable searches and seizures, and interrogations.

The key questions for this hearing seem to us to be these:

- Why should privatized police officers, called bounty hunters, or "bail retrieval agents," have unbridled powers to arrest their fellow citizens without having to abide by the same fundamental constitutional requirements as tax dollar-financed officers performing the exact same core police functions?

- Why should bounty hunters be allowed to maim the national public interest by wielding even more power than is permitted police officers under the United States Constitution, without any of the constitutional responsibilities of such officers?

Perhaps some of the bounty hunter and bail company representatives invited to testify will provide different answers, but we think the bill before you rightly answers these questions:

- There is *no reason consistent with the national public welfare; and*

- They should *not*.

H.R. 3168 will ensure that Americans do indeed have the right to be secure in their persons and in their homes, and that they are protected from *all arrests made in violation of their fundamental constitutional rights*. Bounty hunter arrests, and the often violent acts that accompany them, would be no exception under the new law.

II. *How Can It Be* That Bounty Hunters and Bail Bonding Companies Employing Them Are Above the Law?

I understand that another witness at this hearing, Jonathon Drimmer, will be submitting for the record his excellent law review article on the subject of bounty hunting. I will not repeat his thoughtful and exhaustive treatment of how it is current law allows privatized law enforcement officers to operate above the law. I will simply spotlight the key points, and our position on them.

Bounty Hunter Jurisprudence Is Outside the Bounds of Modern Civil Rights Law

The general, anomalous rule under the majority of current civil rights cases is that bounty hunters and their bondsmen employers are not considered state actors, despite their performance of essential law enforcement functions for the financial benefit of the states' criminal justice systems. The law persists in following turn of the century case law defining them as "purely private actors." Indeed, this has remained the general rule despite the rapidly increasing state reliance on bondsmen and bounty hunters to perform essential law enforcement functions.

Why? It is the odd consequence of courts blindly clinging to illogical precedent -- refusing to root out of the law, in this one area, antiquated decisions unduly elevating private property, including contracts, as primary to all other fundamental American rights. *See e.g., Taylor v. Taintor,* 83 U.S. 366 (1873); In re *Von Der Ahe*, 85 F. 959, 960 (C.C.W.D. Pa. 1898) (holding that the powers of bondsmen and bounty hunters arise "only" from private contract). *But see Jackson v. Pantazes,* 810 F.2d 426 (4th Cir. 1987) (refusing to grant bondsman's motion for summary judgment in Section 1983 case brought by victim of excessive force, because the bondsman was performing acts as part of a symbiotic relationship with the state of Maryland criminal court system, and was thus a state actor for purposes of those acts).

The result of the general rule is that victims are discouraged from even seeking relief by an unreasonably difficult and sparse landscape of rights and remedies against bounty hunter abuses. This anachronistic aspect of law thrives despite its conflict with the general civil rights law as to privatized law enforcement officers and debt collectors.

This is the point of H.R. 3168. In all other areas of law, such illogical precedents have been discarded. Congress needs to step in now and clarify that the Fourth Circuit U.S. Court of Appeals ruling in *Jackson* reflects civil rights *fact* as to bounty hunters when they are engaged in core police functions. This would bring consistency and uniformity to this important area of privatized criminal justice services. It would bring this category of civil rights cases in line with those that are essentially similar. *See e.g., West v. Atkins*, 487 U.S. 42, 56 (1988) (declaring that a state's contracting of medical care for inmates does not relieve the state of its duties under the Eighth Amendment); *Williams v. United States*, 341 U.S. 97, 99-100 (1951) (indicating that private, licensed individuals can be state actors when exercising police-like powers); *NLRB v. Jones & Laughlin Steel Corp*., 331 U.S. 416, 429-430 (1947) (holding that deputized security guards are state actors when performing official functions).

III. Why National Congress Must Act

The civil rights problems of the industry are national in scope. Probably the best evidence of this fact is the geographically diverse victim witness panel at this hearing, as well as the tragic Buffalo, New York case involving bounty hunters from Maryland, which a city police commissioner will be telling you about.

The individual states suffer from a conflict of interest that keeps them generally from doing much about these problems. They have a vested financial interest in low-cost, or no-cost, bounty hunting for the benefit of their criminal justice bail systems.

There have emerged a few state efforts to respond to the problem of untrained, unregulated bounty hunting, despite the fiscal conflict of interest. Some state efforts take the very approach

reflected in H.R. 3168, with respect to their own limited jurisdictions.

For example, on January 10, 1997, the Connecticut legislature saw introduction of Connecticut House Bill 5288, which, like H.R. 3168, specifies that bounty hunters are state actors when they are performing core law enforcement functions. The bill "[p]rovides real remedies to persons who are victimized by the actions of bounty hunters and requires bounty hunters to be bound by the same standards as police officers when they act in a similar capacity in returning bail jumpers to custody." The Pennsylvania legislature has the same type of bill before it. Pending Pennsylvania Senate Bill 1113, introduced September 24, 1997, also states that bounty hunters must abide by the same constitutional restraints as police officers. Copies of these state bills are attached for your convenience.

Still, aside from the financial conflict of interest problem, which deters most states from undertaking legislative efforts, the states are *incapable* of applying *basic federal constitutional standards* to bounty hunters and the bail bond companies that employ them. Only the national Congress has the ability to so act.

IV. How H.R. 3168 Will Improve Current Law

A. *State Actor for a Limited Purpose*

Once the national civil rights law is clarified by Congress, bounty hunters will be deemed state actors for the limited purposes of their police-like functions. The national civil rights laws, as generally developed by the federal courts, will apply to their police actions. This law will apply to all bounty hunters, no matter where they travel or whom they harm. It will protect all citizens harmed by reckless bounty hunters and the bail bond companies that unreasonably employ them, no matter where the citizens live.

We do not think Congress should, or constitutionally *could*, define the specific constitutional rights case law to be applied by the courts under Section 1983, once the statute is clarified by Congress to apply to bounty hunters. But we think it is clear that the amended statute would define bounty hunters and bondsmen as state actors for limited purposes -- that is, only when they are performing core police functions (i.e., seizures of persons who have skipped bail, and the other core police functions undertaken as essential to making such seizures or arrests). The law is clear that persons and entities may be so defined as state actors for limited purposes.

Under the legislation, the bounty hunter or bondsman would not be considered a state actor and would not be subject to Section 1983 jurisdiction and analysis, unless performing essential law enforcement functions. Thus, for instance, the government standards of employment required under Section 1983 will not apply to bounty hunters and bondsmen. Their employment practices are not part of the basic law enforcement functions that bring them under the state actor category

for the limited purposes contemplated by the legislation. Of course, a bondsman, just like any other private employer, is already subject to the general laws against employment discrimination, under Title VII, etc. This would remain true. H.R. 3168 has nothing to say about it.

B. *Fourth Amendment Right to Privacy, Fifth Amendment Right Against Self-Incrimination*

Just like tax dollar-financed police officers performing the exact same functions, the basic Fifth Amendment *Miranda* and Fourth Amendment protections of the citizenry would apply to bounty hunters, when they are performing their core seizure functions. These include the right to be free from unreasonable bounty hunter searches and seizures, the right to "knock and announce" notice essential to the safety of all involved, and the right to be free from coercive, tricky or otherwise unreasonable bounty hunter questioning.

We do not think bounty hunters should be required, at least as a federal law matter, to seek search warrants from state and local authorities in order to do their jobs. The bail contract is their warrant. But they are only supposed to retrieve a bail skipper back to the oversight of the court with jurisdiction over the person, per the bondsman's contract. They should not be in need of, or looking for, evidence of any sort, including incriminating statements. Moreover, any evidence a bounty hunter might happen to see and seize would not be relevant to the bounty hunter's job concern.

Note, though, that the normal rules of search and seizure include the "plain view" doctrine. Thus, evidence not *searched for* by bounty hunters, but rather, *found in their "plain view"* while performing their legitimate police function of seizing a bail skipper, would seem admissible, just as it would be if found by a tax dollar-financed police officer performing the same task. But again, evidence found through such "plain view" should be all that a bounty hunter ever legitimately obtains through the course of his or her work, since, by definition, a bounty hunter is not supposed to be conducting searches, but is only supposed to be retrieving bail skippers.

Another question that has come up is whether *seizure warrants* will be required under H.R. 3168. Some states (e.g., Texas) require bounty hunters to obtain a warrant from a state magistrate, authorizing them to seize a person, before conducting such a seizure. We think this is an additional safeguard that the states should remain free to establish for their citizens. But as long as Americans' *basic* constitutional rights are protected against bounty hunter abuses through the federal civil rights law, we think the decision as to whether to require bounty hunters to secure state seizure warrants should be left up to the states.

In sum, when a bounty hunter is performing the core police functions that make him a state actor for limited purposes under the legislation (making a seizure of the person who has skipped bail), the general Fourth and Fifth Amendment standards will apply. Because the bounty hunter has no legitimate business conducting searches or interrogations, this is essential to protect Americans'

fundamental rights. The federal law already recognizes as much in the current Federal Debt Collection Procedures Act ("FDCPA"), 15 U.S.C. Sections 1692-1692o, which strictly and comprehensively regulates the types of contacts debt collectors may initiate with debtors.

Among its provisions, the FDCPA prohibits collectors from making threats, assaults, and oral or written misrepresentations. The Act also requires that debt collectors offer a "mini-*Miranda"* statement when confronting a debtor, which includes informing the debtor that the collector is seeking to enforce a debt, and that any statements by the debtor can be used against him for that purpose. 15 U.S.C. Sec. 1692 (e)(11). The bounty hunter situation is highly analogous. Bounty hunters *are* debt collectors. They are enforcing the debt owed by the defendant-bail "skipper" to the bondsman, who has employed the bounty hunter to collect that debt on the bail contract. The only difference is that the bounty hunter enjoys vastly greater authorities than do ordinary debt collectors .

V. H.R. 3168 Will *Not* Change Law of State and Local Government Liability

Potential liability will run under this legislation to the bail bond company that has recklessly, dangerously, and unreasonably hired or trained an abusive bounty hunter. But we think it is clear that this bill would not render state and local officials or entities (e.g., municipalities) subject to liability under the federal civil rights laws, for the misconduct of bounty hunters acting as "state actors" for the limited law enforcement functions delineated by the bill.

It is well-established that a state or local authority cannot be held liable simply because it employs a wrongdoer. A municipality cannot be held liable under Section 1983 on a *respondeat superior* theory. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978). Under Section 1983, a local government can be sued for monetary, declaratory or injunctive relief, but *only if* the action that is alleged to be unconstitutional implements or executes "a policy statement, ordinance, regulation, or decision officially adopted and promulgated" by the officers of the relevant government entity, or has been taken "pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." *Monell, id.*, at 690-691. State and local authorities may not be held liable for a mere failure to protect citizens. A pattern or custom of practice by the authorities must have *affirmatively given rise to the harm,* in order to establish the necessary nexus to the municipal or state government authority under Section 1983. *See DeShaney v. Winnebago County Dept. Social Services*, 489 U.S. 189 (1989).

It appears clear that any nexus between state and local government authorities, and bondsmen or bounty hunters, is far too tenuous to subject the authorities to liability for bounty hunter misconduct under current Section 1983 law. And the bill would not change this. Defining bounty hunters as state actors for limited, police function purposes will not render state and local authorities liable for the actions of rogue bounty hunters, over whom (unlike official police

personnel) they bear no affirmative responsibility.

VI. H.R. 3168 Will Not Prevent Due Bail, Nor Bankrupt the Industry

All states place a cap on the amount that the bail bond companies in their jurisdictions may charge accused citizens for bail services. It ranges between seven and ten percent of the total bail amount set by the court. We do not think there is a real risk that any possible increase in insurance premiums for bonding companies, arguably engendered by this legislation, will be passed through to citizens accused who deserve bail. Nor do we think the legislation will result in an unintended consequence of increased jail crowding.

These businesses will get insurance just like all other risky businesses do -- by making sure they conduct themselves with care and in accordance with the law, and hire well-trained personnel. Joint and several liability like that which would be achieved through this measure exists in a few states -- *e.g.*, Florida, North Carolina, and South Carolina. Under this system, the bail bond industries there continue to grow at a healthy rate.

The question is not whether this industry of extraordinary private police powers can continue to be profitable with the addition of minimal federal constitutional safeguards. Rather, the question is whether it should be allowed to make an *unreasonable, unconscionable profit* -- at the direct expense of societal safety and citizen rights. We think this bill gets it right by using market forces to allow the industry to continue growing, but no longer at the undue expense of innocent American lives and liberties.

CONCLUSION

Thank you again for this opportunity to be heard on the need for H.R. 3168. We applaud the legislation. And we look forward to helping Congress in any way we can to bring it into law for the protection of the American People.

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Leslie Hagin is the Legislative Director and Counsel to the National Association of Criminal Defense Lawyers (NACDL). She is a graduate of the University of Texas School of Law.

The National Association of Criminal Defense Lawyers is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers, to ensure justice

and due process for persons accused of crime or other misconduct, and to promote the proper and fair administration of the criminal justice system.

A professional bar association founded in 1958, NACDL's almost 10,000 direct members, and 80 state and local affiliate organizations with another 28,000 members, include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

Neither Ms. Hagin nor NACDL has received any federal grant, contract, or subcontract in the current and preceding two fiscal years.

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