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Special Conservators of the Peace under Code of Virginia § 19.2-13

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In 2004, the Virginia Assembly substantially revised laws regarding the appointment of Special Conservators of the Peace. With the revisions of Virginia Code § 19.2-13, appointments of Special Conservators are now regulated by a state agency, the Virginia Department of Criminal Justice Services (DCJS). Absent licensure by DCJS, Virginia courts may not appoint individuals as Special Conservators. Concurrent with the new criteria for the appointment of Special Conservators, the Virginia Assembly enacted legislation ending the use of Special Police within the Commonwealth.

This monograph discusses the evolution of Special Conservators of the Peace under common law and Virginia statute and is intended as a resource for the courts, police and private industry in understanding the authority and intended functions of Special Conservators of the Peace.

I. What are Conservators of the Peace?

A Conservator of the Peace is defined as a public official authorized to conserve and maintain the public peace.[1] Under common law, Conservators of the Peace included judges[2], police, sheriffs, and constables[3]. Virginia Code specifically lists Virginia judges,

[1] BLACK'S LAW DICTIONARY, 6th ed.

[2] "In England, by the common law, the Lord Chancellor and all the Judges of the Court of King's Bench, among other high officials, by virtue of their offices, are general conservators of the peace throughout the whole kingdom, and may commit all violators of the peace, or bind them in recognizances to keep it; but the other Judges are only so in their own Courts. 1 Black. COMM., 350." In re Glenn, 54 Md. 572, 597-598 (1880). "…it is repugnant to the concept of a judge, sworn to uphold the law, that he be required to observe the commission of a breach of the peace in his presence and be powerless to prevent it. Such a concept demeans his office and public regard for it." City of Lincoln Park v. Sigler, 28 Mich. App. 410, 413 (1970). *See also* In re Colacasides, 379 Mich. 69, 91 (1967); In re Slattery, 310 Mich. 458, 466 (1945).

magistrates, commissioners in chancery, Commonwealth Attorneys, various United States government agents and some other specific law enforcement officers and investigators as Conservators of the Peace.[4]

> The king is mentioned as the first. Then come the chancellor, the treasurer, the high steward, the master of the rolls, the chief justice ant the justices of the King's-bench, all the judges in their several courts, sheriffs, coroners, constables; and some are said to be conservators by tenure, some by prescription, and others by commission.[5]

Members of a police force of a locality in Virginia are "hereby invested with all the power and authority which formerly belonged to the office of constable at common law and are responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances."[6]

> Sheriffs are, *ex officio*, conservators of the peace within their respective counties, and it is their duty, as well as that of all constables, coroners, marshals and other peace officers, to prevent every breach of the peace, and to suppress every unlawful assembly, affray or riot which may happen in their presence[7]

As Conservators of the Peace, police have long had the authority to order groups of persons threatening the public peace to disperse, or to arrest without a warrant for a breach of the peace.

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[3] "A constable and sheriff are conservators of the peace at the common law." Commonwealth v. Gorman, 288 Mass. 294, 296-297 (1934) (quoting Sharrock v. Hannemer, Cro. Eliz. 375, 376 (1595)). "A policeman is an officer whose duties have been, for local convenience, carved out of the old duties of constable, and the constables were always part of the general force at the disposal of the sheriff. There is no division of authority into those of the sheriff and the police. Each is a conservator of the peace possessing such power as the statutes authorize." State ex rel. McKittrick v. Williams, 346 Mo. 1003, 1014-1015 (1940).
[4] CODE OF VIRGINIA § 19.2-12.
[5] Entick v. Carrington, 19 Howell's STATE TRIALS, 1029, 1061 (1765).
[6] CODE OF VIRGINIA § 15.2-1704.
[7] J. Crocker, DUTIES OF SHERIFFS, CORONERS AND CONSTABLES § 48, 33 (2d ed. rev. 1871)

> It is hereby made the duty of the Police Force at all times of day and night, and the members of such Force are hereby thereunto empowered, to especially preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful or dangerous assemblages, and assemblages which obstruct the free passage of public streets, sidewalks, parks and places.[8]

Members of the Commonwealth's State Police, Sheriffs and members of any duly constituted local police force may make an arrest without a warrant of "any person who commits any crime in the presence of the officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence."[9]

> Police officers are not, and have never been, simply enforcers of the criminal law. They wear other hats -- importantly, they have long been vested with the responsibility for preserving the public peace. *See, e.g.*, O. Allen, DUTIES AND LIABILITIES OF SHERIFFS 59 (1845) ("As the principal conservator of the peace in his county, and as the calm but irresistible minister of the law, the duty of the Sheriff is no less important than his authority is great"); E. Freund, POLICE POWER § 86, p. 87 (1904) ("The criminal law deals with offenses after they have been committed, the police power aims to prevent them. The activity of the police for the prevention of crime is partly such as needs no special legal authority"). Nor is the idea that the police are also peace officers simply a quaint anachronism. In most American jurisdictions, police officers continue to be obligated, by law, to maintain the public peace.[10]

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[8] Manual Containing the Rules and Regulations of the Police Department of the City of New York (1887), RULE 414. Quoted in City of Chi. v. Morales, 527 U.S. 41, 108-109 (1999) Thomas, J., dissenting.

[9] CODE OF VIRGINIA § 19.2-81.

[10] Morales, 527 U.S. at 106-107 (citing ARK. CODE ANN. § 12-8-106(b) (Supp. 1997) ("The Department of Arkansas State Police shall be conservators of the peace"); DEL. CODE ANN. Tit. IX, § 1902 (1989) ("All police appointed under this section shall see that the peace and good order of the State . . . be duly kept"); ILL. COMP. STAT. ANN. ch. 65, § 5 11-1-2(a) (Supp. 1998) ("Police officers in municipalities shall be conservators of the peace"); LA. REV. STAT. ANN. § 40:1379 ("Police employees . . . shall . . . keep the peace and good order"); MO. REV. STAT. § 85.561 (1998) ("Members of the police department shall be conservators of the peace, and shall be active and vigilant in the preservation of good order within the city"); N. H. REV. STAT. ANN. § 105:3 (1990) ("All police officers are, by virtue of their appointment, constables and conservators of the peace"); ORE. REV. STAT. § 181.110 (1997) ("Police to preserve the peace, to enforce the law and to prevent and detect crime"); 351 PA. CODE Art. V, ch. 2, § 5.5-200 ("The Police Department . . . shall preserve the public peace, prevent and detect crime, police the streets and highways and enforce traffic statutes, ordinances and regulations relating thereto"); TEXAS CODE CRIM. PROC. ANN., Art. § 2.13 (Vernon 1977) ("It is the duty of every peace officer to preserve the peace within his jurisdiction"); VT. STAT. ANN., Tit. 24, § 299 (1992) ("A sheriff shall preserve the peace, and suppress, with force and strong hand, if necessary, unlawful disorder")).

II. The historical origins of the Conservator of the Peace

Under early Saxon law, each county or shire in England was divided into an indefinite number of *hundreds*, each composing ten groups of ten families governed by a constable with his own court. Each member of the group and subgroup was individually responsible for preserving the peace and apprehending criminals.

> Let him who takes a thief, or to whom one taken is given, and he then lets conceals the theft, pay for the thief according to his *wer*. If he be an *ealdorman*, let him forfeit his shire, unless the king is willing to be merciful to him.[11]
>
> That a thief shall be pursued.... If there be present need, let it be made known to the *hundredman*, and let him make it known to the *tithingmen*; and let all go forth to where God may direct them to go. Let them do justice on the thief, as it was formerly the enactment of Edmund.[12]
>
> And the man who neglects this, and denies the doom of the hundred, and the same be afterwards proved against him, let him pay to the hundred xxx. pence; and for the second time lx. pence, half to the hundred, half to the lord. If he do so a third time, let him pay half a pound; for the fourth time, let him forfeit all that he owns, and be an outlaw, unless the king allow Him to remain in the country.[13]

In 920 AD, King Edward the Elder set forth that the Reeve or *gerefa* of the shire should hold court each month to try cases of both civil and criminal matters. The modern term "sheriff" originates from the Saxon "shire reeve" and the term *gerefa*.[14] The Reeve was the earliest public official charged specifically with keeping the King's peace.

> I will that each reeve have a *gemot* always once in four weeks, and so do that every man be worthy of folk-right; and that every suit have an end, and a term when it shall be brought forward. If that any one disregard, let him make *bot* as we before ordained.[15]

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[11] Laws of Ine, King of Wessex, (cir. 690), Cap. 36.
[12] Ordinances of Edgar (cir. 959-975) § 2.
[13] Ibid. § 3.
[14] 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 339, 343 (1541).
[15] Edward the Elder (cir. 920), Cap. 11. While the court was held every month, the reeve would visit a particular court only every six months. Great Britain, FIRST REPORT OF THE COMMISSIONERS APPOINTED TO INQUIRE AS TO THE BEST MEANS OF ESTABLISHING AN EFFICIENT CONSTABULARY FORCE IN THE COUNTIES OF ENGLAND AND WALES 360 (1839).

The Norman invasion of England in 1066 disrupted the Saxon *hundreds* system, and eventual disregard for collective responsibility in conserving the peace led to relaxed requirements for the King's subjects to appear at each session of court. The baronage and clergy were no longer required to appear unless specifically required, and persons having matters before the court could have attorneys appear on their behalf.[16] In response to the loss of this collective responsibility, Henry III appointed four specific knights in each county deemed responsible for conserving the peace.

> The King to Alured de Lincoln, Ivo de Rocheford, John de Strods, and William de Kaymens, of the county of Dorset, greeting: Whereas, in our Parliament lately holden at Oxford, it was ordained, that all excesses, transgressions, and injuries, done in our realm, should be inquired into by four knights of each county, that (the truth thereof being known) those offences might be more easily corrected; which same knights should take their corporal oaths, in the full county court, or (if such county court be not speedily held) before the sheriffs and coroners; as we have enjoined all our sheriffs faithfully to take such inquisition as aforesaid, we command you, by the fealty you owe us, that, having yourselves, first taken the oath beforementioned, by the oaths of good and lawful men of the county aforesaid, by whomsoever and upon whomsoever lately perpetrated; and this as well concerning justices and sheriffs as our bailiffs and other persons whatsoever. And such inquisition, under your own seals, as well as those of the jurors, you shall bring to Westminster, in the octaves of St. Michael, to be delivered by our own hands to our council there. Moreover, we have commanded our sheriff of the aforesaid county, that, having taken your oaths in form aforesaid, he cause good and lawful men, by whom the said inquisition may be best made, to come before you, at such days and places as you may appoint.[17]

The specific term "Conservator of the Peace" came into being upon the codification and expansion of the authority of the office under Henry III's son, Edward I[18]. Under Edward I, Conservators of the Peace were not only charged with keeping the peace, but where also given the authority to try certain offenses previously heard by the Reeve's court.

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[16] COMMISSIONERS' REPORT at 363.
[17] Ibid. at 362.
[18] Edward I did not continue the numbering of the pre-Norman Edward kings.

These itinerant judges were the earliest historical predecessors to the Justice of the Peace. Conservators of the Peace appointed under Edward I were considered to be in positions of great public trust and social stature.

> Edward, Earl of Cornwall, was appointed conservator of the King's peace for the counties of Middlesex, Essex, Hertford, Cambridge, Huntingdon, Norfolk, Suffolk, Kent, Surrey, Oxford, Bedford, Bucks, Berks, Northhampton, Lincoln, and Rutland; and the various sheriffs, nobles, knights, and other persons in those counties, are commanded to assist the Earl, and those whom he shall depute under him to keep the peace. Rot. Walliæ[19] 10 EDW. I. m. 9.
>
> Richard de Amundeville was in the same year appointed conservator of the peace, together with the sheriff, in the county of Warwick; but the sheriff was to take counsel and direction from Richard de Amundeville as to what he did for the better preservation of the peace. Rot. Pat.[20] 10 EDW. I. m. 8.
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> Besides the above exalted personages, others were commissioned in the same year to go into counties, for the purpose of making inquiries concerning those who were indicted for infractions of the peace, and other offences, and of apprehending all those found guilty, and delivering them to the sheriff, to be kept in ward until the King should further direct. Rot. Pat. 10 EDW. I. m. 8.[21]

Immediately after the death of Edward I and the accession of Edward II in 1307, officers were appointed in every county in England as Conservators of the Peace. Their commissions stated that they shall constantly reside within their respective counties, visit every place therein and the King's laws shall be strictly observed. If any disturbances occur, the Conservators are to raise the *posse comitatus*, arrest the offenders and keep them in custody until the King shall further direct. [22]

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[19] *Rotuli Walliae*, the Scrolls of Wales (Cir. 1281).
[20] *Rotuli litterarum patentium*, the Patent Scrolls (Cir. 1201-1216).
[21] COMMISSIONERS' REPORT at 363, note ‖.
[22] Ibid. at 366.

Edward III strengthened the office and authority of the Conservator of the Peace, but not necessarily for any altruistic interest in maintaining the public peace.

> In the reign of Edward III, an act of parliament ordained "that in every shire of the realm good men and lawful which were no maintainers of evil nor barrators in the county, should be assigned to keep the peace, …to repress all intention of uproar and force even in the first seed thereof and before that it should grow up to any offer of danger." Lambard, book 1, ch. 4; 2 Hale, P. C., ch. 7, note 1. The real purpose of this act seems to have been to enable the king, Edward III, to appoint men upon whom he could rely in the different counties, to repress any effort of the people to release his father, Edward II, from prison.[23]

When the English colonists settled at Jamestown in 1607 they brought not only the common customary law of England, but the law as modified by English statutes of general operation up to that time.[24]

> We see here, at the beginning of permanent civilized life on this continent, not only the contemplation of and provision for civil offices among the colonists, but also the practical application of the principle of local self-government, a principle of Anglo-Saxon derivation which, surviving the Norman Conquest, has always obtained, to a great and increasing extent, in England, and has ever been one of the fundamental principles of civil liberty in the rise, growth and progress of governments and governmental institutions in America.[25]

With formation of government within the American colonies, the offices of sheriff, justice and constable were adopted from the English common law and the English ordinances. A warrant issued by a Native American magistrate directed an early colonial constable to arrest a suspect.

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[23] In re Barker, 56 Vt. 14, 20 (1884).
[24] In re Sanderson, 289 Mich. 165, 173 (1939) (citing Penny v. Little, 3 SCAM. (4 Ill.) 301; Crake v. Crake, 18 Ind. 156; Lavalle v. Strobel, 89 Ill. 370; 1 Kent, COMMENTARIES (14th Ed.) 472, 473; 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1st Ed.) 367-430).
[25] Allor v. Board of Auditors, 43 Mich. 76 (1880), Brief for the realtor at 24.

> 1. I, Hidondi. 2. You, Peter Waterman. 3. Jeremy Wicket. 4. Quick you take him. 5. Fast you hold him. 6. Straight you bring him. 7. Before me, Hidondi.[26]

A minister from a Massachusetts Bay colony described an arrest warrant that was served by early American constables in a private home in 1651.

> On Sunday after their arrival, 'not having freedom in our spirits,' says Clark, 'for want of a clear call from God to go unto the public assemblie to declare there what was the mind, and counsel of God concerning them,' he 'judged it a thing suitable' to hold divine service in the house and with the family of Witter, and four or five others who came in to join their worship. While thus engaged, there came in two constables with a warrant for their arrest. A request to finish the services was denied, and 'the erroneous persons being strangers,' whom the writ of Justice Bridges commanded should be brought before him in the morning, were marched off as prisoners--bail being refused--to the inn for safe keeping.[27]

The Commonwealth's adaptation of the ancient common law office of Conservator of the Peace was described by the Virginia Supreme Court in 1923.

> The office of conservators of the peace is a very ancient one, and their common law authority to make police inspection, without a search warrant, extends throughout the territory for which they are elected or appointed, as the case may be, in private as well as in public places, and upon private as well as public property, unless inhibited from entry for such purpose without a search warrant by some rule of the common law, or by the Constitution, or by statute. It was provided in EDW. III, ch. 15, that "in every shire of the realm good men and lawful, which are no maintainers of evil nor barretors [sic] in the county, shall be assigned to keep the peace;" of which it was said that this "was as much as to say that in every shire the King himself should place special eyes and watches over the people, that should be both willing and wise to foresee, and should be also enabled with meet authority to repress all intention of uproar and force even in the first seed thereof and before that it should grow up to any offer of danger." This was but declaratory of the common law authority of conservators of the peace. That authority could not have been at all efficiently exercised if a search warrant had had to be first obtained before any entry could have been lawfully made upon any land in private tenure.

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[26] Ibid. (citing C. Elliott, THE NEW ENGLAND HISTORY 1:326); Bryant, W., POPULAR HISTORY OF THE UNITED STATES 540, note 1 (1888).
[27] Allor, Brief for the realtor at 25 (citing 2 W. Bryant, HIST. U.S. 106).

> And while the duties and powers of police officers are, in modern times, largely defined and regulated by statute, it is elementary that the common law may be relied on to supply many incidents (of their powers), "and others are based on what may be necessarily implied from the powers expressly conferred."[28]

III. Police, Sheriffs and Constables

Among these Conservators of the Peace, the offices of Police, Sheriffs and Constables require some definition and distinction. In Virginia, the Sheriff is an elected constitutional officer[29] who operates independently of the state and local government.[30] While Sheriffs in Virginia may serve writs of civil process[31], Police generally do not have any authority in civil matters.[32] While Sheriffs and Constables are repeatedly referenced in the common law, Police are relatively recent in origin.[33]

> While the old writers do not, in express terms, speak of police officers as among those who have the right as conservators of the peace to make arrests without warrant, they do refer to a class of officers, conservators of the peace, as having that right. It is said in 1 East's PLEAS OF THE CROWN, 314, "With regard to such ministers of justice who in right of their offices are conservators of the peace, and in that right alone interpose in the case of riots and affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties concerned should have some notice of the intent with which they interpose. If the officer be within his proper district and known, or but generally acknowledged to bear the office he assumes; or if in order to keep the person he produces his staff of office or any other known ensign of authority," etc. This is a declaration of the rights of conservators of the peace, and we take it that when new officers of that

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[28] McClannan v. Chaplain, 136 Va. 1, 12-13 (1923) [internal citations and notations omitted]. *See also* Muscoe v. Commonwealth, 86 Va. 443, 447 (1890) ("By the general laws of the state, which upon this subject, are, for the most part, the common law, a constable may, *virtute officii*, without warrant, arrest for felony, or upon reasonable suspicion of felony, and for misdemeanors committed in his presence, and take the offender before a magistrate to be dealt with according to law.")

[29] VIRGINIA CONST. Art. VII, § 4 (2006).

[30] Sherman v. Richmond, 543 F. Supp. 447, 449 (D. Va. 1982).

[31] CODE OF VIRGINIA § 8.01-293.

[32] CODE OF VIRGINIA § 15.2-1704 (B).

[33] The word "police" was originially a French derivative of the Greek "polis" meaning "city" from which the English words "policy" and "politics" are derived. The English adopted the word "police" from the French sometime during the 16th Century, originally to describe civil organization or public policy in general.

> class are created they come within the reason of the principle, and should have the same protection as those formerly existing.[34]

It is important to understand the evolution of municipal police when considering their present roles as Conservators of the Peace. The earliest instance of a public police force in the English speaking world was the City of Glasgow Police in Scotland.[35] A force of eight officers was first established in 1779 but later failed for lack of finances.[36] In 1788, a "committee of council" consisting of six magistrates attempted to reestablish the force. This committee produced a report which established innovative concepts distinguishing a new sworn, proactive police force from the city's existing militia, night watchmen and unpaid citizen constables. The committee recommended the appointment of an "Intendent of Police" and uniformed police officers. Each of the officers would wear numbered badges with the word "Police" inscribed thereupon and would swear an "oath for the faithful execution of their duty" and make a bond for "their honest and faithful behaviour" during the time they were in office.[37] The committee unsuccessfully sought an Act of Parliament to levy a household tax to pay them.[38]

The 1795 book by Glasgow magistrate Patrick Colquhoun, "A Treatise on the Police of the Metropolis" adopted key points of the committee of council report and is widely considered to be the first academic work to discuss the concepts of professional preventative policing.

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[34] State v. Bowen, 17 S.C. 58, 60-62 (1882).
[35] A. Dinsmor, "Glasgow Police Pioneers" POLICE HISTORY SOCIETY JOURNAL (November 15, 2000).
[36] Ibid., citing EXTRACTS OF RECORDS OF BURGH OF GLASGOW, Vol.VII, pp. 544, 545-7 and 589 (1760-1780).
[37] Ibid., citing MINUTES OF THE CITY OF GLASGOW MAGISTRATES COMMITTEE, p. 139-149 (December 10, 1788).
[38] The Glasgow Police Act was passed in 1800. *Georgii III Regis*, Cap. 88 (1800).

> Watchmen and Patroles, instead of being, as now of comparatively of little use, from their *age*, *infirmity*, *inability*, *inattention*, or *corrupt practices*, might almost at the present expence, by a proper selection, and a more correct mode of discipline, by means of a general superintendance over the whole to regulate their conduct, and keep them to their duty, be rendered of great utility in preventing Crimes, and in detecting Offenders.[39]

These concepts were incorporated by a member of the British Parliament, Robert Peel, in formulating the London Metropolitan Police at Scotland Yard in 1829. The uniformed officers of this new department were originally derogatorily referred to as "Peelies" or "Peelers" before the term using Peel's first name instead, "Bobbies" became widely accepted. The nine Peelian principles that sought to ensure an ethical and accountable police force were as follows:

1. The basic mission for which the police exist is to prevent crime and disorder.
2. The ability of the police to perform their duties is dependent upon the public approval of police actions.
3. Police must secure the willing co-operation of the public in voluntary observation of the law to be able to secure and maintain the respect of the public.
4. The degree of co-operation of the public that can be secured diminishes proportionately to the necessity of the use of physical force.
5. Police seek and preserve public favor not by catering to public opinion, but by constantly demonstrating absolute impartial service to the law.
6. Police use physical force to the extent necessary to secure observance of the law or to restore order only when the exercise of persuasion, advice, and warning is found to be insufficient.
7. Police, at all times, should maintain a relationship with the public that gives reality to the historic tradition that the police are the public and the public are the police; the police being only members of the public who are paid to give full-time attention to duties which are incumbent upon every citizen in the interests of community welfare and existence.
8. Police should always direct their action strictly towards their functions, and never appear to usurp the powers of the judiciary.

[39] P. Colquhoun, A TREATISE ON THE POLICE OF THE METROPOLIS 7th Ed. 106 (1806) [emphasis in the original, footnote omitted].

9. The test of police efficiency is the absence of crime and disorder, not the visible evidence of police action in dealing with it.[40]

In the United States prior to the formation of the London Metropolitan Police, law enforcement in rural areas was handled by a "fee-for-service" sheriff paid by the number and types of criminals caught, subpoenas served, and tax dollars collected.

> By the common law, no officer, whose office relates to the administration of justice could take any reward for doing his duty, but what he was to receive from the king. This law was considered of so much honor to the king, and conduced so much to the welfare of the subject, that all prescriptions whatsoever, contrary to it, were holden void. Though there might be certain fees allowed by custom, yet the custom like all others, must be reasonable. The reason of this rule probably arose from the exalted rank of the sheriff… and from the high dignity of his being the immediate representative of majesty itself, in executing the laws in the different counties in England. The reason of the rule has now ceased; and it is generally admitted that, at the present time, the office of sheriff is sought after, more for the profit accruing from its various duties, than for any distinction conferred upon the successful incumbent. [41]

Towns also used a fee-for-service system to pay constables working for the court to serve subpoenas and make arrests. The constable in turn hired and delegated responsibilities to a team of night watchmen."[42]

Upon the evident success of the London Metropolitan Police, large cities in the United States began to adopt at least some of the more superficial elements of the London model, starting with Boston in 1838, New York in 1844 and Philadelphia in 1854.

> London's officers were civil servants created by the British Constitution, sworn to keeping peace by peaceful means. The U.S. Constitution, in contrast, makes no explicit mention of police. Police departments in the United States hired their officers locally through a system of ward bosses operating under mayoral patronage. Municipal police in the United States operated with considerably more

[40] C. Reid, SHORT HISTORY OF THE BRITISH POLICE (1948).
[41] O. Allen, DUTIES AND LIABILITIES OF SHERIFFS 347 (1845) [internal citations omitted].
[42] 2 B. Forst, "The Privatization and Civilianization of Policing", CRIMINAL JUSTICE 2000 27.

> informal discretion and less formal authority than Peel's officers. They were not given the training, effective supervision, or job security that were part and parcel of policing in London's MPD. They were typically dismissed when their ward chief or mayor failed to win reelection. Both systems were public and the officers uniformed, but the systems differed dramatically from one another in effectiveness and legitimacy.[43]

Unlike the Sheriff, the law enforcement functionary of the judiciary, these new police forces were under the control of the executive branch of government with courts having little or no control over them. The traditional Conservators of the Peace had their law enforcement functions usurped from them. "Constables became servers of court orders; sheriffs became jailkeepers."[44]

Abuses of the political patronage system and a lack of professionalism within these new American police departments led to reform movements in the later part of the 19th Century. Starting in 1894, the New York State Senate began investigating police corruption in New York City. The committee, named after State Senator William Lexow, discovered city police involvement in extortion, bribery, counterfeiting, voter intimidation, election fraud, and brutality, and recommended major reforms to the department.[45] Theodore Roosevelt was appointed president of the New York City Police Commission the following year.[46] Roosevelt was largely responsible for shifting the New York City Police Department away from a political patronage system and creating a civil service system more consistent with the Peelian Principles.

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[43] Ibid. at 28.
[44] Ibid. at 29.
[45] M. Johnson, STREET JUSTICE, A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY 52 (2003).
[46] T. Roosevelt, AN AUTOBIOGRAPHY, IV:1 (1913).

> The first fight I made was to keep politics absolutely out of the force; and not only politics, but every kind of improper favoritism. Doubtless in making thousands of appointments and hundreds of promotions there were men who contrived to use influence of which I was ignorant. But these cases must have been few and far between. As far as was humanly possible, the appointments and promotions were made without regard to any question except the fitness of the man and the needs of the service.[47]

One unfortunate result of the "professional" movement in American policing was the efforts of police reformers to distance police from the public, contrary to both the common law traditions of collective responsibility and the Peelian principles of public policing. In seeking a formalistic and effective entity for the suppression of crime, municipal police organizations, which indeed originated from nightwatchmen, elevated themselves from their private counterparts.[48] "Police professionals had created a climate in which policing became widely regarded as a legitimate State monopoly."[49]

In part as a result of this move towards municipalities being considered the sole provider of law enforcement services, the office of Constable became anachronistic in the United States. Constables were traditionally neither subservient to the Executive or the Judiciary, they were independent officers with the same common law authority to make arrests for offenses occurring in their presence.[50] "[T]he constable . . . hath great original

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[47] Ibid. at 12.
[48] Forst at 31.
[49] Ibid. [internal quotation omitted].
[50] "The word constable is frequently said to be derived from the Saxon *koning-stapel*, and to signify the support of the king. But as we borrowed the name, as well as the office of constable, from the French, I am rather inclined to deduce it, with Sir Henry Spelman and Dr. Cowel, from that language, wherein it is plainly derived from the Latin comes *stabuli*, an officer well known in the empire, so called because, like the great constable of France, as well as the lord high constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms which were performed on horseback." 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 355 (1541).

and inherent authority with regard to arrests…"[51] It can be reasonably asserted that because of its independence from any chain of command, the office of the Constable became problematic as a form of law enforcement in modern times .

> A police force is an organization; it has a controlling mind, by which its members may be made to act in concert; while the constable acts upon his own responsibility and his own conception of his legal duties. It needs no argument to show that the former, and not the latter, is adapted to city government.[52]

While the Office of High Constable still exists in the City of Norfolk[53], it has been eliminated or absorbed into the Sheriff's Office in other jurisdictions in Virginia. The Code of Virginia speaks specifically to the replacement of Constables by police.

> The police force of a locality is hereby invested with all the power and authority which *formerly* belonged to the office of constable at common law…[54]

By the end of the 1960's, the professional policing model faced a substantial backlash, blamed in part for alienating the public from police in the United States.

> The Professional Era of policing, which had built its reputation on widely publicized victories over notorious gangsters, faced a more daunting test starting in the mid-1960s—a crime explosion coupled with severe urban unrest. By most accounts, "professionalism" failed that test. A major contributing factor to the eruption of crime was the emergence of baby boomers—children born after the return home of military personnel from World War II—into the peak offending ages of 15 to 24. For the decade starting in 1963, the homicide rate doubled and the robbery and burglary rates more than tripled, with large increases in virtually every other crime category. Meanwhile, riots broke out in New York in 1964, in

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[51] Atwater v. City of Lago Vista, 532 U.S. 318, 329-330 (2001) (quoting 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 289 (1541)).
[52] White v. Board of Supervisors., 105 Mich. 608, 614-615 (1895).
[53] CITY OF NORFOLK ORDINANCE § 129. The Sheriff of Virginia Beach concurrently holds the title of High Constable.
[54] CODE OF VIRGINIA § 15.2-1704 (A) [emphasis added]. In 1904, the predecessor statute curiously read, "The officers and privates constituting the police force of the cities and towns of the Commonwealth of Virginia shall be, and they are hereby, invested with all the power and authority which *now* belong to the office of constable at common law…" CODE OF VIRGINIA § 1017 (a) (1904) (as cited in Haynes v. Commonwealth, 104 Va. 854, 856 (1905) [emphasis added].

> the Watts area of Los Angeles the following year, in Newark and Detroit in 1967, and in Washington, D.C., in 1968 following the assassination of Martin Luther King, Jr.[55]
>
> Professionalism did not invent brutality, but the ironic distancing of *public* police from the community generated alienation and mutual disrespect. The notion that police were the experts contributed to police arrogance, a sense that members of the community were inferior.[56]

In response to the difficulties presented by the "professional" model in the United States, the 1990's brought forth the "new" concept (in fact, as discussed *supra*, a very ancient one) of community empowerment policing. With scientific studies demonstrating that increased police patrols in squad cars did not reduce crime, police administrators began to seek ways to increase non-confrontational police contact with citizens, including foot patrols and outreach programs.

> The general idea for a new style of policing was to return to much of what was good about an earlier, more truly public style of policing. This meant getting closer to the community, not only to improve relations between the police and community - a worthy end in itself - but also to become more familiar with the problems that were unique to specific areas and develop contacts that would help the police, in *partnership* with the public, both to prevent and solve crimes.[57]
>
> Above all, the community policing movement amounts to a return to fundamental democratic principles of governance: that the police *serve* the public, that they are *accountable* to the public, and that the public has a *voice* in determining how the police will serve them.[58]

[55] Forst at 31.
[56] Ibid. at 32 [emphasis in the original].
[57] Ibid. at 33 [emphasis in the original].
[58] Ibid. [emphasis in the original].

IV. What is the reasoning behind changing the requirements for appointment of Special Conservators of the Peace?

There is an increasing demand in the United States for police services sourced from non-traditional providers, in part because of the failures of the "professional" policing model and a traditional monopoly on law enforcement functions being inadequate for the needs of private industry.

> Policing is widely regarded as an exclusively public-sector activity conducted by sworn officers, but a large and increasing share of the aggregate demand for public safety and security is being handled by the private sector and by civilians. As recently as 1965, there were more sworn police officers than private security personnel and vastly more sworn officers than civilians—the number of sworn officers surpassed the number of full-time civilians employed by law enforcement agencies by 8.3 to 1. Within 30 years, the number of private security personnel soared to about triple the number of sworn officers, while the ratio of sworn officers to full-time civilians in law enforcement agencies had declined similarly by a factor of 3, to 2.6 to 1[59]

There is an inherent disconnect between the security needs of private industry and the services provided by municipal governments. Municipal police and Sheriffs have no specific duty to protect an individual or business, their duty is to the public in general.[60] A police department can not be held liable for a non-malicious failure to enforce the law.[61] "No man ever heard of an action brought against a conservator as such…"[62]

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[59] Ibid. at 21 [internal citations omitted].

[60] Whitaker v. Estate of Highsmith, 12 Va. Cir. 490, 497 (Henrico Co., 1982) (citing Mentillo v. County of Cayuga, 2 Misc. 2d 820 (N.Y. Misc. 1956); Wuethrich v. Delia, 134 N.J. Super. 400 (1975); South v. Maryland, 59 U.S. (18 HOW.) 396 (1856); Commercial Union Ins. Co. v. Wichita, 217 Kan. 44 (1975); Massengill v. Yuma County, 104 Ariz. 518 (1969); McGeorge v. Phoenix, 117 Ariz. 272 (1977); Riss v. New York, 22 N.Y.2d 579 (1968); Malerba v. Huntington Bay, 78 A.D.2d 899 (N.Y. App. Div. 1980); Evett v. Inverness, 224 So. 2d 365 (Fla. Dist. Ct. App. 1969); Fusilier v. Russell, 345 So. 2d 543 (La. Ct. App. 1977); Porter v. Urbana, 88 Ill. App. 3d 443 (1980); Trujillo v. City of Albuquerque, 93 N.M. 564 (1979); Bruttomesso v. Las Vegas Metro. Police Dep't, 95 Nev. 151 (1979); Young v. Gossling, 23 Ill. App. 2d 426 (1959)). *See* 74 AM. JUR.2d, *Torts* § 11 (No legal duty to take action to avoid harm to others except in certain special relationships).

[61] South v. Maryland, 59 U.S. (18 HOW.) 396 (1856). *See* 70 AM. JUR.2d, *Sheriffs, Police, and Constables* § 94 (the rule throughout the United States is that there is no liability on the part of a law enforcement officer as a result of an officer's failure to preserve the peace or arrest lawbreakers).

However, an employer, landlord or innkeeper can be held liable for failing to protect its employees, tenants and invitees from known dangers. [63]

> …neither the innkeeper nor the common carrier is an absolute insurer of the guest's or the passenger's personal safety. *See, e.g.*, Crosswhite, 182 Va. at 716, 30 S.E.2d at 674 (innkeeper); Norfolk & Western, 105 Va. at 821, 54 S.E. at 883 (common carrier). Nonetheless, we have held that the duty of care imposed on common carriers is an elevated duty that requires them "'so far as human care and foresight can provide . . . to use the utmost care and diligence of very cautious persons; and they will be held liable for the slightest negligence which human care, skill and foresight could have foreseen and guarded against.'" Norfolk & Western, 105 Va. at 821, 54 S.E. at 883 (quoting Connell v. Chesapeake and Ohio Ry. Co., 93 Va. 44, 55, 24 S.E. 467, 468 (1896)). Given the nature of the special relationship between an innkeeper and a guest, we hold that it imposes on the innkeeper the same potential elevated duty of "utmost care and diligence" to protect a guest from the danger of injury caused by the criminal conduct of a third person on the innkeeper's property.[64]

For example, a large government contractor in Arlington might occupy two high-rise office buildings on either side of a busy roadway. Employees of that contractor must routinely cross that roadway to get to the other building in the course of their business. If there is a problem with motorists speeding through a marked crosswalk between the buildings, the employer may reasonably believe it has some obligation to protect its employees from the dangers of crossing that road. The ordinary recourse would be for the employer to call the County Police and ask that they enforce the traffic regulations on that block. If the County fails to do so, the employer has limited other means to resolve the problem. The area of danger is within public space, not part of the property the employer controls.

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[62] Entick v. Carrington, 19 Howell's STATE TRIALS, 1029, 1061 (1765).
[63] Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970).
[64] Taboada v. Daly Seven, Inc., 2006 Va. LEXIS 30, 19-20 (2006).

While private companies traditionally rely upon uniformed security guards for their general security requirements, security guards have no authority to enforce laws on public space outside the property of their employers.[65] Security guards generally can not take state action or be considered agents of the state.[66] Security guards have "no duty or authority with respect to the general enforcement of public order."[67] They are not subject to the limitations placed upon police officers under the Fourth and Fifth Amendments.

> The duty of giving Miranda warnings is limited to employees of governmental agencies whose function is to enforce the law, or to those acting for such law enforcement agencies by direction of the agencies; . . .it does not include private citizens not directed or controlled by a law enforcement agency, even though their efforts might aid in law enforcement.[68]

Unlike Special Conservators of the Peace, security guards in Virginia are not required to make personal performance bonds and they are not sworn to perform the duties of their office.[69]

> If any single concern is paramount, it is that of *legitimacy.* The sworn oath of police to serve the public at large confers on them an intrinsic legitimacy.[70]

This further disconnect between the capabilities of the traditional security guard and private industry's evolving security needs simply cannot be resolved. Special Conservators of the Peace in Virginia fill this void in meeting private industry's needs

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[65] CODE OF VIRGINIA § 9.1-146. *See* Frias v. Commonwealth, 34 Va. App. 193, 200 (2000). *Cf.* CODE OF VIRGINIA § 46.2-1243 (private security guards may be deputized in some Virginia jurisdictions to issue summonses for handicapped parking violations).
[66] Debroux v. Commonwealth, 32 Va. App. 364, 370 (2000); Coston v. Commonwealth, 29 Va. App. 350, 353 (1999).
[67] Mier v. Commonwealth, 12 Va. App. 827, 833 (1991).
[68] Ibid. at 830 (quoting State v. Bolan, 27 Ohio St.2d 15, 18, 271 N.E.2d 839, 842 (1971)) [internal quotation marks omitted].
[69] *Compare to* CODE OF VIRGINIA § 19.2-13.
[70] Forst at 45 [emphasis in the original].

while still being held accountable to the public. Rather than being solely dependent upon the state regulatory agency to detect and punish misconduct[71], the Special Conservator of the Peace serves at the discretion of the local Circuit Court and that Court has the authority, (as does the Conservator's sponsor) to remove the Conservator from office for such misconduct.

In 2002, the Virginia Assembly took a close look at previous appointments of Special Conservators of the Peace and determined there were vast inconsistencies in the appointment criteria and the terms of the individual appointments between jurisdictions. The SJR 69 study found that large numbers of appointments of Special Conservators of the Peace did not meet existing statutory requirements.[72] Virginia Code provisions for bond requirements, time limitation and qualifications were not uniformly and consistently applied by the appointing courts.[73] Potentially, thousands of persons could have law enforcement powers without any training, liability coverage or qualifications and there was no mechanism to ensure local law enforcement agencies were aware of persons with Conservator powers in their respective jurisdictions.[74]

As a result of these findings, the Virginia State Crime Commission recommended that the Department of Criminal Justice Services "regulate, certify, and register Conservators of

[71] "…existing [private security] licensing institutions are underresourced and ineffective; license revocations are extremely rare." Ibid. at 58.
[72] Virginia State Crime Commission, SPECIAL CONSERVATORS OF THE PEACE AND SPECIAL POLICE 5 (2002). The study found 88% of the orders studied did not have the social security number of the appointee, 17% did not address the duration of the appointment, 11% exceeded the statutory term limitation of four years, 63% did not specify that the duration of the appointment and use of the Conservator powers was contingent on continued employment, 71% did not address the bond requirement. http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/SD122003/$file/SD12_2003.pdf.
[73] Ibid. at 6.
[74] Ibid. at 7.

the Peace as they do private security officers."[75] The Commission recommendations included requiring fingerprint-based background checks, bond or insurance requirements and training standards.[76]

In 2004, the Virginia Assembly implemented these recommendations. All prior appointments of Special Police in Virginia were voided.[77] Any prior appointments of Special Conservators of the Peace not meeting the new registration requirements were voided.[78] The regulation of Special Conservators of the Peace was established within the Department of Criminal Justice Services by the Private Security Services Section, but Special Conservators of the Peace are not private security guards. The Special Conservators of the Peace program is "a separate regulatory program with its own set of regulations."[79]

V. What are the criteria for registration?

An applicant must be at least 18 years of age and be a United States citizen or legal resident alien.[80] Legal presence in the United States must be demonstrated by proper documentation presented to DCJS or a DCJS compliance agent.[81] Each applicant must

[75] Ibid.
[76] Ibid.
[77] CODE OF VIRGINIA § 15.2-1737 (C).
[78] CODE OF VIRGINIA § 19.2-13 (B).
[79] DCJS Information Package regarding Special Conservators of the Peace, http://www.dcjs.virginia.gov/pss/documents/scp/infoPackage.pdf. *See also* Frias, 34 Va. App. 198-200 (Virginia armed security guards are not conservators of the peace).
[80] 6 VIRGINIA ADMINISTRATIVE CODE 20-230-30.
[81] Acceptable documents include: an original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States provided it contains an official seal, an unexpired U.S. Passport, a certificate of U.S. Citizenship or Naturalization, a U.S. Citizen ID Card, a

complete a Fingerprint Application and one fingerprint card to DCJS, together with a payment of $50.00.[82] All applicants submitting a Fingerprint Application must identify any criminal conviction history, other than minor traffic offenses.[83]

> The department may deny a registration in which any person with a criminal conviction for a misdemeanor involving (a) moral turpitude, (b) assault and battery, (c) damage to real or personal property, (d) controlled substances or imitation controlled substances as defined in Article 1 (§ 18.2-247 et seq.) of Chapter 7 of Title 18.2, (e) prohibited sexual behavior as described in Article 7 (§ 18.2-61 *et seq*.) of Chapter 4 of Title 18.2, (f) firearms, or (g) any felony.[84]

Once registered, the applicant must inform DCJS in writing within 10 days after pleading guilty or *nolo contendere* or being convicted or found guilty of any felony or of a misdemeanor.[85] The applicant must notify DCJS of any change of address, email address or telephone number.[86]

Drug testing is accomplished via an independent contractor, National Confederation of Professional Services, Inc.[87] in Newport News, Va. (NCPS). Upon the applicant faxing credit card information to NCPS, the company mails a chain of custody form to the

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U.S. Military DD214, Resident Citizen ID Card (INS I-179) or Resident Alien Card (INS 1-551), U.S. Certificate of Birth Abroad, Report of Birth Abroad of a Citizen of the U.S., a U.S. driver's license, a Social Security Card or U.S. government ID card. DCJS List of Acceptable Documents, http://www.dcjs.virginia.gov/forms/privatesecurity/listOfAcceptableDocs.pdf.

[82] 6 VIRGINIA ADMINISTRATIVE CODE 20-230-31. While the code section specifies two fingerprint cards, DCJS presently only requires and processes one card.

[83] Ibid. Convictions include any plea of *nolo contendere*. The record of a conviction, authenticated in such form as to be admissible in evidence under the laws of the jurisdiction where convicted, is *prima facie* evidence of such conviction. 6 VIRGINIA ADMINISTRATIVE CODE 20-230-40.

[84] Ibid. "Misdemeanor crimes of moral turpitude are limited to those crimes involving lying, cheating and stealing, including making a false statement and petit larceny." Newton v. Commonwealth, 29 Va. App. 433, 448 (1999).

[85] 6 VIRGINIA ADMINISTRATIVE CODE 20-230-51. DCJS must also be timely notified of any non-training related firearms discharge and if the registrant is "found guilty by any court or administrative body of competent jurisdiction to have violated the special conservator of the peace statutes or regulations of that jurisdiction, there being no appeal there from or the time for appeal having elapsed." Ibid.

[86] Ibid.

[87] http://www.ncpsinc.com.

applicant. The applicant then brings the form to a Laboratory Corporation of America Patient Service Center[88], where a urine sample is taken. The applicant then attaches a copy of the form to the application. The cost to the applicant is $41.50. If DCJS denies an application based upon the drug test results, the applicant will be informed in writing by DCJS.[89]

The applicant must complete the minimum training as set forth by the Virginia Criminal Justice Services Advisory Board, unless granted a training waiver or training exemption by DCJS for prior training[90]. The training may not exceed 24 hours for unarmed Conservators and 40 hours for armed Conservators.[91] Once the entry-level training has been successfully completed, the DCJS training school will forward the applicant's training records to DCJS.[92]

The applicant may then make an application with DCJS by completing the required form and paying the initial registration fee of $60.00. The applicant must provide with the application evidence of either a cash bond, or a surety bond executed by a surety company authorized to do business in the Commonwealth, of not less than $10,000, conditioned upon the faithful and honest conduct of his business or employment; or

[88] http://www.labcorp.com/psc/index.html.
[89] 6 VIRGINIA ADMINISTRATIVE CODE 20-230-32.
[90] 6 VIRGINIA ADMINISTRATIVE CODE 20-230-84, *et. seq.*
[91] 6 VIRGINIA ADMINISTRATIVE CODE 20-230-60. Descriptions of the course content are contained within this code section. Firearms training requirements are described in 6 VIRGINIA ADMINISTRATIVE CODE 20-230-80, *et. seq.*
[92] A searchable list of DCJS licensed training schools may be found at http://info.dcjs.virginia.gov/ps /directory/schoolSearch.cfm.

evidence of a policy of liability insurance or self-insurance in an amount of not less than $10,000.[93]

Upon approval of the application, DCJS shall send to the registrant a temporary registration letter. The registrant shall attach the letter as an exhibit to any application for appointment as a Conservator with the Circuit Court. Once the registrant receives an appointment, the registrant must provide documentation of the appointment to DCJS within 30 days.[94] DCJS will then provide the registrant with a DCJS registration credential.[95] The registrant must notify DCJS and the Circuit Court if the Conservator has left employment.[96]

VI. What are the criteria for appointment?

Once the prospective Conservator obtains a DCJS registration, an application may be made by a qualified sponsor, requesting an appointment within a particular judicial district.

> Upon the application of any sheriff or chief of police of any county, city, town or any corporation authorized to do business in the Commonwealth or the owner, proprietor or authorized custodian of any place within the Commonwealth and the showing of a necessity for the security of property or the peace, a circuit court judge of any county or city, in his discretion, may appoint one or more special

[93] 6 VIRGINIA ADMINISTRATIVE CODE 20-230-30. "Any person who is aggrieved by the misconduct of any person registered as a special conservator of the peace and recovers a judgment against the registrant, which is unsatisfied in whole or in part, may bring an action in his own name against the bond or insurance policy of the registrant." CODE OF VIRGINIA § 19.2-13 (C).
[94] 6 VIRGINIA ADMINISTRATIVE CODE 20-230-51.
[95] This was originally accomplished by sending the registrant a letter to present to the local Customer Service Center of the Department of Motor Vehicles, who would then produce the credential. Now, DCJS produces the credential and the registrant must be photographed by a local training school which has the proper photo equipment.
[96] Ibid.

> conservators of the peace who shall serve as such for such length of time as the court may designate, but not exceeding four years under any one appointment.[97]

For corporate clients with a specific mission at established locations, the need will be evident from their circumstances. In addition to ordinary physical security functions, Special Conservators of the Peace are employed in particularly demanding functions throughout the Commonwealth, including nuclear security[98] and military force protection.[99] These companies can easily enumerate the locations requiring services and the particular need for "the security of property or the peace".

However, many companies serve as contractors for numerous other non-DCJS clients, providing services on demand at multiple locations. Their "necessity" for appointments is not as immediately apparent. These companies seek appointments for a particular jurisdiction in anticipation of future demand for these services, not unlike a new attorney or physician seeking licensure from the Commonwealth without having an existing client base. The specific future need for these services is not entirely predictable. If a retailer suffers a burglary or a fire at a store location within a particular judicial circuit, the retailer may require the services of a Conservator on a few hours notice, to secure those premises until repairs can be made and the premises secured. No municipal police department ordinarily would permit the continued allocation of their patrol officers for

[97] CODE OF VIRGINIA § 19.2-13.
[98] *See i.e.* http://www.bwxt.com. The BWX Technologies Police Department is a private, DCJS-licensed criminal justice agency providing services to the U.S. Government for "complex, high-consequence nuclear and national security operations."
[99] 53% of the Conservator appointments studied by the Virginia State Crime Commission in 2002 came from two cities, Newport News and Norfolk. CRIME COMMISSION REPORT at 13.

such a purpose. The client must depend upon the ability of the contractor to put officers in place promptly upon demand.

Special event planners, such as for concerts and parades, require the services of a large number of public safety personnel for short periods of time, particularly on evenings and weekends for events such as concerts and parades. This can tax the abilities of a local police force to provide overtime officers to fully support crowd control and security requirements for these events.

Absent a sufficiently broad order of appointment, covering these types of contingencies, the companies employing Conservators may have to ask for multiple orders from the various courts and on short notice. It is more efficient and effective for the courts to carefully consider one appointment per Conservator for an extended term of appointment and create ongoing relationships with these appointees where the appointee and the sponsor become "known entities" to the court. Productive relationships require that the sponsor companies be sufficiently responsive to any concerns a court or local law enforcement officials may have. A company's failure to quickly correct problems or remove inappropriate personnel from service easily jeopardizes that company's ability to seek future appointments from the courts. A track record of a known company and effective communication between the company, the court and the local law enforcement officials helps lend credence to the company's representations as to the suitability of the prospective appointee and that company's "necessity" for the appointment.

VII. Terms of the Order of Appointment

Virginia law requires that each order of appointment contain the following information, the name of the sponsor, be it the Sheriff, Chief of Police, corporation or property owner making the application[100] and the specific identifying information regarding the appointee, including "the person's complete name, address, date of birth, social security number, gender, race, height, weight, color of hair, color of eyes, firearm authority or limitation as set forth in subsection F, date of the order, and other information as may be required by the Department of State Police."[101]

> The order of appointment may provide that a special conservator of the peace shall have all the powers, functions, duties, responsibilities and authority of any other conservator of the peace within such geographical limitations as the court may deem appropriate within the confines of the county, city or town that makes application or within the county, city or town where the corporate applicant is located, limited to the judicial circuit wherein application has been made, whenever such special conservator of the peace is engaged in the performance of his duties as such. The order may also provide that the special conservator of the peace is a "law-enforcement officer" for the purposes of Article 4 (*§ 37.2--808* et seq.) of Chapter 8 of Title 37.2. The order may also provide that the special conservator of the peace may use the title "police" on any badge or uniform worn in the performance of his duties as such. The order also may (i) require the local sheriff or chief of police to conduct a background investigation which may include a review of the applicant's school records, employment records, or interviews with persons possessing general knowledge of the applicant's character and fitness for such appointment and (ii) limit the use of flashing lights and sirens on personal vehicles used by the conservator in the performance of his duties.[102]

Court appointments shall be limited to the judicial circuit wherein application has been made and to those cities and counties wherein the corporate applicant or its subsidiary holds title to real property.[103] This section makes possible blanket appointments for end-

[100] CODE OF VIRGINIA § 19.2-13 (E).
[101] Ibid.
[102] Ibid. part (A).
[103] Ibid. part (E).

user corporate sponsors with property in multiple jurisdictions. The Code is silent as to whether a leasehold interest in property held by a corporation amounts to holding title to real property. For those sponsor corporations who provide these services to other companies by contract, there is an obvious disadvantage to them. Despite having a "necessity" to provide services for a client in another jurisdiction, it appears that the company may not avail themselves of their client's property holdings to obtain authority for its Conservators to work in that jurisdiction.

Instead, the company must seek out court orders in each jurisdiction, creating a patchwork of authority for each Conservator, with uniformity between orders in even neighboring jurisdictions unlikely. Further, the sponsor may face impediments to obtaining appointments where the unfettered discretion of the court may deny appointments without need for particular justification. There may be conflicts of interest between local law enforcement agencies and the sponsor companies. The law enforcement agencies may assert undue influence to cause the court to deny Conservator appointments to protect "part-time" or "off-duty" employment by agency employees.[104] In response to these concerns, the Virginia Assembly considered legislation during the 2006 term to permit Conservators appointed in one jurisdiction to work in other jurisdictions upon proper notice to the Circuit Court of the new jurisdiction and DCJS.[105]

[104] Many police officers work part-time in security positions. Although some departments prohibit such arrangements, some 150,000 police officers have such part-time employment. "But special problems do arise when the establishments where these officers work part-time are in the officer's fulltime police jurisdiction: risk of corruption, questions of liability (especially coverage for injury and sick leave), conflict of interest and favoritism, problems of reduced effectiveness on official duty due to diminished capacity associated with private workloads, and questions about whether uniforms, publicly issued resources, and publicly financed training should be used for the benefit of private interests." Forst at 47 [citations omitted].

[105] H.B. 1567.

One alternative is to seek appointment by the Circuit Court of the City of Richmond, which has the capability to grant a statewide appointment. Absent the amenability of this particular court to such an appointment, this matter will likely require further legislative attention.

VIII. Powers of the Virginia Special Conservator of the Peace

a. Arrest without a warrant

The Conservator's ability to arrest without a warrant for a breach of the peace occurring in his presence is a fundamental element of the Conservator's traditional authority, dating back to its earliest origins in common law.

> A constable or other known conservator of the peace may lawfully interpose upon his own view to prevent a breach of the peace, or to quiet an affray . . . [106]

> At common law, the constable's office was twofold. As conservator of the peace, he possessed, *virtute officii*, a "great original and inherent authority with regard to arrests," and could "without any other warrant but from [himself] arrest felons, and those that [were] probably suspected of felonies…"[107]

> As conservator of the peace in his county or bailiwick, he is the representative of the king, or sovereign power of the State for that purpose. He has the care of the county, and, though forbidden by *magna charta* to act as a justice of the peace in trial of criminal cases, he exercises all the authority of that office where the public peace was concerned. He may upon view, without writ or process, commit to prison all persons who break the peace or attempt to break it; he may award process of the peace, and bind any one in recognizance to keep it. He is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to jail for safe custody.[108]

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[106] Atwater v. City of Lago Vista, 532 U.S. 318, 330 (2001) (quoting 1 E. East, PLEAS OF THE CROWN § 71, 303 (1803)).
[107] Payton v. New York, 445 U.S. 573, 605 (1980) White, J., dissenting (quoting 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1541) 292 and 2 M. Hale, PLEAS OF THE CROWN 85 (1736)) [internal citations omitted].
[108] South v. Md., 59 U.S. at 401.

While the concept of requiring a recognizance to keep the peace (posting a peace bond) may be rather anachronistic[109] and certainly now confined to the discretion of the courts in Virginia cases [110], the power of a Conservator to arrest without a warrant is expressly set forth by Virginia law.

> Every conservator of the peace shall have authority to arrest without a warrant in such instances as are set out in §§ 19.2-19 and 19.2-81. Upon making an arrest without a warrant, the conservator of the peace shall proceed in accordance with the provisions of § 19.2-22 or § 19.2-82 as the case may be.[111]

Under § 19.2-81, a Special Conservator of the Peace has the same authority to make an arrest without a warrant as State Troopers, Sheriffs and municipal police officers.

> Such officers may arrest, without a warrant, any person who commits any crime in the presence of the officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence.[112]

The Code further enumerates certain misdemeanor offenses not occurring in the officer's presence which the officer may make an arrest without a warrant under certain circumstances.

> Any such officer may arrest without a warrant any person whom the officer has probable cause to suspect of operating a watercraft or motor boat (i) while intoxicated in violation of subsection B of § 29.1-738 or (ii) in violation of an order issued pursuant to § 29.1-738.4, in his presence, and may thereafter transfer custody of the person suspected of the violation to another officer, who may obtain a warrant based upon statements made to him by the arresting officer.
>
> Any such officer may, at the scene of any accident involving a motor vehicle, watercraft as defined in § 29.1-712 or motorboat, or at any hospital or medical facility to which any person involved in such accident has been transported, or in the apprehension of any person charged with the theft of any motor vehicle, on

[109] Fedele v. Commonwealth, 205 Va. 551, 555-556 (1964).
[110] CODE OF VIRGINIA § 19.2-19.
[111] CODE OF VIRGINIA § 19.2-18.
[112] CODE OF VIRGINIA § 19.2-81.

> any of the highways or waters of the Commonwealth, upon reasonable grounds to believe, based upon personal investigation, including information obtained from eyewitnesses, that a crime has been committed by any person then and there present, apprehend such person without a warrant of arrest. In addition, such officer may, within three hours of the occurrence of any such accident involving a motor vehicle, arrest without a warrant at any location any person whom the officer has probable cause to suspect of driving or operating such motor vehicle while intoxicated in violation of § 18.2-266, 18.2-266.1, 46.2-341.24, or a substantially similar ordinance of any county, city, or town in the Commonwealth.
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> …
>
> Such officers may also arrest without a warrant for an alleged misdemeanor not committed in their presence involving (i) shoplifting in violation of § 18.2-96 or 18.2-103 or a similar local ordinance, (ii) carrying a weapon on school property in violation of § 18.2-308.1, (iii) assault and battery, (iv) brandishing a firearm in violation of § 18.2-282, or (v) destruction of property in violation of § 18.2-137, when such property is located on premises used for business or commercial purposes, or a similar local ordinance, when any such arrest is based on probable cause upon reasonable complaint of the person who observed the alleged offense. The arresting officer may issue a summons to any person arrested under this section for a misdemeanor violation involving shoplifting.[113]

Upon arresting a subject without warrant, the officer shall bring the arrestee before a magistrate of competent jurisdiction who shall examine the officer under oath to determine if probable cause existed for the arrest.[114] If no warrant or summons is issued by the magistrate, the arrestee shall be released.[115]

§ 19.2-18 does not specifically state that Conservators have the authority to make a warrantless arrest as otherwise provided under § 19.2-81.3 in cases of assault and battery against a family or household member, stalking and for violations of protective orders, or authority to arrest illegal aliens under § 19.2-81.6. There is no specific authority

[113] Ibid.
[114] CODE OF VIRGINIA § 19.2-82.
[115] Ibid.

indicating a legislative intent to prohibit such arrests by Conservators. It appears that the omission is only a function of the peculiar construction of the applicable statutes. However, this can be addressed by a circuit court by incorporating an appropriate operative provision into a Special Conservator's order of appointment specifically granting such authority if appropriate.

b. Arrest with a warrant

Curiously, there is no specific provision under Virginia law for an arrest with a warrant by a Conservator. In 1991, the United States District Court for the Eastern District of Virginia opined that defendant IRS agents, otherwise found to be Conservators of the peace under Virginia Code § 19.2-12, were not entitled under Virginia law to make an arrest on a state warrant.[116]

> In the absence of federal authority, the Defendants must show that the arrest was authorized by state law. They fail to do so.
> …
>
> Chapter 2 of Title 19.2, which describes the authority of conservators of the peace, contains no provision authorizing execution of arrest warrants.[117]

However, Virginia law provides that Conservators may make an arrest without a warrant, where the Conservator is made aware of the existence of an outstanding warrant by certain means.

> Such officers may arrest, without a warrant or a capias, persons duly charged with a crime in another jurisdiction upon receipt of a photocopy of a warrant or a capias, telegram, computer printout, facsimile printout, a radio, telephone or teletype message, in which photocopy of a warrant, telegram, computer printout, facsimile printout, radio, telephone or teletype message shall be given the name or

[116] Terrell v. Petrie, *et. al.*, 763 F. Supp. 1342, 1347 (E.D.Va. 1991).
[117] Ibid.

> a reasonably accurate description of such person wanted and the crime alleged.
>
> Such officers may arrest, without a warrant or a capias, for an alleged misdemeanor not committed in his presence when the officer receives a radio message from his department or other law-enforcement agency within the Commonwealth that a warrant or capias for such offense is on file.[118]

"An officer has probable cause, and indeed the legal duty, to arrest upon knowledge of the existence of an unexecuted felony warrant for the suspect."[119] It is unreasonable to assert that, absent specific language authorizing the execution of an outstanding arrest warrant, a Conservator does not have authority *virtute officii* to respond to an otherwise lawful command to apprehend and deliver a person before the court.

> Where the arresting officer was acting on personal knowledge of the existence of felony warrants commanding the arrest of defendant, *it would be a strained construction of the law* to invalidate an arrest made under such circumstances, notwithstanding a statute which permits the arrest had the required information and allegation come to him by radio, telegram or teletype.[120]

c. Issuance of a summons

Virginia law specifically permits the issuance of summonses by Special Conservators of the Peace, under those circumstances otherwise justifying the issuance of summonses by other law enforcement officers, if such Conservator is in uniform or displaying a badge of office. [121] Upon application, the chief law enforcement officer of the city or county shall provide each Conservator with a supply of summonses forms and the Conservator shall be responsible for accounting for them.[122]

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[118] CODE OF VIRGINIA § 19.2-81.
[119] Crowder v. Commonwealth, 213 Va. 151 (1972).
[120] Ibid. [emphasis added].
[121] CODE OF VIRGINIA § 19.2-74.
[122] Ibid.

For those Conservators appointed in multiple jurisdictions this creates some logistical problems, as each summons issued by localities is preprinted with the specific jurisdiction, requiring a different set for each jurisdiction. It can be argued it would be more practical for these Conservators to receive one set from the State Police. The State Police summonses have no specific jurisdictions pre-printed upon them. However, absent specific instructions from DCJS or the courts, the State Police are unlikely to offer their assistance in this regard.

d. Warrantless arrest outside of the Conservator's jurisdiction

Under Virginia law, an officer may make an arrest up to one mile outside of the officer's jurisdiction, if the offense occurred actually within the officer's jurisdiction.[123] Outside of that one-mile limit, a Virginia officer has the same authority as a private citizen and may make an arrest if a citizen would have authority to make an arrest under the same circumstances.[124] In Virginia, any citizen may make a warrantless arrest for a felony or *any breach of the peace* that occurs in the citizen's presence.[125]

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[123] CODE OF VIRGINIA § 19.2-250. The distance is reduced to 300 yards for "towns situated in counties having a density of population in excess of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more". Ibid. *See* Breitbach v. Commonwealth, 35 Va. App. 604 (2001) (A police officer located outside the one-mile jurisdictional limit of a town had the authority to arrest a speeding driver where the officer employed radar to observe a violation within that limit. Where the arresting officer was located when he observed the speeding violation was irrelevant; the relevant question was whether the offense occurred within the town's jurisdiction as defined by this section.) The statute's purpose is to prevent the territory contiguous to a city from becoming a refuge for criminals. Murray v. City of Roanoke, 192 Va. 321(1951); Kelley v. County of Brunswick, 200 Va. 45 (1958).

[124] Hudson v. Commonwealth, 266 Va. 371, 377-378 (2003) (citing State ex rel. West Virginia v. Gustke, 516 S.E.2d 283, 289-291 (W. Va. 1999)(citing State v. McCullar, 110 Ariz. 427, 428 (1974) (noting that state statute permitted a private person to "make an arrest when the person has in his [or her] presence committed a felony," and concluding that law enforcement officers from another state "were authorized to make a lawful arrest as private persons if a felony was committed in their presence"); Cervantez v. J.C. Penney Co., Inc., 24 Cal. 3d 579, (1979) (finding that law enforcement officer who was not acting within his official capacity could make lawful arrest for misdemeanor offense if criteria of statute permitting arrest by private citizen was met), superseded by statute on other grounds as stated in Melendez v. City of Los Angeles, 63 Cal. App. 4th 1 (1998); People v. Wolf, 635 P.2d 213, 216 (Colo. 1981) ("a peace officer acting outside the territorial limits of his authority does not have less authority to arrest than a person who is a

By "peace" as used in the law in this connection, is meant the tranquility enjoyed by the citizens of a municipality or community where good order reigns among its members. It is the natural right of all persons in political society, and any intentional violation of that right is "a breach of the peace." It is the offense of

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private citizen"); State v. Phoenix, 428 So. 2d 262, 265 (Fla. Dist. Ct. App. 1982) ("In addition to any official power to arrest, police officers also have a common law right as citizens to make so-called citizen's arrests." [citation omitted]); People v. Niedzwiedz, 268 Ill. App. 3d 119, 122 (1994) ("A police officer can make an extraterritorial warrantless arrest in the same situation that any citizen can make an arrest."); Dodson v. State, 269 Ind. 380, 382 (1978) ("Even if the officers were without statutory arrest powers as policemen, they retained power as citizens to make an arrest…"); State v. O'Kelly, 211 N.W.2d 589, 595 (Iowa 1973) ("An officer who seeks to make an arrest without warrant outside his territory must be treated as a private person. Of course, his action will be lawful if the circumstances are such as would authorize a private person to make the arrest." [citations and internal quotations omitted]); State v. Miller, 257 Kan. 844 (1995) ("An officer who makes an arrest without a warrant outside the territorial limits of his or her jurisdiction must be treated as a private person. The officer's actions will be considered lawful if the circumstances attending would authorize a private person to make the arrest."); State v. Washington, 444 So. 2d 320, 324 (La. Ct. App. 1983) ("even if the officers were acting only as private citizens when they effectuated the arrest, it was valid"); Stevenson v. State, 287 Md. 504, 510 (1980) ("a peace officer who makes an arrest while in another jurisdiction does so as a private person, and may only act beyond his [or her] bailiwick to the extent that the law of the place of arrest authorizes such individuals to do so" [citations omitted]); Commonwealth v. Harris, 11 Mass. App. Ct. 165 (1981) (citing with approval "an extensive line of cases from other states upholding the validity of an extraterritorial arrest made by a police officer who lacked the official authority to arrest where the place of arrest authorizes a private person to make a 'citizen's arrest' under the same circumstances" [citations omitted]); People v. Meyer, 424 Mich. 143, 154 (1985) ("As a general rule, peace officers who make a warrantless arrest outside their territorial jurisdiction are treated as private persons, and, as such, have all the powers of arrest possessed by such private persons. In such cases, the officers' actions are lawful if private citizens would have been authorized to do the same." [citations and footnotes omitted]); State v. Schinzing, 342 N.W.2d 105, 109 (Minn. 1983) (concluding that actions of police officer in stopping a vehicle outside of his territorial jurisdiction were lawful in that the officer's actions were "within the authority of a citizen to do in making a citizen's arrest"); Settle v. State, 679 S.W.2d 310, 317 (Mo. Ct. App. 1984) (when a police officer "left the territorial boundaries of Kansas City, his status transformed into that of a private citizen" and the officer could have made a valid arrest if the circumstances had been such that a private citizen could have made an arrest [citations omitted]); Molan v. State, 614 P.2d 79, 80 (Okla. Crim. App. 1980) ("This Court has held that a law enforcement officer outside his jurisdiction may make a citizen's arrest." [citation omitted]); State v. MacDonald, 260 N.W.2d 626, 627 (S.D. 1977) ("Lacking official power however, the authorities generally hold that [a public police officer] does have the same power of arrest as that conferred on a private citizen."); State v. Johnson, 661 S.W.2d 854, 859 (Tenn. 1983) (a deputy acting outside of his territorial jurisdiction may be "limited to the authority of a private person" in making an arrest); State v. Harp, 13 Wash. App. 239 (1975) (officer acting outside of his territorial jurisdiction could make an arrest as a private citizen))).

[125] Hudson, 266 Va. at 379 (citing Gustke, 516 S.E.2d at 291-92; Carroll v. United States, 267 U.S. 132 (1925) (quoting 9 Halsbury, LAWS OF ENGLAND 612 "In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence…"); W. Keeton, ed., PROSSER AND KEETON ON THE LAW OF TORTS § 26 (5th ed. 1984) ("Broadly speaking, either an officer or a private citizen may arrest without a warrant to prevent a felony or a breach of the peace which is being committed . . . in his presence.") [Footnotes omitted]). "Despite argument on brief that he could only be the subject of a citizen's arrest for a felony, Hudson conceded at trial that 'any normal citizen can pull somebody over for breach of the peace.'" Ibid. at 379-380.

> disturbing the public peace, or a violation of public order or public decorum. Actual personal violence is not an essential element in the offense.[126]

Driving while intoxicated or driving recklessly is a sufficient a breach of the peace for an officer to make an arrest outside the officer's jurisdiction.[127]

e. Failure to obey a Conservator of the Peace

> If any person, being required by a conservator of the peace on view of a breach of the peace or other offense to bring before him the offender, refuse or neglect to obey the conservator of the peace, he shall be guilty of a Class 2 misdemeanor; and if the conservator of the peace declare himself or be known to be such to the person so refusing or neglecting, ignorance of his office shall not be pleaded as an excuse.[128]

f. Enhanced penalty for assault upon a Special Conservator of the Peace

Virginia law does not specifically provide for enhanced penalties for assaults upon Special Conservators of the Peace. If any person knowingly assaults a "law-enforcement officer" as defined by Virginia Code § 18.2-57 (E), they are guilty of a Class 6 felony.[129] Upon conviction, "the sentence of such person shall include a mandatory minimum term of confinement of six months."[130]

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[126] Hudson, 266 Va. at 380 (quoting Byrd v. Commonwealth, 158 Va. 897, 902-903 (1932) (quoting Davis v. Burgess, 54 Mich. 514 (1884))).
[127] Ibid. ("Whether Officer Wills suspected Hudson was driving while intoxicated or not, Hudson's dangerous conduct on a public highway, in and of itself was a breach of the peace under any definition of that concept. Hudson's driving presented a clear and present danger not only to Officer Wills, but to any person or their property on or near the highway. Hudson's actions in forcing Wills off the road and driving so as to imperil others clearly constituted a breach of the peace sufficient to justify a citizen's arrest. The similarity of Hudson's dangerous driving to that of an intoxicated driver only makes the case stronger.")
[128] CODE OF VIRGINIA § 18.2-464. *See also* CODE OF VIRGINIA § 18.2-463 ("If any person on being required by any sheriff *or other officer* refuse or neglect to assist him: (1) in the execution of his office in a criminal case, (2) in the preservation of the peace, (3) in the apprehending or securing of any person for a breach of the peace, or (4) in any case of escape or rescue, he shall be guilty of a Class 2 misdemeanor." [Emphasis added.])
[129] CODE OF VIRGINIA §18.2-57 (C).
[130] Ibid.

> *"Law-enforcement officer"* means any full-time or part-time employee of a police department or sheriff's office which is part of or administered by the Commonwealth or any political subdivision thereof, who is responsible for the prevention or detection of crime and the enforcement of the penal, traffic or highway laws of this Commonwealth, and any conservation officer of the Department of Conservation and Recreation commissioned pursuant to § 10.1-115, and game wardens appointed pursuant to § 29.1-200, and such officer also includes jail officers in local and regional correctional facilities, all deputy sheriffs, whether assigned to law-enforcement duties, court services or local jail responsibilities, auxiliary police officers appointed or provided for pursuant to §§ 15.2-1731 and 15.2-1733 and auxiliary deputy sheriffs appointed pursuant to § 15.2-1603.[131]

The Virginia Court of Appeals recently excluded federal police officers from protection under § 18.2-57 (C), finding the officers were not specifically enumerated within this definition.[132] In this case, the Commonwealth Attorney argued that the federal police officers should have been treated "as the "functional equivalent" of state or local law enforcement officers for purposes of the assault-and-battery statute."[133] The Court rejected this argument, finding that there was no evidence that the federal officers had any powers of arrest under Virginia law.

> At trial, the Commonwealth did not introduce a reciprocal agreement into evidence. Nor did any witnesses once mention the existence of any agreement of any sort. The federal officers testified only that, as they understood it, their "authority" to arrest under state law came "from the City of Norfolk." Similarly, the word "agreement" never appears in any comments by the prosecutor during the trial. She argued only that the federal officers have a "special conservancy under a statute . . . that allows them to issue summons." When summarizing the evidence, however, the trial judge mistakenly recalled the federal officers testifying that their arrest powers stemmed from "a mutual agreement" with the City of Norfolk.[134]

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[131] CODE OF VIRGINIA §18.2-57 (E).
[132] South v. Commonwealth, 47 Va. App. 247, 251 (2005) (excluding federal police officers of the U.S. Navy, "If a victim does not fit within one of the listed categories (conservation officers, game wardens, jail officers, deputy sheriffs, and auxiliary officers), the statute does not apply unless the law-enforcement officer is an 'employee of a police department or sheriff's office which is part of or administered' by the Commonwealth or local government.")
[133] Ibid. at 252.
[134] Ibid. at 252 n. 4.

…

> A reciprocal agreement under Code § 15.2-1726 cannot, by itself, contractually confer arrest authority on federal officers to enforce state law. Immediately after recognizing the reciprocal power of arrest, the statute includes a "however" proviso which confirms that, no matter what the agreement may say, "no federal law-enforcement officer shall have authority to enforce the laws of the Commonwealth unless specifically empowered to do so by statute." *Id*. All the more, we question whether a reciprocal agreement under Code § 15.2-1726 can contractually confer upon a federal officer the "privilege" of special victim status reserved by the legislature solely for state and local officers under Code § 18.2-57(E).[135]

In justifying their argument to exclude protection "reserved by the legislature solely for state and local officers" the Virginia Court of Appeals relied substantially on their mistaken determination that federal officers had no statutory powers of arrest under Virginia law (such officers are in fact, conservators of the peace under Va. Code § 19.2-12[136] and have powers of arrest under Va. Code § 19.2-18). Such statutory arrest powers are specifically conferred upon Special Conservators of the Peace as discussed *supra*.

In 1925, the Virginia Supreme Court found that Special Police officers were entitled to protection from intimidation or impediment in the performance of their duties.[137]

> If there were no other provisions of the statute, and it had been intended by this language to limit and define all of the duties of such officers, the contention would doubtless be sound; but there are other parts of the statute which must be also considered. By section 4797 such persons so appointed are made conservators of the peace in their respective counties. By section 4801 their jurisdiction is limited to the county in which they are appointed, but their authority extends throughout the State when actually in pursuit of persons accused of crime, as well as when acting under authority of a duly executed warrant for the arrest of the person accused of committing a crime. They are conservators of

[135] Ibid. at 254.
[136] Virginia Conservators of the Peace include "…any special agent or law-enforcement officer of the United States…Department of Defense…" CODE OF VIRGINIA § 19.2-12.
[137] Williams v. Commonwealth, 142 Va. 667 (1925).

> the peace, and the general frame of the statute clearly indicates that they have the general power, authority and duties of other peace officers.[138]
>
> …
>
> The statute under which the accused were prosecuted, Code section 4525[139], thus defines the crime: "If any person, by threats, or force, attempt to intimidate or impede a judge, justice, juror, witness, or an officer of a court, or any sergeant, constable, or other peace officer, or any revenue officer, in the discharge of his duty, or to obstruct or impede the administration of justice in any court, he shall be deemed to be guilty of a misdemeanor.
>
> That these special policemen are peace officers -- conservators of the peace -- is quite apparent, and there is no limitation, so far as we are advised, upon their power to arrest persons charged with a felony and found within their territorial jurisdiction, and as has been shown, when actually in pursuit, to arrest persons outside of the counties for which they have been appointed. The clause of the statute quoted from section 4802 is not intended to limit their general authority as peace officers conferred by section 4797.[140]

The Virginia Court of Appeals considered including federal officers in the definition of "law-enforcement officer" but incorrectly determined they had no statutory powers of arrest. Special Conservators of the Peace appointed under § 19.2-13 may "have all the powers, functions, duties, responsibilities and authority of any other conservator of the peace"[141] including statutory powers of arrest. Absent the Virginia Assembly specifically including Conservators within the definition of "law-enforcement officer" under § 18.2-57 (E), Virginia courts should consider the state powers and statutory authority conferred upon Special Conservators of the Peace in determining whether they are entitled to protection under § 18.2-57 (C).

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[138] Ibid. at 669.
[139] Predecessor to CODE OF VIRGINIA § 18.2-460. *See* 1 M.J., OBSTRUCTING JUSTICE, § 2.
[140] Ibid. at 670.
[141] CODE OF VIRGINIA § 19.2-13 (A).

IX. Liability for misconduct by Special Conservators of the Peace

Under the existing case law in Virginia, a private employer may not be held liable under a theory of *respondeat superior* for torts committed by a Special Conservator of the Peace when the Conservators acts as a public officer, as opposed to an agent, servant, or employee of the employer.[142] However, Virginia Code initially appears to conflict with this case law.

> If any such special conservator of the peace is the employee, agent or servant of another, his appointment as special conservator of the peace shall not relieve his employer, principal or master, from civil liability to another arising out of any wrongful action or conduct committed by such special conservator of the peace while within the scope of his employment.[143]

It is necessary to make distinctions amongst the particular types of conduct that would give rise to an alleged cause of action against the Conservator and the employer.

> …we held in N. & W. Ry. Co. v. Haun, 167 Va. 157, 187 S.E. 481 (1936), that a special police officer appointed by public authority, but employed and paid by a private party, does not subject his employer to liability for his torts when the acts complained of are performed in carrying out his duty as a public officer. The test is: in what capacity was the officer acting at the time he committed the acts for which the complaint is made? If he is engaged in the performance of a public duty such as the enforcement of the general laws, his employer incurs no vicarious liability for his acts, even though the employer directed him to perform the duty. On the other hand, if he was engaged in the protection of the employer's property, ejecting trespassers or enforcing rules and regulations promulgated by the employer, it becomes a jury question as to whether he was acting as a public officer or as an agent, servant, or employee.[144]

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[142] Austin v. Paramount Parks, Inc., 195 F.3d 715, 731 (4th Cir. 1999) (citing Norfolk & W. Ry. Co. v. Haun, 167 Va. 157 (1936); Glenmar Cinestate, Inc. v. Farrell, 223 Va. 728 (1982)). *See also* Hall v. Shreveport, 157 La. 589, 594 (1925) ("The police officers of a city are not regarded as servants or agents of the municipality. They are conservators of the peace, and exercise many of the functions of sovereignty; they are appointed and paid by the municipality as a convenient mode of exercising the functions of government; they assist the city in the performance of its governmental duties, and not in the discharge of its proprietary obligations.")

[143] CODE OF VIRGINIA § 19.2-13 (E).

[144] Austin, 195 F.3d at 731 (quoting Glenmar, 223 Va. 728).

While the Virginia Code speaks to the Conservator's appointment not relieving his employer's liability for those acts committed in the furtherance of the employer's duties, official acts immunity still attaches if the Conservator is performing duties as a state actor otherwise within conformance of the law.

> Some of the duties here prescribed are ministerial, but many of them are in a high degree executive. It is the chief duty of a policeman to execute the laws of the Commonwealth, both for the punishment and prevention of crime; indeed his most important powers and duties are executive. But if his functions be regarded as chiefly ministerial, he comes within the reason, letter and meaning of the statute, which makes it a felony to offer a bribe to any executive officer of the Commonwealth to influence his act; for, as already said, public officers whose duties are ministerial are included under the head of "executive officers." It cannot be supposed that the Legislature intended that the crime denounced by section 3744 of the Code, could be committed with impunity by those executive officers whose duties may be defined as being chiefly or entirely ministerial. Such a construction would exclude from the operation of the statute a large number of the public officers of the Commonwealth.[145]

Discretionary or executive acts are generally defined as those acts involving the formulation of policy while ministerial acts are defined as those relating to the execution of policy.[146] To determine whether a given governmental action is discretionary or ministerial, the court must first determine whether it is the kind of action "that the discretionary function exception was designed to shield" that is, whether the action involves "the permissible exercise of policy judgment."[147] If the answer to this first inquiry is yes, then the action is immune from suit, unless the government has adopted a "statute, regulation or policy [that] specifically prescribes a course of action for an employee to follow."[148] Ministerial functions were defined as those reflecting "the

[145] Haynes v. Commonwealth, 104 Va. 854, 857 (1905).
[146] McKethean v. WMATA, 588 A.2d 708, 715 (D.C. 1991).
[147] Berkovitz v. United States, 486 U.S. 531, 536-7 (1988) [citation omitted]; McKethean, 588 A.2d at 715.
[148] Berkovitz, 486 U.S. at 536; McKethean, 588 A.2d at 715.

execution of policy as distinct from its formulation."[149] If the Conservator performs an official state act, and performs that act in conformance with applicable law, he cannot be held liable for the consequences of that act.

> …where an individual or a municipality acts as a conservator of the peace, he or it represents the sovereign power of the State for that purpose, and is entitled to all the immunities of such sovereign…[150]

Discretionary acts "call for a delicate balancing of competing considerations" and the Conservator must not be impeded in making these decisions with unnecessary deliberations over civil liability.[151]

X. H.R. 218

In 2004, the United States Congress enacted legislation to provide protection for law enforcement officers from inconsistent state laws regarding firearms. The Law Enforcement Officer's Safety Act of 2004 (LEOSA), H.R. 218 provides federal authorization for state and local law enforcement officers to carry firearms in each state.[152] This is of little concern within the Commonwealth itself, as Virginia law clearly provides such protection to Conservators in Virginia.[153] However, any Special

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[149] Elgin v. District of Columbia, 337 F.2d 152, 154-55 (D.C. Cir. 1964).
[150] State use of Cocking v. Wade, 87 Md. 529 (1898) (citing South v. Maryland, 18 How, 396).
[151] Owen v. Independence, 445 U.S. 622, 648 (1980) (public officials include those who "can be called on to exercise police powers as conservators of the peace.") *See also* Hall v. Shreveport, 157 La. 589, 594 (1925) ("The police officers of a city are not regarded as servants or agents of the municipality. They are conservators of the peace, and exercise many of the functions of sovereignty; they are appointed and paid by the municipality as a convenient mode of exercising the functions of government; they assist the city in the performance of its governmental duties, and not in the discharge of its proprietary obligations.")
[152] 18 U.S.C. 926B.
[153] CODE OF VIRGINIA § 18.2-308 grants an exemption from state laws prohibiting carrying concealed weapons to any law enforcement officer, and to any Conservator of the Peace while in the performance of

Conservator of the Peace who lives outside of Virginia and works within Virginia may have some difficultly transporting firearms from home to work lawfully.[154] LEOSA provides a uniformity of protection for any "qualified law enforcement officer" throughout the United States.

> (a) Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).
>
> (b) This section shall not be construed to supersede or limit the laws of any State that--
>
> (1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or
> (2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.
>
> (c) As used in this section, the term 'qualified law enforcement officer' means an employee of a governmental agency who--

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the Conservator's duties, or "while in transit to or from such duties." *See* Frias v. Commonwealth, 34 Va. App. 193, 200 (2000) (Section 18.2-308(C) provides that Conservators of the Peace are exempt from the prohibition against carrying a gun on school grounds while in the discharge of their official duties, or while in transit to or from such duties); Withers v. Commonwealth, 109 Va. 837, 841 (1909). Further, *any qualified person* shall be granted a permit to carry a concealed handgun in Virginia upon making a proper application under this section with minimal cost. *See* Fey v. Rappoport, 58 Va. Cir. 190, 197 (Fairfax County, 2002).

[154] District of Columbia laws prohibiting the possession and carrying of pistols "shall not apply to marshals, sheriffs, prison or jail wardens, or their deputies, policemen or other duly appointed law enforcement officers". DC CODE § 22-4504. *But see* U.S. v. Savoy, D.C. Super. Ct. Crim. No. F-5748-98 (2001). THE DAILY WASHINGTON LAW REPORTER, Vol. 129, Num. 89, 877 (uniformed member of United States Postal Police not a "police officer" for purpose of weapons exemption under District of Columbia law); Shivers v. United States, 533 A.2d 258, 263 (D.C. 1987) (District of Columbia Special Police officer not covered by exemption); Middleton v. United States, 305 A.2d 259, 261-262 (D.C. 1973) (uniformed officer of United States Federal Protective Service not covered by exemption). *See also* Seegars v. Ashcroft, 297 F. Supp. 2d 201, 238 (D.D.C. 2004) ("This Court agrees with Judge Nebeker and therefore concludes that the Second Amendment does not apply to the District of Columbia" citing Sandidge v. United States, 520 A.2d 1057 (D.C. 1987)) *reversed in relevant part* 396 F.3d 1248, 1254 (D.C. Cir. 2005), *rehearing, en banc, denied*, 413 F.3d 1 (D.C. Cir. 2005), *cert. denied* 126 S. Ct. 1187, 163 L. Ed. 2d 1141 (2006); Kopko v. Miller, 892 A.2d 766 (Pa. 2006) (county Sheriff not law enforcement officer under Pennsylvania law). Maryland law permits Conservators of the Peace to carry various weapons including "Nunchaku" and "star knives", but not handguns. MARYLAND CRIMINAL LAW CODE ANN. § 4-101 (2006). Perhaps this code section is intended for those Conservators skilled in martial arts and have no need for firearms in the performance of their duties. The Maryland code exempts "a law enforcement official of another state or subdivision of another state temporarily in this State on official business" but makes no provision for a Virginia Conservator who resides in Maryland, but not on official business. Ibid. § 4-203.

(1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;
(2) is authorized by the agency to carry a firearm;
(3) is not the subject of any disciplinary action by the agency;
(4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;
(5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and
(6) is not prohibited by Federal law from receiving a firearm.

(d) The identification required by this subsection is the photographic identification issued by the governmental agency for which the individual is employed as a law enforcement officer.

(e) As used in this section, the term 'firearm' does not include--
(1) any machinegun (as defined in section 5845 of the National Firearms Act);
(2) any firearm silencer (as defined in section 921 of this title); and
(3) any destructive device (as defined in section 921 of this title).[155]

As discussed *supra*, a Virginia Special Conservator of the Peace "is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest". Those Conservators meeting the DCJS training and qualification requirements for firearms and having been granted firearms authority by the court are "authorized by the agency to carry a firearm" and meet "standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm".

A question remains as to whether the Conservator is "an employee of a governmental agency" for the purposes of LEOSA. It is immediately evident that these Conservators generally are not in the paid employment of DCJS. However, each private company

[155] 42 U.S.C. 926B.

licensed to employ Conservators is a "Criminal Justice Agency" under Virginia law.[156] Under Federal law, Special Conservators of the Peace do meet some established definitions of employees of DCJS by virtue of DCJS's "power and control" over Conservators set forth under Virginia law.[157] The Circuit Court granting the Order of Appointment has the ability to set aside any of these questions as to the Conservator's eligibility by specifically stating within the order that the Conservator shall be considered a "qualified law enforcement officer" for the purpose of LEOSA.

XI. Conclusion

The office of Conservator of the Peace is an ancient institution. Previous shortcomings and inconsistencies in the appointment of Special Conservators of the Peace under Virginia law have been remedied in part by a regulatory program under the Virginia Department of Criminal Justice Services. Each proposed appointee must meet minimum training and eligibility requirements before the court may consider the appointment.

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[156] CODE OF VIRGINIA § 9.1-101 ('"Criminal justice agency' means (i) a court or any other governmental agency or subunit thereof which as its principal function performs the administration of criminal justice and any other agency or subunit thereof which performs criminal justice activities, but only to the extent that it does so; (ii) for the purposes of Chapter 23 (§ 19.2-387 *et seq.*) of Title 19.2, any private corporation or agency which, within the context of its criminal justice activities employs officers appointed under § 15.2-1737, or special conservators of the peace or special policemen appointed under Chapter 2 (§ 19.2-12 *et seq.*) of Title 19.2, provided that (a) such private corporation or agency requires its officers, special conservators or special policemen to meet compulsory training standards established by the Criminal Justice Services Board and submits reports of compliance with the training standards and (b) the private corporation or agency complies with the provisions of Article 3 (§ 9.1-126 *et seq.*) of this chapter, but only to the extent that the private corporation or agency so designated as a criminal justice agency performs criminal justice activities; and (iii) the Office of the Attorney General, for all criminal justice activities otherwise permitted under subdivision (i) and for the purpose of performing duties required by the Civil Commitment of Sexually Violent Predators Act (§ 37.2-900 *et seq.*). 'Criminal justice agency' includes the Virginia State Crime Commission.")

[157] Seattle Opera 292 F.3d 757 at 762 (D.C. Cir 2002), quoting NLRB v. Town & Country Electric, Inc., 516 U.S. 85 (1995). *See also* OP. VA. ATT'Y GEN. 05-026 (Virginia regional jail officer, not an employee of a local police or sheriff's department but having statutory powers of arrest as a conservator of the peace, is a "qualified law enforcement officer" under LEOSA).

The office of Special Conservator of the Peace is particularly suited to meet the evolving needs of government and private industry to provide public safety services without taxing municipal and state government police resources. While there exist certain lapses within the enabling statutes, the courts may address these shortcomings with specific language within the Order of Appointment.

It is important that the Conservators work together with other local police resources to overcome the shortcomings of the independent nature of the constable at common law and to make Conservators and integral part of the community's public safety program. It is further important for the Conservator's sponsor to be attentive and responsive to any concerns of the court or local government regarding the suitability and responsibility of its Conservators. Effective communication between the courts and the sponsor will improve confidence in both the sponsor's selection of Conservator candidates and the overall confidence in the Conservator program by the government and the public.