Vitae Republicae – The Life of the Republic

Though he may only stand by and wait for his call of duty, the County Sheriff in every state in which he assumes a Constitutional Office is responsible to the people that elected him to perform his duties in fulfilling one of "the most important prerogatives of the state" – keep the public safe and secure – "the preservation of the peace". *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44; 9 Am. Rep. 104 (1871) (CAMPBELL, J.). In his Treatise on the Law of Sheriffs and Other Ministerial Officers, William Law Murfree wrote, in 1884:

> [T]he Sheriff is, in each of the United States, a constitutional officer, recognized *eo nomine* as part of the machinery of state government, and therefore, although it is competent for legislatures ***to add to his powers*** or exact from him the performance of additional duties, it is, upon well-established legal principles, ***beyond their powers*** to circumscribe his common-law functions or to transfer them to other officers.
>
> [Murfree, Preface, p. v. (emphasis added).]

And, again, in § 48 of his treatise, Murfree explains that "where the office of sheriff is a constitutional office, ***it is not competent for the legislature*** to diminish his official powers, or to transfer to other officers, the duties and emoluments which properly pertain to his office." *Id*., ch. II, p. 28 (emphasis added), *cf.* 1 W. Anderson, Sheriffs, Coroners and Constables, § 43 (1941) ("Where the sheriff is named in the Constitution his duties are the same as they were ***at the time the Constitution was adopted***.") (emphasis added).

This rule of law, i.e., that those original, common-law powers inhering in the Office of Sheriff at common law have been preserved and forever engrained in the machinations of State government by the very naming of the Office in the Constitution has been cited numerously in the highest courts of many jurisdictions in the United States, and it has, in all essence, withstood the test of time. "The rationale supporting *inherent authority*" as explained by the New Hampshire Supreme Court in *Daniels v. Hanson*, 115 N.H. 445, 448 (1975) and as reiterated in an articulate and extremely well-researched opinion out of that same state's Superior Court of Rockingham County in the case of *Linehan (High Sheriff of Rockingham County) v. Rockingham County Commissioners*, 2003 WL 22872517 (N.H. Super. 2003), derives from the principle that "[t]he framers of the Constitution had reference to the office with those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the Constitution was adopted." *Id*., citing Anderson, *supra*.

In the execution of these common-law duties that inhere in his office, the Sheriff is the chief executive law enforcement officer in his county on behalf of his electorate. Anderson, *supra* at § 6; *Daniels*, *supra* at 449. This is so, because to them he is directly accountable to fulfill the charge of his Constitutional Office. From them he derives his power and for them he executes it. Therefore, "the common-law authority to carry out all law enforcement duties became constitutional authority ***by the very nature of being present when the framers drafted the State constitution***." *Linehan*, *supra* at p. 11 (emphasis added).

What are among these inherent common-law powers, which have been preserved and remain extant today absent constitutional amendment, irregardless of the fact that the power itself is not described or explicitly provided for? See, e.g., *Kennedy v. Brunst (Sheriff)*, 26 Wis. 412 (1870) (stating that while "it is quite true that the constitution nowhere defines what powers, rights and duties shall attach or belong to the office of sheriff…there can be no doubt that the framers of the constitution had reference to the office with those generally recognized legal duties and functions belonging to it in this country, and in the territory when the constitution was adopted").

In maintaining the proper constitutional orientation, Justice Campbell, one of the four most heralded Justices in Michigan's Supreme Court history stated, as early as 1880, the rule as such in *Allor v. Bd. of Wayne County Auditors*, 43 Mich. 76, 97-98; 4 N.W. 492, 496 (1880). He noted, citing the *Hurlbut* decision, *supra*, that the common-law power of preservation of the peace by the County Sheriff was "recognized and fixed by our constitutional policy, and so connected with the course of criminal justice as to be beyond ***legislative annihilation***." As explained by Mr. Murfree in his influential treatise on the subject, Lord Coke, who traced the Office of Sheriff and its powers back to the Roman *consulatum*, explained that the Sheriff's powers and duties at common law comprised three of the most important aspects of sustaining the operation of representative government – *vitae justiciae* – "for no suit begins, and no process is served, but by the sheriff"; *vitae legis* – "he is…to make execution [of judgments] which is the *life and fruit* of the law"; and finally, "*vitae republicae*…he is *principalis conservator pacis*[, i.e., *conservator of the public peace*] within the county, ***which is the life of the commonwealth***, *vitae republicae pax*." Murfree, ch. I,§ 2, p. 2 (emphasis added).

The common-law power of the Sheriff as a conservator of the peace, and the meaning of that power has been established in the common-law jurisprudence of this country since its inception. Of the duties of the Sheriff in this regard, the Michigan Supreme Court in *Scougale v. Sweet*, 124 Mich. 311 (1900) referred to the United States Supreme Court case of *South v. Maryland*, 18 How. 398; 15 L.Ed. 433 to explain that "[u]pon this point we need say little…[i]n regard to the duty of a sheriff as a conservator of the peace, the supreme court in that case said: 'The powers and duties of conservators of the peace exercised by the sheriff are not strictly judicial, but he may be said to act as the chief magistrate of his county, wielding the executive power for the preservation of the public peace….'" As explained by Murfree, the Sheriff "is the *principal conservator of the peace* for his county, and ***from that function are derived*** his powers of making arrests for breaches of the peace, or to prevent commission of the offenses of that character." Murfree, ch. XXX, § 1160, p. 628.

Thus, Justice Campbell explained that "[i]t cannot be maintained that legislation would be valid which retained the names but destroyed the powers of such officers. While there is an undoubted power to vary the duties of such officers it cannot be lawful to so change those duties as to practically change the office. When officers are named in a constitution they are named as having a known legal character. That character is what powers obtained in the office at common law and the powers cannot be abrogated short of constitutional amendment. *Allor*, *supra* at 102-103. He continued:

> The general laws of the state have made [Sheriffs] in all important particulars, what they were at common law when our American systems were framed. They are here, and always have been, the local peace officers of their vicinage, the ministerial officers of justices of the peace, and the bailiffs of courts of record of criminal jurisdiction in the county. It would serve no useful purpose to enter into any of the doubtful questions concerning the origin and meaning of the term [Sheriff]. His powers and duties are among the best known subjects of legal inquiry. From the high constable of the realm to the ordinary constable, the different ranks were all, within their several spheres, ***guardians of the public safety, and conservators and defenders of the public peace, with power to summon to their aid any persons whom they found it necessary to call.*** The ordinary constable is the most ancient peace officer known, and was by various names, but with substantially identical powers, ***the legal head of his community for the purpose of enforcing the peace***. Until conservators of the peace were appointed, he had during much of the time nearly all of the authority afterwards conferred on them.
>
> The watchman and other persons from time to time provided ***for by the statutes*** and now represented by the police[***, e.g., local and state police forces***], were usually ***legally subordinate*** and to some extent under his discretion. Most arrests were made by him or under his supervision. The office was an onerous one, and in process of time became more troublesome than pleasant, and met with the treatment which all offices meet with which deal with the handling of rogues and vagabonds; but it has never ceased to be important and responsible, and ***it is remarkable as the one office which, in all the mutations of prerogative, has continued, since the times long prior to the conquest, an office filled by popular choice for the preservation of peace in the territory of its constituents.*** See 1 Backus on Sheriffs, Coroners and Constables, 38, et seq.; Finch's Law c. 22, p. 127; Comyn's Dig. "Lul" M. 6-12; 2 Hale P.C. c. 10, 11, 12; Tomlyn's Law Dic. "Constable;" King v. Routledge, Doug. 513.
>
> [*Id*. at 102-105 (emphasis added).]

Finally, Justice Campbell notes that the independent judiciary might be the only hope to protect the People from legislative ignorance. Speaking of the predecessor to the Office of Sheriff and the principle that the common-law powers and duties Constitutional Officers cannot be abrogated, Justice Campbell stated: "The argument, although dealing with very ancient affairs, in no sense belongs to mere antiquarian curiosity. It is very unfortunate and very discreditable that so little heed is sometimes paid to the continued and perpetual importance of institutions which form an essential element in the organic life of our government. Courts, at least, are found to respect what the people have seen fit to preserve, by constitutional enactment, ***until the people are unwise enough to undo their own work***. The loss of interest in the preservation of ancient rights is not a very encouraging sign of public spirit or good sense." *Allor*, *supra* at 102 (emphasis added).

So, if Delaware adheres to the common law, and the common law brings with it the preservation of all the common-law powers and duties inherent in the Office of Sheriff upon the naming of that Office in the Delaware Constitution, and, in fact, uniquely perhaps, Delaware's Constitution *actually does explicitly contain at least one of the traditional common-law powers of the Sheriff, here the most important one of "conservator of the peace" which, without debate, includes* ***the powers to make arrests and enforce the law against breaches of public order and peace***, how can any right-minded, constitutionally conscious Officer of the Court, Sheriff or Legislator make the bald and unfounded statement that the Sheriff has no powers of arrest?

I would call to task any such individual who ignorantly challenges the powers of the County Sheriff to enforce the law and to make arrests in light of this unassailable constitutional legal history, and, more importantly, in light of the precise language of the Delaware Constitution vesting the Sheriff with powers of conservator of the peace.[1] Not to mention the horrendous consequences this proposed usurpation has of eviscerating the public's will and their representative choice in who they wish to perform this inarguable constitutional duty.

---

[1] Black's Law Dictionary provides a very thorough definition of the powers of a "conservator of the peace" and even cites Delaware's own constitutional provision as a legal exemplar. It provides:

> **CONSERVATORS OF THE PEACE.** ***Officers authorized to preserve and maintain the public peace.*** In England, these officers were locally elected by the people until the reign of Edward III, when their appointment was vested in the king. ***Their duties were to prevent and arrest for breaches of the peace,*** but they had no power to arraign and try the offender until about 1360, when this authority was given to them by act of parliament, and "then they acquired the more honorable appellation of justices of the peace." 1 Bl. Comm. 351.
>
> Even after this time, however, many public officers were styled "conservators of the peace," not as a distinct office but ***by virtue of the duties and authorities pertaining to their offices.*** In this sense the term may include the king himself, the lord chancellor, justices of the king's bench, master of the rolls, coroners, sheriffs, constables, etc. 1 Bl. Comm. 350. See Smith v. Abbott, 17 N.J.L. 358. In Texas, the constitution provides that county judges shall be conservators of the peace. Const. Tex. Art. 4, § 15; Jones v. State, Tex. Cr. App. 65 S.W. 92. ***The Constitution of Delaware (1831)*** provides that: "The members of the senate and house of representatives the chancellor, the judges, and the attorney-general shall, by virtue of their offices, be conservators of the peace ***throughout the state***; ***and*** the treasurer, secretary, and prothonotaries, registers, recorders, ***sheriffs,*** and coroners, ***shall, by virtue of their offices***, be ***conservators thereof within the counties respectively in which they reside***.
>
> [Black's Law Dictionary (rev'd. 4th ed.) (1968), p. 378 (emphasis added).]

The power of the County Sheriff to make arrest and to bring criminals to justice – i.e., the power of a conservator of the peace, is, indeed, *vitae republicae*, i.e., the life of the republic, for without the ability to preserve law and order combined with the execution of that function by an accountable individual chosen by the People the path to totalitarian and authoritarian rule by force of will rather than by rule of law is blazed and the door to chaos thrown agape. The further that government authority is removed from control and accountability to the People the easier it will be for the former, whether by choice or design, to suppress the latter.

Our respective states' constitutions have preserved the ability of the County Sheriff to exercise law enforcement authority over the citizens within his county for as long as we have named that Office in our founding charters. Neither the legislature nor the judiciary has the power or authority to remove this power from the Office because it is inherent by virtue of the naming of that office in the state's Constitution, which office was vested with the power of a conservator of the peace, and more specifically, that power, as vested in the Sheriff, included the most basic power to prevent breaches of the public peace and arrest those who seek to break it. As noted by the Wisconsin Supreme Court of this basic principle:

> It would certainly be a very idle provision of the Constitution, ***to secure to the electors the right to choose their Sheriff, and at the same time leave to the legislature the power to detach from the office of sheriff all the duties and functions by law belonging to that office when the constitution was adopted, and commit those duties to some other officer not elected by the people.***
>
> [*Brunst, supra* at 414 (emphasis added).]

Indeed, in 1982, the same Supreme Court, adhering to this fundamental principle of basic constitutional law noted:

> Within the field of his responsibility ***for the maintenance of law and order***, the sheriff today retains his ancient character and ***is accountable only to the sovereign, the voters of his county***…. No other county official supervises his work or can require a report or an accounting from him concerning his performance of his duty. He chooses his own ways and means of performing it. He divides his time according to his own judgment of what is necessary and desirable but is ***always subject to call and is eternally charged with maintaining the peace of the county and the apprehension of those who break it.*** In the performance of his duty he is detective and patrolman, as well as executive and administrator, and he is emphatically one of those who may serve though they only stand and wait. We recite these qualities and characteristics of the office not because they are novel but because they are so old that they are easily forgotten or unappreciated.

[*Wisc. Professional Police Ass'n v. Dane County*, 316 N.W.2d 656, 661 (Wis. 1982), citing *Andreski v. Industrial Comm'n*, 52 N.W.2d 135, 137-38 (Wis. 1952) (emphasis added).]

Thus, while the Office of Sheriff in Delaware may be under attack by the General Assembly and other non-accountable, non-representative entities, the People of that state remain the *only* and *ultimate* arbiter of its fate. The framers of the Delaware Constitution were wise enough to insure the Office, with all of its appurtenant powers, would be forever cemented into the state's constitutional government. This mechanism, of course, preserved the People's ability to choose who shall wield this power.

If we are to respect the rule of law and be governed thereby, then no judge or legislator can usurp these constitutional powers. Regardless of what customs or policies have been instilled and whether, by virtue of ignorance, apathy, political motivations, or simple passage of time, these powers have been eroded or are no longer respected, the substantive legal rule must prevail in the state of Delaware, as in all states, if it is to regard itself as a Sovereign unto its own right, fully and voluntarily participating in the creation of its own constitutional destiny. It was, after all, the first state to acquiesce in the promise of self-government as an independent Sovereign – let it not be the first to withdraw itself into an unknown fate we can only hope and pray will not result in what history teaches will most certainly be oppression and subjugation followed by revolution or anarchy.

Respectfully submitted,

Carson J. Tucker