

No. 08-5231

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

MARIO TERRELL DAY,
Appellant.

On Appeal from the United States District Court
For the Eastern District of Virginia
Richmond Division

BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC.
IN SUPPORT OF PETITION FOR REHEARING

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Heidi Boghosian, *Applying Restraints to Private Police*,
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Amicus Curiae American Civil Liberties Union of Virginia, Inc. (ACLU of Virginia), by counsel, files this Brief in support of appellant’s Petition for Panel Rehearing and Rehearing En Banc (the “Petition”). Both parties consent to the filing of this Brief.

INTEREST OF *AMICUS CURIAE*

The ACLU of Virginia is a non-profit Virginia corporation affiliated with the American Civil Liberties Union (ACLU), the oldest and largest citizen membership organization devoted to preservation and furtherance of Constitutional rights in the United States. The ACLU of Virginia has approximately 11,000 members and has appeared frequently before the state and federal courts of Virginia both as amicus and direct counsel in constitutional cases. One of the ACLU’s core commitments is the protection of the right to be free from unreasonable searches and seizures.

FACTUAL AND PROCEDURAL BACKGROUND

Amicus adopts the Factual and Procedural Background set forth in the Petition.

ARGUMENT

Amicus fully endorses the legal arguments set forth in the Petition. As explained in the Petition, the “public function” test is the proper standard for determining whether private security guards should be considered state actors for

purposes of the Fourth and Fifth Amendments, and, applying that standard, the security guards involved in this case are state actors. Rather than restating those legal arguments, this Brief will focus on the public policy implications of allowing such security guards to perform searches, seizures, and interrogations without the protections of the Constitution.

The issue of constitutional constraints on “private” actors who perform law-enforcement functions is pressing, as the ranks of such “private police” have exploded in recent decades. In the 1990s, “private security expenditures grew to approximately \$52 billion, as compared to law-enforcement expenditures of \$30 billion.” Heidi Boghosian, *Applying Restraints to Private Police*, 70 Mo. Law Rev. 177, 191 (2005) (citing William C. Cunningham, U.S. Private Security Trends, Address at Law Commission of Canada’s “In Search of Security” Conference (Feb. 2003). Recent estimates place the number of private security guards at 200 million, compared to 725,000 public law enforcement officers. *Id.* “Many of these privately paid police behave like public law enforcement officers: detaining individuals, conducting searches, investigating crimes, and maintaining order.” Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. Crim. L. & Criminology 49, 50 (2004). Absent constitutional limitation, this legion of private police poses a grave threat to civil liberties.

The law enforcement activities of private police bear the imprimatur of the state. The protection of the populace from internal and external threats is the most central responsibility of government. By definition, the state maintains a monopoly on the legitimate use of force. Note, *Constitutional Limits on Private Policing and the State's Allocation of Force*, 59 Duke L. J. 519, 523-26 (2009); Joh, *supra*, at 69 (citing Max Weber, *Politics as Vocation* 2 (H.H. Gerth & C. Wright Milss trans. 1965) (1946)). Through extensive regulation, Virginia has delegated a portion of this power to armed security guards. As Judge Davis's dissent from the panel opinion explains, "Officer Costa's actions were made possible by and legitimized by Virginia law; no private citizen could have achieved what he did on behalf of the government under the circumstances presented here." *U.S. v. Day*, -- F.3d --, 2010 WL 60900, *8 (4th Cir. Jan. 8, 2010). Armed security guards must register with the state and satisfy state-mandated training requirements, and are subject to investigation and discipline by the Criminal Justice Services Board. *Id.* at *11. Additionally, contrary to the panel opinion (*Id.* at *7), an armed security guard's arrest power exceeds that granted to ordinary citizens. *Id.* at *11.

In addition to the fact that the state expressly allocates police powers to them, armed security guards behave more like police than like private citizens. "First, for private police, policing is an occupational objective, not a voluntary

task. . . . Second, private police are, to varying degrees, trained to behave like public police. . . . Third, private police are more like public police and less like private citizens because they are . . . ‘repeat players’ who possess incentives to use legal rules strategically.” Joh, *supra* at 112.

Private security guards’ use of the accoutrements of the police – such as uniforms, guns, and handcuffs – further blurs the distinction between public and private. “[P]rivate security personnel are frequently mistaken for public police.” Boghosian, *supra*, at 204. “Officers in uniform often signify to individuals, rightly or wrongly, that they do not have the right to refuse a search.” *Id.*

The case at bar illustrates how security guards may use the indicia of official authority to induce compliance from individuals. The uniformed guards “drew their weapons and yelled at Day to freeze as they ran toward him.” *Day* at *1. Day immediately complied. The officers restrained him and conducted a *Terry* search, then asked if he had “anything illegal” on him. Day told them that he had a little marijuana. The officers searched his pants and found the marijuana, then interrogated him about the firearm, and Day again answered their questions. In other words, the officers behaved in every respect like police officers, and Day responded by complying with their demands.

For all of these reasons, the *Jarrett/Ellyson* test employed by the panel majority is a poor fit for analyzing the status of armed security guards. Under that

test, the court examines “(1) whether the Government knew of and acquiesced in the private individual’s challenged conduct; and (2) whether the private individual intended to assist law enforcement or had some other independent motivation.”

Day at *3. As Judge Davis noted, the test was developed in the context of “private persons acting as police informants” (*Id.* at 12), and it is designed to assess the activities of a private *individual* in relation to the government. It therefore fails to take into account the *institutional* relationship between armed security guards and the government, specifically, the state’s delegation of police power to security guards, and the ways in which security guards are institutionally inclined to look and act like police officers.

The government realizes a substantial benefit from its delegation of authority to the private security industry. Increasingly, public police departments enter into formal partnerships or informal cooperative relationships with private security companies. *Joh, supra*, at 67-72. Even in the absence of a formal relationship, security forces may, as in this case, detain suspects to be handed over to the police, and “creat[e] a private arm to seize evidence that can be passed on to public police for use in criminal prosecutions.” *Boghossian, supra*, at 191. In the absence of constitutional limits, private security guards can obtain evidence in ways that would be prohibited to the public police, giving the police an incentive to let private security guards perform evidence gathering functions whenever

possible. “Because the law of criminal procedure has led, for better or worse, towards increased regulation of the daily work of the public police . . . , there exist structural pressures, perhaps ones that can never be measured satisfactorily, of delegating some ‘dirty work’ to the private police.” Joh, *supra*, at 124. The inevitable result is an increase in unreasonable searches and seizures and custodial interrogation, the fruits of which will be used in criminal proceedings.

CONCLUSION

Virginia actively delegates a portion of its police powers to armed security guards who look and act like public police. Under these circumstances, evidence gathered in violation of the Fourth and Fifth Amendments should not be admissible in a criminal trial. For these reasons, *Amicus* respectfully requests that the Petition for Rehearing be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2010, I served 2 copies of the foregoing document by U.S. Mail, postage pre-paid, and also electronically filed the foregoing document with Clerk of Court using the CM/ECF System, which will send notice such filing to the following registered CM/ECF users:

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