



# CITY OF TACOMA

## OFFICE OF THE CITY MANAGER

### ISSUE BRIEF

**TO:** Mayor and City Council

**FROM:** Anita Gallagher, Assistant to the City Manager, City Manager's Office

**SUBJECT:** Legislative Priority on Independent Prosecution

---

#### **Background**

The City of Tacoma's 2021 legislative agenda included several policy priorities related to systems transformation in law enforcement and the criminal justice system. We asked that the Legislature advance reforms that address the disparate impacts of systems and institutions on communities of color. The Legislature enacted a package of police reform bills consisting of over a dozen pieces of legislation, including the City's top priority, establishing a mechanism for independent investigations of incidents involving fatal use-of-force and deaths occurring in police custody. Coupled with the independent investigations policy on the City's legislative agenda was a similar independent structure for prosecutions. Legislation on independent prosecution was introduced in the 2021 legislative session, but did not advance. The Government Relations team recommends that the City Council continue to advocate for this policy's successful passage in the 2022 legislative session.

#### **Summary of Policy Dialogue**

While the concept of independent prosecution was not contemplated in Initiative 940, public sentiment around this issue is similar to that for independent investigations of police use-of-force. Community members have expressed doubt that prosecution conducted by an adjacent local authority can be entirely objective and free of bias. During the summer of 2020, the Governor's Task Force on Independent Investigations took up the issue and a robust dialogue occurred on how such a system might be structured. The Task Force heard from several legal experts on the matter. The following is a very brief summary of the considerations that were highlighted in those discussions.

- The Task Force was provided with a matrix (included in Council's Study Session packet) outlining the legal considerations to be analyzed for five models that would represent a departure from the current system in which the County Prosecuting Attorney has decision-making authority. The matrix included input from the law firm K & L Gates as well as the Washington Association of Prosecuting Attorneys.
- During the course of the Task Force's discussions, the Washington Association of Prosecuting Attorneys raised concerns about any proposed structure that would intrude upon the core functions of the county prosecuting attorney. From this perspective, such a change would likely require an amendment to the Washington State constitution.
- The Task Force also received a memorandum from K & L Gates (included in Council's Study Session packet) that provides some analysis on the alternative models for independent prosecution. Notably, the firm stated that "We have identified no case law testing the constitutionality of an independent agency with the power to investigate and prosecute such cases independently or through the delegation of power from the State Patrol, AG or the Governor."



## CITY OF TACOMA OFFICE OF THE CITY MANAGER ISSUE BRIEF

[House Bill 1507](#), sponsored by Rep. Debra Entenman (D- 47<sup>th</sup> LD), introduced in the 2021 legislative session, would have established an Independent Prosecutions Unit within the Office of the Attorney General. It would have authorized the Office of the Attorney General with jurisdiction concurrent with county prosecuting attorneys to investigate and prosecute crimes involving use of deadly force by police officers committed on or after July 1, 2022. The bill was not heard in the House Committee on Public Safety until the cut-off date for policy bills, so the bill did not advance. The City did sign in support for the legislation and Mayor Woodards met with the Chair and Vice Chair of the Committee in advance to express the City's support for the policy.

### **Looking Forward to the 2022 Legislative Session**

The Washington Coalition for Police Accountability, a key stakeholder group in the policy discussion on police and criminal justice system reform, plans to continue to advocate for a system change providing for independent prosecution. There is ongoing dialogue between stakeholders and Rep. Entenman regarding how to advance legislation on this topic in the 2022 session. While House Bill 1507 proposed a structure that did not present any legal concerns, there is some discussion as to whether or not the Office of the Attorney General can be entirely impartial given that it provides legal counsel to the Washington State Patrol. The City's Government Relations team will continue to engage in the discussions and will be prepared to support the City Council in advocacy efforts moving forward.

# Investigation and Prosecution Legal Issues

## Investigations:

System Proposal	Legal Issue Level of Concern		Legal Issue Notes
<b>Current System</b> – Independent Investigation Teams (IIT)			
<b>Separate Agency</b> in Executive Branch (similar to Department of Social and Health Services, Washington State Patrol, Health Care Authority, etc.)	KLG	WAPA	<ul style="list-style-type: none"> <li>WAPA concerns that a separate agency would usurp the authority of the Sheriff if the jurisdiction is exclusive rather than concurrent</li> <li>KLG believes the legislature can create exclusive jurisdiction</li> </ul>
<b>Separate Agency</b> NOT in Executive Branch			<ul style="list-style-type: none"> <li>WAPA concerns that a separate agency would usurp the authority of the Sheriff if the jurisdiction is exclusive rather than concurrent. Greater concerns with non-executive branch agency</li> <li>No clear authority on point</li> </ul>
<b>Division within Attorney General’s (AG) Office</b>			<ul style="list-style-type: none"> <li>WAPA concerned that a separate agency would usurp the authority of the Sheriff if the jurisdiction is exclusive rather than concurrent</li> <li>WAPA concern of potential conflicts arising from prosecution and investigation being housed in same agency                             <ul style="list-style-type: none"> <li>Others believe this concern can be addressed</li> </ul> </li> </ul>
<b>Division within Auditor’s Office</b>			<ul style="list-style-type: none"> <li>WAPA concern that the Washington Constitution does not authorize the auditor to conduct criminal investigations</li> <li>Constitution confers authority only for financial matters. See <a href="#">State ex rel. Graham v. San Juan County, 102 Wn.2d 311, 686 P.2d 1073 (1984)</a></li> <li>WAPA concern that assigning this task to the auditor would usurp the authority of the Sheriff</li> </ul>
<b>Division within Washington State Patrol</b>			<ul style="list-style-type: none"> <li>WAPA concern that this would usurp the authority of the Sheriff if the WSP were given exclusive rather than concurrent jurisdiction</li> </ul>

## Prosecutions:

System Proposal	Legal Issue Level of Concern		Legal Issue Notes
<b>Current System</b> – County Prosecuting Attorney has decision-making authority			<ul style="list-style-type: none"> <li>WAPA states this is consistent with Washington Constitution</li> <li>KLG finds the PA does not have sole jurisdiction now and AG may sometimes overrule PA</li> </ul>
<b>Separate Agency</b> – Agency outside Prosecuting Attorney or Attorney General			<ul style="list-style-type: none"> <li>WAPA concern that this would intrude upon the core functions of the county prosecuting attorney and cannot be accomplished without a constitutional amendment</li> <li>KLG finds that there are many agencies that do prosecution of cases using the AG now</li> </ul>
<b>Attorney General</b> – Transfer of sole prosecutorial decision-making authority to AG	KLG	WAPA	<ul style="list-style-type: none"> <li>WAPA concern that this would intrude upon the core functions of the county prosecuting attorney if the Attorney General’s authority is exclusive and cannot be accomplished without a constitutional amendment</li> </ul>
<b>Attorney General</b> – Concurrent jurisdiction with county Prosecuting Attorney			<ul style="list-style-type: none"> <li>Consistent with Washington Constitution under limited circumstances – prosecuting attorney consent or Governor request when prosecuting attorney refuses to act</li> <li>WAPA concern that any expansion beyond the two circumstances mentioned above would intrude upon the core functions of the county prosecuting attorney                             <ul style="list-style-type: none"> <li>This view is not universally shared</li> </ul> </li> </ul>
<b>Special Prosecutor</b> – Designated by Legislature on individual cases or all cases			<ul style="list-style-type: none"> <li>WAPA concern that this would intrude upon the core functions of the county prosecuting attorney and cannot be accomplished without a constitutional amendment</li> <li>KLG has not examined this issue.</li> </ul>
<b>Special Prosecutor</b> – Designated by Governor on individual cases	KLG	WAPA	<ul style="list-style-type: none"> <li>WAPA concern that this would intrude upon the core functions of the county prosecuting attorney and those of the attorney general and cannot be accomplished without a constitutional amendment.</li> </ul>

**Key:**

- No legal or constitutional issues impacting this structure
- Potential legal or constitutional issues that may impact this structure
- Legal or constitutional issues making this structure unadvisable

## MEMO

TO: Sonja Hallum, Office of the Governor

FROM: K&L Gates LLP

DATE: October 14, 2020

RE: Scope of Constitutional Authority and Limitations, Statutory Example, and Considerations for Models and Implementation

## I. INTRODUCTION

The plain language of the Washington State Constitution and current statutes are consistent with the ability of the legislature to authorize the Attorney General (AG) and potentially an independent agency to investigate and prosecute a specific class of criminal cases, such as crimes involving excessive use of force. We cannot reach a final conclusion about this proposition because it is untested in the courts and we have found no case law directly addressing the constitutionality of an exclusive grant of authority to investigate and prosecute such cases. However, RCW 43.10.090 does grant exclusive authority in certain circumstances to the AG to prosecute cases that otherwise would be under the jurisdiction of the prosecuting attorneys (PAs). This statute has been unchallenged on constitutional grounds, so while it is good law and useful guidance, we cannot make a definitive conclusion about its constitutional validity. In the final section, we provide an overview of the possible options for implementing a framework to conduct independent investigations into or prosecutions of police use of force cases.

## II. SCOPE OF CONSTITUTIONAL AUTHORITY AND LIMITATIONS

### A. Overview of Constitutional Limits on Who can Investigate and Prosecute

The legislature's ability to affect the scope of authority held by constitutional officers will likely be determined in light of the provisions of the Washington State Constitution describing the role of a prosecuting attorney, sheriff, AG, and the Governor.

Three articles of the Washington State Constitution address matters relating to these constitutional officers. The first relevant constitutional provision, Article XI, section 5, addresses the role of county sheriffs and prosecuting attorneys:

The *legislature*, by general and uniform laws, *shall* provide for the election in the several counties of boards of county commissioners, *sheriffs*, county clerks, treasurers, *prosecuting attorneys* and other county, township or precinct and district officers, as public convenience may require, *and shall prescribe their duties*, and fix their terms of office[.] [Emphasis added.]

Under the plain text of the Washington State Constitution, the legislature has the authority to *prescribe* the *duties* of *sheriffs* and prosecuting attorneys. Although the Washington State Constitution provides that the legislature can *prescribe* the duties of the county officers, this does not permit the legislature to “interfere with core” functions that are “fundamental and inherent” to the constitutional role of the county officer. *State v. Rice*, 174 Wn.2d 884, 859-60, 279 P.3d 849 (2012) (emphasis added).

In terms of the history of the constitutional provision, “[a]rticle XI, section 5 was borrowed from the constitution of another state.” *Id.* at 859. The provision was “the culmination of a nationwide trend toward locally elected officials,” which began about 1820. *Id.* at 859. This movement “strengthened the concept of a decentralized government . . . established greater independence for elected officials, and defined positions that required exercise of discretion.” *Id.* (internal quotation marks and citation omitted). “By adopting article XI, section 5, and ensuring public enforcement of criminal laws by locally elected officials, the people of Washington provided accountability to local communities and further diffused governmental power.” *Id.* at 904-05 (internal quotation marks and citation omitted). Further, these officers “exercise the powers and perform the duties *then recognized* as appertaining to the respective offices.” *Id.* at 905 (emphasis added).

The second constitutional provision, Article III, section 21, describes the role of the AG:

The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law.

The third constitutional provision is comprised of Article III sections 2 and 5, which describe the authority and duties of the Governor. Article III, section 2 provides: “The supreme executive power of his state shall be vested in a governor.” Article III, section 5 provides, “[t]he governor may require information in writing from the officers of the state upon any subject relating to the duties of their respective offices, and shall see that the laws are faithfully executed.”

## **B. Authority to Investigate**

Our analysis of the authority to investigate demonstrates that sheriffs have traditionally exercised investigation responsibilities. However, current practice indicates that multiple entities currently conduct investigations at the state level (e.g., an agency, State Patrol, AG). Further, we have not found cases prohibiting the legislature from vesting the authority to investigate in an agency (whether or not in conjunction with the investigatory power of the AG).

As noted above, Article 11, section 5 of the Washington State Constitution expresses the people's intention that certain county officers, including sheriffs, "exercise the powers and perform the duties then recognized as appertaining to the respective offices which they were to hold." Op. Atty. Gen. 1961-62, No. 25 (quoting *State ex rel. Johnston v. Melton*, 192 Wash. 379, 73 P.2d 1334 (1937)). Sheriffs hold "common-law powers and duties," and, according to our Supreme Court, "[s]uch powers and duties are detailed and elaborated upon in *State v. Williams*, 346 Mo. 1003, 144 S.W. (2d) 98 (1940)." *Id.* (quoting *State ex rel. Johnston v. Melton*, 192 Wash. 379, 73 P.2d 1334 (1937)).

*Williams* explained:

Under the common law [the sheriff] was the conservator of the peace within the county, had the safe keeping of the county jail and commanded the posse comitatus. One author says that 'for a thousand years the sheriff has been the principal conservator of the peace in his county, with full power to command, whenever necessary, the power of the county. . . . His duties are described in *Farmers' Mut. Fire A. v. Hunolt*, Mo. App., 81 S.W.2d 977, 981: 'Sheriffs are given power, and it is made their duty, to preserve the peace, *arrest* and commit to jail all felons, traitors, and other misdoers, to execute all process, and to attend upon courts of record.

Op. Atty. Gen. 1961-62, No. 25 (emphasis added) (quoting *State v. Williams*, 346 Mo. 1003, 1014, 144 S.W.2d 98, 104 (1940)).

Notably, the provisions of RCW 36.28.010 "set out the duties of the sheriff very much as they existed at common law." Op. Atty. Gen. 1967-62, No. 25. The general duties of the sheriff, as prescribed under RCW 36.28.010, require the sheriff to:

- (1) *arrest* and commit to prison all persons who break the peace, or attempt to break it, and all persons guilty of public offenses;
- (2) defend the county against those who, by riot or otherwise, endanger the public peace or safety;
- (3) *execute the process and orders of the courts* of justice or judicial officers, when delivered for that purpose, according to law;
- (4) *execute all warrants* delivered for that purpose by other public officers, according to the provisions of particular statutes;

- (5) attend the sessions of the courts of record held within the county, and obey their lawful orders or directions; and
- (6) keep and preserve the peace in their respective counties, and quiet and suppress all affrays, riots, unlawful assemblies and insurrections, for which purpose, and for the service of process in civil or criminal cases, and in *apprehending or securing any person for felony or breach of the peace*, they may call to their aid such persons, or power of their county as they may deem necessary.

(Emphasis added.) The sheriff's duties must be read in conjunction with those of the AG and Governor. We have not found case law involving constitutional challenges to the statutory duties of the AG and Governor. Washington law provides, at the Governor's request, the AG shall "investigate violations of the criminal laws within this state." See RCW 43.10.090. Similarly, the AG has concurrent authority to "investigate crimes" (and initiate and conduct prosecutions) upon the request of or with the concurrence of the PA, Governor, or the organized crime intelligence unit of the state patrol.<sup>1</sup> RCW 43.10.232. Further, we have not found cases or authority addressing RCW 43.10.234, which provides a procedure for the court to designate a prosecuting attorney when the PA and AG both file an information or indictment charging the a defendant with "substantially the same offense(s)" based on "whose prosecution of the case will best promote the interests of justice." The court dismisses the indictment of the person not designated as the prosecuting attorney. *Id.*

In *State ex rel. Johnston v. Melton*, 192 Wash. 379, 388, 73 P.2d 1334 (1937), the Washington Supreme Court held that legislation providing for the appointment of investigators by PAs with "the same authority as the sheriff" to make arrests "anywhere in the county . . ." was unconstitutional. Thus *Melton* addressed whether one county official may carry out a duty assigned by the constitution to a different county official. *Melton* does not address whether certain investigatory powers can be held by a state official or an independent agency.<sup>2</sup>

Notably, the Washington State Constitution grants the Governor independent authority to seek information from public officials (e.g., potentially police officers exercising state functions) and oversee the execution of laws:

[article III, section 5] with RCW 43.06.010 which details the general duties of the governor, provide for the authority of the governor to *require information from other public officials*, and

---

<sup>1</sup> See RCW 43.43.850 (describing the creation of the organized crime intelligence unit in the Washington State Patrol).

<sup>2</sup> See Op. Atty. Gen. 1970, No. 161, "The thrust of [*Melton*], as we view it, is that insofar as the powers and functions of a county sheriff are concerned, those powers and functions must be performed (*at the county level*) by the sheriff or his deputies, and *not by some other county officer or employee.*" (Internal quotation marks and citations omitted).

invests the governor with power to see that the laws are faithfully executed.

*State v. Sponburgh*, 84 Wn.2d 203, 211, 525 P.2d 238, 243 (1974) (emphasis added) (holding the governor was a proper party to receive grand jury evidence under its constitutional authority); see also Op. Atty. Gen. 1981, No. 9 (“the Governor, for purposes of determining qualification of prospective appointee to public office, may request that the State Patrol provide the Governor information contained in records on file with the Patrol and, pursuant to a local cooperation act agreement with the Governor, search out records maintained by other law enforcement agencies or custodians or interview contacts with personal knowledge”).

### C. Authority to Prosecute

Below, we address cases relating to the constitutional authority to prosecute. As described, there is a distinction in tone between cases that interpret the constitutional provisions relating to county PAs and those relating to the AG. On the one hand, the cases interpreting Article XI, section 5 (relating to county government) of the Washington State Constitution use broad language that suggests PAs’ prosecutorial power may not be limited in certain circumstances. On the other hand, the cases interpreting Article III, section 21 (relating to the AG) indicate that PAs’ prosecutorial power may be held in parallel by the AG. Note that in *Seattle v. McKenna* (discussed below), the Supreme Court held that the constitutional powers of the AG could be supplemented with “broad authority” granted to the AG by the legislature.

#### 1. Cases Interpreting the Power of PAs

As noted above, the core functions of county PAs are the “duties *then* recognized as appertaining to the respective offices.” *State v. Rice*, 174 Wn.2d 884, 905, 279 P.2d 849 (2012) (internal quotation marks and citation omitted). The core functions of PAs have remained largely unchanged since 1879. See *State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 181, 385 P.3d 769, 782 (2016), as amended (Feb. 8, 2017) (comparing the duties defined in the Laws of 1879 and those in RCW 36.27.020(1), but notably, the core function at issue was the role of a prosecuting attorney as legal advisor; not its role prosecuting criminal or civil cases).

In 1879, the description of the core duties of PAs differs only slightly from those identified in today’s RCW, as shown in the texts below.

#### Laws of 1879 (Section 6 of An Act in relation to Prosecuting Attorneys, Defining Their Duties and Fixing Their Compensation)

Each prosecuting attorney shall be the legal advisor of the board of county commissioners of his county or district; he shall also *prosecute all criminal and civil actions, in which the territory is a party, the jurisdiction of the action being in his*

*county or district, or in which his county or district is a party; defend all suits brought against the territory, the jurisdiction of which is in his county or district; and all suits brought against the county or district in which he was elected.*

RCW 36.27.020(3) and (4)

The prosecuting attorney shall...

(3) *Appear for and represent[ing] the state, county, and all school districts subject to the supervisory control and direction of the attorney general in all criminal and civil proceedings in which the state or the county or any school district in the county may be a party;*

(4) *Prosecute all criminal and civil actions in which the state or the county may be a party, defend all suits brought against the state or the county...*

In *State v. Rice*, the court upheld a criminal sentencing statute addressing sexual offenses and rejected an argument that the statute violated the separation of powers doctrine by impermissibly invading PAs' core function of exercising broad charging discretion. Rice argued that her criminal conviction should be overturned because the legislature's special allegation statute made filing special allegations mandatory. *State v. Rice*, 174 Wn.2d 884, 888, 279 P.2d 849 (2012). The State argued that "prosecuting attorneys have no inherent authority whatsoever because the legislature can 'prescribe their duties' under article XI, section 5 of our constitution." *Id.* The Washington Supreme Court rejected the State's argument, concluding:

The State ignores that under article XI, section 5, the very concept of a locally elected 'prosecuting attorney' includes the core function of exercising *broad charging discretion on behalf of the local community*. Although the legislature can fashion the duties of prosecuting attorneys, the legislature cannot interfere with the core functions that make them 'prosecuting attorneys' in the first place.

*Id.* (emphasis added) (citing *State ex rel. Johnston v. Melton*, 192 Wash. 379, 388, 73 P.2d 1334 (1937)).

Prosecutors must have broad charging discretion, not just "some modicum of charging discretion." *Id.* ("Without broad charging discretion, a prosecuting attorney would cease to be a "prosecuting attorney" as intended by the state constitution. This would be true even if some modicum of charging discretion remained." (Citing *Melton*, 192 Wash. at 390, 73 P.2d 1334)).

While the legislature is free to establish statutory duties that do not interfere with core prosecutorial functions . . . the legislature cannot interfere with the *fundamental and inherent charging discretion of prosecuting attorneys*, including discretion over the filing of available special allegations.” *Id.* at 905-06. The legislature cannot *force* the PA to file criminal charges. *Id.* at 900 (“Under the state constitution, a prosecuting attorney is a locally elected executive officer who has inherent authority to decide which available charges to file, if any, against a criminal defendant. The separation of powers doctrine thus precludes the legislature from requiring prosecuting attorneys to file any supplemental charges.”). Ultimately the court upheld the statute because the statute only *directed* PAs to file special allegations rather than *mandated* the filing (*i.e.*, failure to charge special allegations did not come with any attached consequences to the PA).

## 2. Cases Interpreting the Power of the AG

As noted above, Article III, section 21 of the Washington State Constitution provides that the AG “shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law.”

Article III, section 21 of the Washington constitution is not “self-executing.” See *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18 (1935). When a statute provides for the authority of “proper state officers to bring actions, that authority is exclusive.” *State v. Gattavara*, 182 Wash. 325 (1935) (emphasis added); see also *Okanogan Highlands Alliance v. Crown Resources Corp.*, No. 20-cv-147-RMP, 2020 WL 5899400, at \*5 (E.D. Wash. Oct. 5, 2020) (holding that RCW 43.10.030(1) “grants the attorney general discretionary authority to act in any court, state or federal, trial or appellate, on a *matter of public concern, provided there is a cognizable common law or statutory cause of action*, which includes bringing an action under the Washington Water Pollution Control Act on behalf of the people of Washington.” (Emphasis added; internal quotation marks and citation omitted); *Burnett v. State Dept. of Corrections*, 187 Wn. App.159, 349 P.3d 42 (2015) (recognizing that the AG “is the constitutionally recognized office that acts as attorney for state officers. Numerous statutes implement this constitutional directive and charge the attorney general with representing state agencies in litigation.” (Citing RCW 43.10.030)).

Washington courts have recognized the legislature’s authority to grant supplemental authority to the AG. In *City of Seattle v. McKenna*, the Washington Supreme Court held that the AG was authorized to join federal litigation in a health care case in the name of the state. 172 Wn.2d 551, 259 P.3d 1087 (2011). The AG’s authority to intervene was based on statute (see RCW 43.10.030), and not based expressly on the constitution.

In *McKenna*, the Supreme Court recognized the ability of the legislature to provide the AG with broad authority that supplements the constitutional powers of the AG:

The framers of the Washington Constitution designed an executive branch of government that dispersed authority among several officers. In addition to assigning certain duties to each officer, the framers left additional duties to be determined by future generations in the exercise of self-government.

The people of the state of Washington have, by statute, vested the attorney general with broad authority, and Attorney General McKenna's decision to sue to enjoin the enforcement of the PPACA falls within that broad authority. [172 Wn.2d at 564]

In *Gattavara*, the court held that absent a specific grant of power, a state agency could not *institute* an action to recover industrial insurance premiums separately from the AG, despite a statute authorizing the agency to *appear* for the department in any action instituted for the purpose of collecting industrial insurance premiums. 182 Wash. 325, 47 P.2d 18 (1935). According to *Gattavara*, the Washington State Constitution is modeled after the federal constitution, which created the AG's office as a check upon the various branches of government. *Id.* at 332-33. While the statute on which the department relied allowed its attorneys to *appear* for the department in the action at issue, it did not authorize the department to *institute* such actions. That duty was left to the AG under another statute.<sup>3</sup> Accordingly, it is the AG who "must exercise his judgment as to whether the action shall be instituted." *Id.* at 330.

*Gattavara* noted that the rights and powers of PAs and the AG in "prosecuting offenders against the laws" is "*absolute in all cases where the statute has not specially granted the power to another.*" Specifically, the Court noted:

On the Attorney General in certain instances, and on the prosecuting attorneys of the several counties of the state in others, is imposed the duty of prosecuting offenders against the laws. *The rights and powers of these officers in this respect are absolute in all cases where the statute has not specially granted the power to another*; and, as we find no special grant of power to the medical board to employ special counsel to prosecute offenders against the act in question, we are forced to the conclusion that no such power exists.

182 Wash. at 330 (emphasis added).

As a corollary to the absolute authority discussed in *Gattavara*, state agencies may not independently appoint counsel to criminally prosecute actions where the legislature has not expressly provided such authority. In *State ex rel. State Board of Medical Examiners v. Clausen*, 84 Wash. 279, 146 P. 630, 632 (1915), the Court held that the Board of Medical Examiners could not employ private counsel at the state's expense where the statutory authority did not expressly so provide. The board was charged with enforcing medical licensing requirements, which included the potential for criminal actions. *Id.* at 284-85. The board argued that separate counsel was necessary because assistance "cannot be obtained" from either the AG or PA office, specifically that these officers were neglecting their duty in attaining evidence, preparing cases, and conducting prosecutions. *Id.* at 280-281.

---

<sup>3</sup> See Laws of 1929, Chapter 92, page 177 ("The attorney general shall have the power and it shall be his duty .... To institute and prosecute all actions and proceedings for, or for the use of the state which may be necessary in the execution of the duties of any state officer").

The Court rejected the board's argument, holding that absent a special express grant of power to another, these criminal prosecutions must be prosecuted by either the AG or PA. *Id.* at 284-85. Finding no express grant of power to the board to employ special counsel to prosecute offenders, the court concluded that "no such power exists." *Id.* at 285 (the court also noted that under the Constitution and by statute, the attorney general is made legal advisor to all state officers. The court defined state officers as anyone "perform[ing] state functions" even if "technically speaking they may or not be state officers"). Had the legislature expressly authorized the board to employ private counsel, the Court's reasoning indicates that it would have upheld the decision. However, this issue has not been specifically addressed.

Other cases recognize the limits of the AG's authority based on legislative intent. For example, In *State ex rel. Hamilton v. Superior Court*, the court held that the AG could not force a prosecutor to dismiss an action filed by the prosecutor seeking to oust a county commissioner. 3 Wn.2d 633, 101 P.2d 588 (1940). According to the Court, this would usurp the prosecutor's discretion, and is not saved by the statutory language that the prosecutor's duty to "to appear for and represent the state and the county . . . in which he is a prosecuting attorney, in all criminal and civil actions and proceedings in such county in which the state or such county . . . is a party," is "*subject to the supervisory control and direction of the attorney general.*" Notably, this holding is based on statutory interpretation of the roles of the PA and AG, and does not support a constitutional limit on the ability of the AG to pursue a criminal prosecution that might otherwise be conducted by a PA.

Further, as noted above, the AG has concurrent statutory authority to "conduct prosecutions" upon the request of or with the concurrence of the PA, Governor, or the organized crime intelligence unit of the state patrol. RCW 43.10.232. From our review, it appears this statute has not been constitutionally tested.

#### **D. Conclusion**

In sum, the Washington State Constitution does not impose any express restrictions on the ability of the legislature to limit the jurisdiction of a sheriff or PA with regard to cases on police use of force. Again we note that the relevant cases were based on statutory interpretation and the Supreme Court has generally been deferential to the legislature's determination of the duties of the AG.

### **III. STATUTORY EXAMPLE**

Our analysis addresses the extent to which the legislature may vest jurisdiction over a class of crimes by police in an office or entity other than the sheriff and PA. While RCW 43.10.090 provides useful guidance, we have not found any Washington state statutes granting exclusive jurisdiction to the AG (as opposed to the PA) over the investigation and prosecution of a class of crimes that have been subject to an appellate determination of validity.

As noted above, RCW 43.10.030 provides the general powers and duties of the AG, including appearing for and representing the state before the supreme court or the court of appeals in all cases in which the state is interested. Further to these general powers and duties, RCW 43.10.090 permits the AG to override a PA's decision not to prosecute only if certain conditions of RCW 43.10.090 are met. In turn, RCW 43.10.090 provides:

Upon the written request of the governor, the attorney general shall investigate violations of the criminal laws within this state.

If, after such investigation, the attorney general believes that the criminal laws are improperly enforced in any county, and that the prosecuting attorney of the county has failed or neglected to institute and prosecute violations of such criminal laws, either generally or with regard to a specific offense or class of offenses, the attorney general shall direct the prosecuting attorney to take such action in connection with any prosecution as the attorney general determines to be necessary and proper.

If any prosecuting attorney, after the receipt of such instructions from the attorney general, fails or neglects to comply therewith within a reasonable time, the attorney general may initiate and prosecute such criminal actions as he or she shall determine. In connection therewith, the attorney general shall have the same powers as would otherwise be vested in the prosecuting attorney.

From the time the attorney general has initiated or taken over a criminal prosecution, the prosecuting attorney shall not have power or authority to take any legal steps relating to such prosecution, except as authorized or directed by the attorney general.

Few cases have addressed RCW 43.10.090. Four cases cite the statute and one more references the preceding version of RCW 43.10.090 from the Laws of 1937. None of these cases provide an in-depth discussion of the legislative intent of the statute, however, the limited discussion available does provide some context as to the overriding powers of the AG.

Under RCW 43.10.090, the AG has exclusive prosecutorial authority when an AG's investigation indicates that criminal laws have been improperly enforced in a county, and that the local PA has failed to remedy the situation after being instructed to do so by the AG. *State v. Howard*, 106 Wn.2d 39, 42, 722 P.2d 783, 785 (1985) (citing RCW 43.10.090). In such cases, the PA has no authority over the case except as authorized by the AG. *Whatcom Cty. v. State*, 99 Wn. App. 237, 248, 993 P.2d 273, 279 (2000) (citing RCW 43.10.090). The two cases do not examine the constitutional validity of the statute itself. In sum, the courts to date have enforced RCW 43.10.090 according to its terms, which grant exclusive jurisdiction to the AG when the terms of the statute have been met. In *Seattle v. McKenna* the Supreme Court specifically found that the legislature could provide the AG with "broad authority" beyond the powers specified in the constitution. This is consistent with the idea that the legislature could grant broader authority to the AG

with respect to use-of-force crimes, particularly where there is a strong state interest in independent and consistent evaluation.

#### IV. MODELS OF AUTHORITY TO INVESTIGATE OR PROSECUTE

In analyzing the different options for implementing an agency, whether the agency would be authorized directly to have both investigatory and prosecutorial functions or whether the investigation and/or prosecution roles may be delegated to the AG, the Governor, or other state officer may be considered.

We have found no direct authority either prohibiting or validating the following models:

<b>Structure</b>	<b>Investigate</b>	<b>Prosecute</b>
<b>Independent Agency</b>	Agency as limited law enforcement agency (Agency)  State Patrol  AG	Agency  and/or PA  and/or AG
<b>AG</b>	Agency as limited law enforcement agency (Agency)  State Patrol  AG	Agency  and/or PA  and/or AG
<b>Governor</b>	Agency as limited law enforcement agency (Agency)  State Patrol  AG	Agency  and/or PA  and/or AG

One model could grant an independent agency investigatory authority over a class of criminal cases (e.g., police use of force), but grant exclusive jurisdiction to prosecute with the AG or PA.

Another model is an independent agency with both investigatory and prosecutorial authority. Such authority is currently granted to the Washington State Insurance Commissioner (WSIC) and may serve as a useful example. WSIC can hire investigators that investigate crimes with the concurrence of the PA and use the power of the State Patrol.<sup>4</sup> WSIC may hire “assistant attorneys general and support staff” and prosecute cases on its own, or choose to *direct* the AG or PA to do so (and both officers *must* take up the prosecution when WSIC requests).<sup>5</sup> The statutory scheme appears to leave open as a policy question how WSIC assigns responsibility for prosecution and seems

<sup>4</sup> See RCW 48.02.080(1), (2) and (4).

<sup>5</sup> See RCW 48.02.080(3) and (4).

consistent with either a shared or exclusive model for prosecution. Note that the WSIC is an elected office, established by statutory and not constitutional provisions.

Another model would grant the AG exclusive jurisdiction over the investigation and prosecution of a limited class of criminal cases involving police officers. As noted throughout, this approach is possible within the current statutory and constitutional framework. However, this approach would not create an *independent* agency, but would rather vest oversight of police use of force with the AG.

Again, the constitutionality of granting an agency authority to investigate and prosecute a limited class of criminal cases is unclear. The case law is simply inconclusive. We have identified no case law testing the constitutionality of an independent agency with the power to investigate and prosecute such cases independently or through the delegation of power from the State Patrol, AG, or the Governor. There may be constitutional limits that would prevent granting an agency such investigative or prosecutorial power, as it may infringe on the constitutional powers of the PA, AG, or Governor.

As a final thought, under any of the models outlined above, it may be prudent to try to use a vehicle, such as a declaratory judgment action or at least a formal opinion of the AG, to test the validity of the new law.