

THE GOVERNOR'S PRIVATE EYES

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In his inaugural speech on January 3, 1967, Florida Governor Claude Kirk declared a War on Crime. For this purpose he announced the creation of a unique War on Crime Program. Its activities were to include a Citizen's Awareness Program, but its main function was directed to the investigation of crimes. As the Program's director, the Governor appointed Mr. George Wackenhut, the president of the Wackenhut Corporation, a large private investigation firm. Mr. Wackenhut agreed to provide his services for one dollar a year; his corporation was simultaneously retained to supply the Program with the necessary administrative facilities and investigative manpower.¹ Payment for these services was expected to be covered by donations from hopeful and grateful citizens of Florida.

The duties of the Program's investigators were to receive complaints of alleged criminal law violations, to conduct investigations, to make findings and evaluations of facts, and then either to close the file or to proceed towards an arrest, indictment and conviction by referring the matter to regular law enforcement agencies.² The purpose of their activities was to look into charges of criminal deeds with a view to bringing the culprits to justice.³ The investigators themselves had no power to arrest, nor privilege to carry arms, but the Governor requested all law enforcement agencies to cooperate with them. This request included surrender of confidential police files.⁴ Probably, too, the Director, with the Governor's approval, exerted a certain amount of pressure to produce such cooperation.⁵ Moreover, the investigators were "commissioned" by the Governor "to conduct investigations on behalf of the State of Florida" and for that purpose each was an

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¹ The agreement between the Governor and the Wackenhut Corporation is not a public document, but Mr. Wackenhut, the president of the corporation, has supplied some information in the form of a fact sheet that he published as the director of the Program [hereinafter cited as Fact Sheet], and in his address to the stockholders of the corporation at their first annual meeting held on April 24, 1967. Much of the data contained in this paper is derived from these two documents and from the Governor's inaugural address on January 3, 1967.

² Fact Sheet at 3, 6-7; Advisory Opinion to the Governor, 200 So. 2d 534, 535 (Fla. 1967).

³ Fact Sheet at 7:

In the short space of 14 weeks, a total of 17 arrests have been made on 44 different criminal counts by duly constituted law enforcement agencies as a result of information furnished by the Governor's War on Crime investigators.

I can state affirmatively that many indictments and arrests will shortly be forthcoming.

⁴ The Chief of Police of the City of Tampa asked Attorney General Earl Faircloth for an opinion as to the power of the Governor to require the surrender of secret police files to the investigators. The Attorney General was of the opinion that the Governor had no such powers. Op. Att'y Gen., March 2, 1967.

⁵ Cf. Directive No. 6 to the Program's investigators, which reads as follows: "If any state or local law enforcement officers refuse to cooperate, you should immediately advise headquarters and pursue the matter no further unless instructed." Fact Sheet at 5.

"official representative of the Governor."⁶ They, therefore, gathered information regarding criminal activities of specific individuals in the name of and on behalf of the state.

One of the main reasons for the adoption of this unique program was the Governor's desire to by-pass the legislature, in order to avoid delays and to ensure the immediate availability of funds.⁷ Instead of attempting to create a governmental department, the Governor retained the Wackenhut Corporation; instead of trying to obtain funds through legislative appropriations, he planned to solicit donations from private citizens, hold such donations as a private trustee, and use them to finance the War. However, the laws of Florida provide that funds received by any state official "under the authority of the laws of the state" must be deposited in the state treasury and disbursed pursuant to an appropriation⁸ or under a trust established with the approval of the planning and budget commission for a "purpose authorized by law."⁹ In two Advisory Opinions to the Governor the Supreme Court of Florida held that the donations would be received "under the authority of the laws of the state" and the establishment of the Program was, indeed, a "purpose authorized by law."¹⁰ The result of these opinions was to subject the disbursement of the donations to the approval of the legislature or the planning and budget commission, exactly what the Program was devised to avoid. This may have been one of the reasons for its premature death.

Even though the Program no longer exists, its creation and activation raise constitutional and policy questions that merit discussion. The purpose of this paper is to examine the legal basis of such a type of program, to evaluate its desirability, and to analyze the law enforcement powers of state governors and the means that they may employ in exercising those powers. In particular, this paper will consider the following questions: When may a governor conduct or authorize investigation of crimes with a view to prosecution of offenders? What, if any, are the investigatory powers of a governor? When, if ever, may criminal investigations be performed by a private contractor on behalf of the state? Finally, what are the merits and disadvantages of employing an independent contractor to carry out investigations like those of the War on Crime Program?

⁶ *Id.* at 3.

⁷ The Director was frank: The Governor's problem, he said, was that there was no statewide law enforcement agency in Florida. "Formation of a new governmental agency would have called for approval from the State Legislature not then in session." There were no governmental funds immediately available. "Furthermore, no such funds would become available until the legislature provided them. There was no telling when that might be." *Id.* at 2.

⁸ Fla. Stat. Ann. § 215.31 (1958).

⁹ Fla. Stat. Ann. § 215.32(2)(b) (Supp. 1969).

¹⁰ Advisory Opinion to the Governor, 200 So. 2d 534 (Fla. 1967); Advisory Opinion to the Governor, 201 So. 2d 226 (Fla. 1967).

I. CONSTITUTIONAL AUTHORITY TO INVESTIGATE CRIMES

When may a Governor investigate or authorize the investigation of crimes with a view to prosecution of offenders? It is submitted that, absent express constitutional or statutory authorization, he may neither perform nor authorize such functions. The Florida Supreme Court based the legitimacy of the Program on the constitutional provision imposing on the Governor a duty to "take care that the laws be faithfully executed"¹¹ and on two sections of a Florida statute.¹²

A. *The "Take Care" Provision*

Most state constitutions vest in the governor the power of the "supreme" or "chief" executive.¹³ Most state constitutions also impose upon the governor, directly or by implication,¹⁴ a duty to "take care" that the laws be faithfully executed.¹⁵ These constitutional provisions have received diverse interpretations by state courts, depending upon the text of the laws under consideration, the context of and the parties to the controversy, and the view taken by courts and legislatures of their governor's role in the orga-

¹¹ Fla. Const. art. IV, § 6; Advisory Opinion to the Governor, 200 So. 2d 534, 535 (Fla. 1967).

¹² See pp. 639, 646-47, *infra*.

¹³ Ala. Const. art. V, § 113; Alas. Const. art. III, § 1; Ark. Const. art. VI, § 2; Cal. Const. art. V, § 1; Colo. Const. art. IV, § 2; Conn. Const. art. IV, § 5; Del. Const. art. III, § 1; Fla. Const. art. IV, § 1; Ga. Const. art. V, § I, ¶ 1; Hawaii Const. art. IV, § 1; Idaho Const. art. IV, § 5; Ill. Const. art. V, § 6; Ind. Const. art. V, § 1; Iowa Const. art. IV, § 1; Kan. Const. art. I, § 3; Ky. Const. § 69; La. Const. art. V, § 2; Me. Const. art. V, Pt. I, § 1; Md. Const. art. II, § 1; Mass. Const. pt. II, ch. II, § 1, art. I; Mich. Const. art. V, § 1; Miss. Const. art. V, § 116; Mont. Const. art. VII, § 5; Neb. Const. art. IV, § 6; Nev. Const. art. V, § 1; N.H. Const. pt. 2, art. 41; N.J. Const. art. V, § I, ¶ 1; N.M. Const. art. V, § 4; N.Y. Const. art. IV, § 1; N.C. Const. art. III, § 1; N.D. Const. art. III, § 71; Ohio Const. art. III, § 5; Okla. Const. art. VI, § 2; Ore. Const. art. V, § 1; Pa. Const. art. IV, § 2; R.I. Const. art. VII, § 1; S.C. Const. art. IV, § 1; S.D. Const. art. IV, § 1; Tenn. Const. art. III, § 1; Tex. Const. art. IV, § 1; Vt. Const. ch. II, § 3; Va. Const. art. V, § 69; Wash. Const. art. III, § 2; W. Va. Const. art. VII, § 6; Wyo. Const. art. IV, § 1.

¹⁴ In Massachusetts, for instance, the duty to see that the laws be executed can be implied from the language of the oath which the governor takes upon taking office and Mass. Const. pt. II, ch. II, § I, art. VII, which provides that the militia may be called out for "the enforcement of the laws."

¹⁵ Ala. Const. art. V, § 120; Alas. Const. art. III, § 16; Ariz. Const. art. V, § 4; Ark. Const. art. VI, § 7; Cal. Const. art. V, § 7; Colo. Const. art. IV, § 2; Conn. Const. art. IV, § 12; Del. Const. art. III, § 17; Fla. Const. art. IV, § 6; Hawaii Const. art. IV, § 5; Idaho Const. art. IV, § 5; Ill. Const. art. V, § 6; Ind. Const. art. V, § 16; Iowa Const. art. IV, § 9; Kan. Const. art. I, § 3; Ky. Const. § 81; La. Const. art. V, § 14; Me. Const. art. V, pt. 1, § 12; Md. Const. art. II, § 9; Mich. Const. art. V, § 8; Minn. Const. art. V, § 4; Miss. Const. art. V, § 123; Mo. Const. art. VII, § 5; Neb. Const. art. IV, § 6; Nev. Const. art. V, § 7; N.H. Const. pt. 2, art. 41; N.J. Const. art. V, § 1, ¶ 11; N.M. Const. art. V, § 4; N.Y. Const. art. IV, § 3; N.C. Const. art. III, § 7; N.D. Const. art. III, § 75; Ohio Const. art. III, § 6; Okla. Const. art. VI, § 8; Ore. Const. art. V, § 10; Pa. Const. art. IV, § 2; R.I. Const. art. VII, § 2; S.C. Const. art. IV, § 12; S.D. Const. art. IV, § 4; Tenn. Const. art. III, § 10; Tex. Const. art. IV, § 10; Utah Const. art. VII, § 5; Vt. Const. ch. II, § 20; Va. Const. art. V, § 73; Wash. Const. art. III, § 5; W. Va. Const. art. VII, § 5; Wis. Const. art. V, § 4; Wyo. Const. art. IV, § 4.

nizational scheme of government. Moreover, in many states the position of governor has undergone drastic changes from a mere figurehead to a strong head of the executive branch. Many of the decisions cited, therefore, refer to gubernatorial powers that have since been expressly granted by constitutional¹⁶ or statutory¹⁷ provisions. The governors' positions have been strengthened by legislative and constitutional grants, not by judicial interpretation, which explains the governors' emphasis on their relationships with the legislatures¹⁸ and the paucity of courts' opinions in this area.

With this as background, a few general conclusions regarding judicial interpretation of the "take care" provision may be cautiously drawn. First, with notable exceptions, such as Indiana,¹⁹ state courts have interpreted governors' constitutional executive powers not as a limitation, but as a grant.²⁰ Neither was the "take care" provision regarded by those courts as a source of diverse implied powers. Specific functions had to be based on specific constitutional or statutory grants, and executed in strict conformity therewith,²¹ except, perhaps, the power to sue²² or to control suit²³

¹⁶ N.J. Const. art. 4, § 5, ¶ 5. See *Richman v. Lignham*, 22 N.J. 40, 53-54, 123 A.2d 372, 379-80 (1956).

¹⁷ E.g., C. Rohr, *The Governor of Maryland* 114 (1932) [hereinafter cited as Rohr]. See also *Henry v. State*, 87 Miss. 1 (1905), dissent modified, 88 Miss. 843, 39 So. 856 (1906) (containing full report) holding that the Governor may not represent the state in the state courts. The legislature then provided the Governor with such power. See *Temple v. State*, 123 Miss. 741, 86 So. 580 (1920).

¹⁸ See L. Lipson, *The American Governor, From Figurehead to Leader* (1939) [hereinafter cited as Lipson]; J. Phillips, *State and Local Government in America* 189 (1954) [hereinafter cited as Phillips]; Carley, *Legal and Extra-Legal Powers of Wisconsin Governors in Legislative Relations*, 1962 Wis. L. Rev. 3.

¹⁹ *Tucker v. State*, 218 Ind. 614, 35 N.E.2d 270 (1941). See also *Spears v. Reeves*, 148 Cal. 501, 83 P. 432 (1906); Note, *Gubernatorial Executive Orders As Devices For Administrative Direction and Control*, 50 Iowa L. Rev. 78, 81 (1964).

²⁰ *Field v. People*, 3 Ill. (2 Scam.) 79 (1839); *Martin v. Chandler*, 318 S.W.2d 40 (Ky. 1958); *Opinion of Justices*, 72 Me. 542 (1881) (Governor's powers are only those that are generally given to him by the constitution or necessarily inferable from powers clearly granted, and he is to execute powers conferred upon him in the manner and under the methods and limitations prescribed); *State ex rel. Bennett v. Bonner*, 123 Mont. 414, 214 P.2d 747 (1950) (Governor had no implied power to transact judicial business, such as directing judges to hold court); *Herlihy v. Donohue*, 52 Mont. 601, 609, 161 P. 164, 167 (1916) (dictum); *Wentz v. Thomas*, 159 Okla. 124, 15 P.2d 65 (1932) (powers of removal of officers not necessarily implied from the constitutional take care provision); cf. *Shields v. Bennett*, 8 W. Va. 74, 89 (1874). Contra, *Tucker v. State*, 218 Ind. 614, 35 N.E.2d 270 (1941), which seems to be an exception.

²¹ *Tennessee Gas Transmission Co. v. State*, 232 Ark. 156, 335 S.W.2d 312 (1960) (permits and easements signed by the Governor and other state officials purporting to authorize the laying of a pipeline do not bind the state in absence of express legislative authority); *Martin v. Chandler*, 318 S.W.2d 40 (Ky. 1958) (The Governor has no power to transfer functions from one agency to another. He "has only such powers as are vested in him by the Constitution and the statutes enacted pursuant thereto."); Rohr, *supra* note 17, at 100-02 (1932). Contra, *Gordon v. Morrow*, 186 Ky. 713, 218 S.W. 258 (1920) (Governor had power to dismiss a private attorney, such power being implied from the statutory authority to hire).

²² See cases cited in note 27, *infra*.

²³ *State v. Dawson*, 86 Kan. 180, 119 P. 360 (1911) (the Attorney General had no discretion to refuse to prosecute when required to by the Governor); cf. *Morss v. Forbes*, 24 N.J. 341, 132 A.2d 1 (1957), as to the Governor's control over county prosecutors.

in state courts. The above interpretations may be contrasted with those of the Supreme Court of the United States, tending to interpret constitutional provisions concerning presidential executive power as a limitation rather than a grant.²⁴ The reason some presidents have not made use of such permissive interpretation (for example, President Taft)²⁵ is self-restraint not judicial constraint.

Second (and this rule seems to govern on the federal level too),²⁶ power that is not in harmony with legislative intention may not be implied from the "take care" provision. For example, in Oklahoma the "take care" provision was interpreted to give the Governor implied power to represent the state in the state's courts.²⁷ Yet, the same court held that where a statute granted the Bank Commissioner authority to institute proceedings on behalf of the state, the Governor was precluded from instituting such proceedings, except, perhaps, when the Commissioner refused to act. The argument that the "take care" provision gave the Governor an implied power to prosecute this action was rejected on the ground that the constitution required the Governor to observe all laws, including the statutory grant of power to the Commissioner, especially in this case, where the same law provided the substantive legal basis for the action.²⁸

Third, the "take care" provision, *per se*, does not furnish a basis for governors' powers to appoint or remove officers. As noted, governors were not granted full control over the executive branch.²⁹ Even today, when the trend is toward stronger executive heads of state government, many state

²⁴ E.g., *In re Neagle*, 135 U.S. 1 (1890). See generally 2 C. Antieau, *Modern Constitutional Law* § 13.27 (1969) [hereinafter cited as Antieau]; E. Corwin, *The President: Office and Powers* 147-54 (4th rev. ed. 1957) [hereinafter cited as Corwin]; 2 B. Schwartz, *A Commentary on the Constitution of the United States* 59-65 (1963) [hereinafter cited as Schwartz].

²⁵ Corwin, *supra* note 24, at 153.

²⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); 2 Schwartz, *supra* note 24, at 71-73; Corwin, *Comment: The Steel Seizure Case: A Judicial Brick Without Straw*, 53 *Colum. L. Rev.* 53 (1953).

²⁷ *State ex rel. Haskell v. Huston*, 21 Okla. 782, 790-91, 97 P. 982, 985-86 (1908). The court could have based its decision on a statutory provision but chose the constitutional "take care" clause instead. Mississippi seems to be the only state where the court held that the take care provision did not by implication grant the Governor power to represent the state in the state's courts. The take care provision, said the court, should be viewed as no more than "a comprehensive description of the duty of the executive to watch with vigilance over all the public interests." *Henry v. State*, 87 Miss. 1, 33-34 (1905), dissent modified, 88 Miss. 843, 39 So. 856, 862 (1906) (containing full report). The decision was overruled by the Mississippi legislature, which expressly authorized the Governor to bring proper suit in cases affecting the general public. The court promptly proceeded to interpret this statutory provision strictly and there the matter rests. *Temple v. State ex rel. Russell*, 123 Miss. 741, 86 So. 580 (1920). See also *Alexander v. State*, 56 Ga. 478 (1876) (as to power to sue based on a duty to supervise all state property); *State ex rel. Strauss v. Dubuclet*, 25 La. Ann. 161, 163 (1873) (as to such power stated in general terms).

²⁸ *State ex rel. Murray v. Pure Oil Co.*, 169 Okla. 507, 509-11, 37 P.2d 608, 610-11 (1934).

²⁹ B. Maddox & R. Fuquay, *State and Local Government* 78-80 (1962) [hereinafter cited as Maddox & Fuquay]. See, e.g., *Wentz v. Thomas*, 159 Okla. 124, 177, 15 P.2d 65, 114 (1932).

constitutions still provide for elected key officials.³⁰ By contrast, the federal chief executive was granted more power to control the executive branch,³¹ including the power to appoint most of his officers, and as early as 1926 the Supreme Court recognized his power to remove all executive officers.³² At times Congress has narrowed presidential power of appointment by creating tailor-made offices,³³ but such occasions have been rare. The principle that the power to appoint is vested in the President is not questioned.³⁴ On the state level the power to appoint and remove officers is generally held not to be exclusively executive, and, subject to express constitutional grants, such power is deemed vested in the legislature.³⁵ Indiana seems to be the

³⁰ J. Kallenbach, *Federal Cooperation With the States Under the Commerce Clause* 377 (1942) [hereinafter cited as Kallenbach]; Maddox & Fuquay, *supra* note 29, at 87; Rohr, *supra* note 17, at 110-112.

³¹ Historically the constitution of the United States owes its language in Article II, §§ 1 & 3 to state constitutions. But unlike most state governors at the date of the drafting, the president was given more power to control the executive branch of the government and a greater measure of independence from the legislature in the conduct of his executive functions. Kallenbach, *supra* note 30, at 32-36, 56, 376; 2 Schwartz, *supra* note 24, at 35-38; *The 50 States and Their Local Governments* 223, 224 (J. Fesler ed. 1968); Carley, *Legal and Extra-Legal Powers of Wisconsin Governors in Legislative Relations*, 1962 *Wis. L. Rev.* 3, 13, 16, 17; Young, *The Development of the Governorship*, 31 *State Government* 178 (1958). In the states, the movement towards a "stronger chief executive" took place only in later years. Since most of the oldest state constitutions were drafted with the vivid memory of the British Governor in mind, the tendency was to establish a weak executive and a strong legislature, as a buffer to tyranny. During the years that followed, the fear of a strong executive subsided, and the need for an effective administration of state affairs manifested itself. Also, the evils of a strong legislature have proven that democracy is better preserved by checks and balances rather than the predominance of a legislature. For a survey of the development of the office of the Governor, see Corwin, *supra* note 24, at 30; Kallenbach, *supra* note 30, at 334-36; Lipson, *supra* note 18; Maddox & Fuquay, *supra* note 29, at 66-68; Phillips, *supra* note 18, at 185-88; Note, *Gubernatorial Executive Orders as Devices For Administrative Direction and Control*, 50 *Iowa L. Rev.* 78 (1964); Note, *Presidential Power: Use and Enforcement of Executive Orders*, 39 *Notre Dame Lawyer* 44 (1963). Notice that the trend towards strengthening the state's chief executive (following the federal example) has not gone unquestioned: Highsaw, *The Southern Governor—Challenge to the Strong Executive Theme*, 19 *Public Administration Rev.* 7 (1959).

³² *Myers Adm'rx v. United States*, 272 U.S. 52 (1926); Corwin, *supra* note 24, at 85-95.

³³ 2 Schwartz, *supra* note 24, at 43-4.

³⁴ *Id.* at 40-45; Note, *Power to Appoint to Public Office under the Federal Constitution*, 42 *Harv. L. Rev.* 426 (1928).

³⁵ There is a constitutional provision permitting the Massachusetts General Court to name officers. *Mass. Const.* pt. II, ch. I, § I, art. IV; see, e.g., *Opinion of the Justices*, 302 *Mass.* 605, 622, 19 *N.E.2d* 807, 818 (1939). See also *Fox v. McDonald*, 101 *Ala.* 51, 13 *So.* 416 (1893); *Dunbar v. Cronin*, 18 *Ariz.* 583, 164 *P.* 447 (1917), and cases cited therein; *State ex rel. Landis v. Bird*, 120 *Fla.* 780, 163 *So.* 248 (1935) (authority to appoint, especially judges, is not inherent in the governor); *Thorne v. Squier*, 264 *Mich.* 97, 109, 249 *N.W.* 497, 500 (1933) (power to appoint). See, e.g., *State ex rel. Wehe v. Frazier*, 47 *N.D.* 314, 323, 182 *N.W.* 545, 548 (1921) (the fact that the Constitution vested in the governor the executive power does not grant the governor the power of removal unless by legislative act the power is made executive, as with the power of appointment). The Governor's power is distinguished from presidential power in *Hutchins v. Des Moines*, 176 *Iowa* 189, 207, 157 *N.W.* 881, 887 (1916) (lists cases holding that the power of appointment is inherently executive; Ill., Ala., Md., Ore., Cal., Iowa decisions justified the point). For a description of legislative appointment in Maryland, see Rohr, *supra* note 17, at 112-16. See also Phillips, *supra* note 18, at 186. See also A. Holcombe, *State Govern-*

only state where the power to appoint and remove officers has been held by judicial interpretation to be vested exclusively in the Governor. In *Tucker v. State*³⁶ the Supreme Court of Indiana held that a statute which provided for appointment of officers by both the Governor and others was unconstitutional. The decision was based on the "take care" provisions.

It is inconceivable that the Constitution makers would vest in the Governor the entire executive power, with the admonition that he take care that the laws are enforced, knowing that in enforcing them he must have the assistance of subordinates, and then strip him of all appointive power.³⁷

The court rejected the argument that the Governor had only such powers as were expressly granted to him by the constitution and the laws. It held that executive appointive powers were implied from the constitutional provision. But most state courts seem to have gone the other way. Their position is well summarized by the dissent in the *Tucker* case:

The governor by Art. 5 § 16, is not required to execute the laws but to "take care that the laws be faithfully executed." If officers fail to perform their duties, the governor may remove them if the constitution gives him that right or, if not, "bring the subject to the cognizance of that department of the government which has the power to remove or punish them. . . ." He may in sufficient emergency call out the militia . . . [But, he does not necessarily] "have agents of his own nomination."³⁸

Fourth, as a corollary to the principles cited above, the "take care" provision pertains to governors' duties to supervise the operation of the executive branch of the government, and not to any authority or duty to execute or enforce the laws personally or through personal agents. This provision does not cast governors in the role of law enforcers,³⁹ but rather as overseers of the legality of performance by those to whom law enforcement was specifically entrusted.⁴⁰ It is assumed that whenever in the opinion of

ment in the United States 334-36 (3d ed. 1935) [hereinafter cited as Holcombe]; Dawley, *The Governors' Constitutional Powers of Appointment and Removal*, 22 Minn. L. Rev. 451 (1938); Mechem, *The Power to Appoint to Office: Its Location and Limits*, 1 Mich. L. Rev. 531 (1903).

³⁶ 218 Ind. 614, 35 N.E.2d 270 (1941).

³⁷ Id. at 655-56, 35 N.E.2d at 235.

³⁸ Id. at 714-15, 35 N.E.2d at 308.

³⁹ E.g., Illinois: Ill. Const. art. V, § 6; 1918 Att'y Gen. Rep. 805 (Governor had no power to aid the courts in the execution of their process except by virtue of his power to use the militia in case the courts are obstructed in enforcing their process); 1915 Att'y Gen. Rep. 78 (Governor had no power by virtue of the "take care" provision to enforce the Sunday closing law).

⁴⁰ *Arizona State Dep't v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960) (the Attorney General had no power to test the legality of an action by the Land Department, such authority being reserved to the Governor, under the take care provision and the statutes); *Shields v. Bennett*, 8 W. Va. 74, 89, 90 (1874), overruled on another point in *Simms v. Sawyer*, 85 W. Va. 245, 101 S.E. 467 (1919). See also *Opinion of the Justices*, 102 N.H. 183, 152 A.2d 870 (1959) (as to the New Hampshire Governor and Council's interest in the legality of operations of the executive branch). For a similar description of the position of the Governor and his duties as supreme executive in Maine, see *State v. Simon*, 149 Me. 256, 99 A.2d 922 (1953).

the governor specific laws should be carried out, he will activate the appropriate officers, and if they refuse, he may have resort to the courts.⁴¹ However, when law enforcement officers are elected or occupy a semi-autonomous position,⁴² the law enforcement activities of a governor are not always effective or efficient. In such cases they were probably not intended to be.⁴³

On the federal level the problem rarely arises because the President of the United States controls the executive branch and can execute the laws by directing the officers entrusted with specific duties. *In re Neagle*,⁴⁴ however, is an example of a President, without express legislative authority, appointing his own nominee to act in an area already committed to other law enforcement agencies. The authority for such action was implied from the "take care" provision in the Federal Constitution. Except in Indiana, it is doubtful whether any governor has such implied powers. Moreover, it seems that the "take care" provision does not, by itself, furnish a basis for the employment of outside help to perform services parallel to those of statutory or constitutional officials.⁴⁵ There are a few instances where governors, without legislative authority, employed outsiders, usually counsel, to act concurrently with public officials.⁴⁶ Attempts by executive officers and grand juries to employ outsiders have been generally invalidated, especially when the functions duplicated were expressly entrusted to these same public officials.⁴⁷

⁴¹ *Crawford v. Gilchrist*, 64 Fla. 41, 52, 59 So. 963, 967 (1912) (citing *State v. Crawford*, 28 Fla. 44, 10 So. 118 (1891) as standing for the proposition that "the Governor as such could maintain an action to compel the performance of a ministerial official action when the people of the State had an interest."); *State ex rel. Stubbs v. Dawson*, 86 Kan. 180, 191, 119 P. 360, 364 (1911).

⁴² For a discussion of the autonomous position of law enforcement agencies see Phillips, *supra* note 18, at 188. For an historical description see Holcombe, *supra* note 35, at 404-06. See, e.g., *In re Di Brizzi*, 303 N.Y. 206, 213, 101 N.E.2d 464, 467 (1951), where great emphasis was put on the fact that the Governor had "requested" and not "ordered" the Attorney General to use the statutory powers of investigation.

⁴³ See, e.g., *Gorham v. Robinson*, 57 R.I. 1, 186 A. 832 (1936) (*dictum*) (even though the Governor is chief executive, the Constitution gives him very little power vis-à-vis a strong legislature).

⁴⁴ 135 U.S. 1 (1890).

⁴⁵ The Supreme Court of Florida was of the same opinion. In Advisory Opinion to the Governor, 200 So. 2d 534 (Fla. 1967), it based the Governor's authority to employ investigators on the take care provision "as implemented" by legislation. See also, e.g., *Randall v. State*, 16 Wis. 362 (1863) (Governor had no implied power to hire an attorney to attend the taking of testimony in support of charges preferred against a county officer to procure his removal from office).

⁴⁶ See note 41, *supra*.

⁴⁷ For example, a grand jury may not employ investigators without express legislative authority: *Allen v. Payne*, 1 Cal. 2d 607, 608, 36 P.2d 614 (1934); Note, *The Grand Jury as an Investigatory Body*, 74 Harv. L. Rev. 590, 596 (1961); Note, *The Grand Jury—Its Investigatory Powers and Limitations*, 37 Minn. L. Rev. 586, 599 (1953). See also *Woody v. Pears*, 35 Cal. App. 553, 170 P. 660, 661 (1917); *William J. Burns Int'l Detective Agency v. Holt*, 138 Minn. 165, 168, 164 N.W. 590, 592 (1917); *William J. Burns Int'l Detective Agency v. Doyle*, 46 Nev. 91, 208 P. 427 (1922). These decisions are also based on the ground that a grand jury should inquire into crimes in the manner provided for by law, a ground with separation of powers underpinning. Other grounds included the

Decisions restricting power to employ outsiders to function concurrently with public officers are sometimes based on the principle prohibiting delegation of powers or usurpation of powers⁴⁸ and on the rule that when the mode of performing an authorized activity is prescribed, no other method of doing it may be employed. The obligation of the Attorney General to furnish legal services to departments of state government in Kentucky was held to bar such departments from employing their own lawyers⁴⁹ and to require a legislative special authority for the employment of outside counsel.⁵⁰ The principle against delegation of powers was applied to the Governor of Michigan in his attempt to employ an attorney to assist him in drafting proposals for new legislation.⁵¹

It should be noted that contracts which provide for outside services to assist the hiring entity in the performance of its own duties, especially with expert assistance, have been upheld.⁵² But since the Florida Program's investigators rendered assistance to the police, F.B.I. and other law enforcement agencies in the performance of their duties,⁵³ and not to the Governor in the performance of his, this exception does not apply to their employment.

B. *Power to Act in Emergency and Command the Militia*

From this analysis, the rule would appear to be: A governor may not rely on the "take care" provision as authority to personally execute the law, including crime investigations or the authorization of such investigations, unless and until the legislature has expressly authorized him to do so. To this rule, there exists an almost universal exception: When public officers are unable or unwilling to act, the governor should step in and act in their stead. Thus, in *Johnson v. Conner*⁵⁴ an Oklahoma court confirmed an appointment of a private attorney hired by the Governor to represent the interests of the state in court, basing the Governor's authority on the "take care" provision.

negation of inherent power to hire investigators, the undesirability of duplication of functions and the reservation of such functions to regular police.

⁴⁸ *State ex rel. Balsev v. Bowen*, 111 Ohio 561, 146 N.E. 108 (1924). Where the degree of interference by private employees in the execution of official duties is great, a Pennsylvania court deemed such interference as an illegal ousting of the public official and voided the employment also on this ground. *Smith v. Gallagher*, 408 Pa. 551, 556-59, 185 A.2d 135, 137-38 (1962).

⁴⁹ *Montgomery v. Gayle*, 216 Ky. 567, 288 S.W. 323 (1926).

⁵⁰ *Johnson v. Commonwealth ex rel. Meredith*, 291 Ky. 829, 165 S.W.2d 820 (1940). Similar reasoning has been adopted in other jurisdictions: *State ex rel. Workmen v. Goldthait*, 172 Ind. 210, 87 N.E. 122 (1909); *Simpson v. Silver Bow County*, 87 Mont. 83, 285 P. 195 (1930); *Francher v. Board of Comm'rs*, 28 N.M. 179, 210 P. 237 (1922); *News-Dispatch Printing & Auditing Co. v. Board of Comm'rs*, 61 Okla. 259, 161 P. 207 (1916).

⁵¹ *Cahill v. Board of State Auditors*, 127 Mich. 487, 86 N.W. 950 (1901) (the court felt that preparing bills and resolutions was not part of the Governor's duty).

⁵² *Pritchard & Abbott v. McKenna*, 162 Tex. 617, 350 S.W.2d 333 (1961). See also *Skidmore v. County of Amador*, 7 Cal. 2d 37, 59 P.2d 818 (1936); *Nelson v. Blanco Ind. School Dist.*, 390 S.W.2d 361 (Tex. Civ. App. 1965).

⁵³ *Advisory Opinion to the Governor*, 200 So. 2d 534, 535 (Fla. 1967).

⁵⁴ 205 Okla. 233, 234-35, 236 P.2d 987, 989 (1951).

[T]he individual state and county officers [are] charged with the assessment and collection of taxes. But, when those officers are incapable of enforcing the same, either because of lack of ability or, as here, because of conflicting elements, it then becomes the statutory duty of the Governor as chief executive to effect their enforcement

A failure on their part places the burden secondarily upon the shoulders of the Governor⁵⁵

So, also, the Governor of Florida was held to be authorized, by implication from his constitutional power to fill vacancies, to appoint a person to perform the functions of a sheriff and other executive officers, where no specific regulations were provided and when the incumbent officer was absent due to war service.⁵⁶

This emergency exception is also consistent with governors' roles as commanders of state militias. All state constitutions provide for the establishment and calling of a militia or a national guard, *inter alia*, to execute the laws and preserve the peace, and bestow upon the governor the title of commander-in-chief of these military forces.⁵⁷ Although not one constitution says so explicitly, it has long been held that the militia may not be called out to execute the laws either by assisting civil authorities or, even more so,

⁵⁵ *Id.* at 234-35, 236 P.2d at 989-90. See also to the same effect: *State ex rel. Livingston v. Graham*, 25 La. Ann. 629, 630 (1873) (based on the duty of the Governor in the interest of the State); *State ex rel. Murray v. Pure Oil Co.*, 169 Okla. 507, 37 P.2d 608 (1934) (dictum); *State v. Clausen*, 146 Wash. 588, 264 P. 403 (1928) (taxpayer cannot restrain misapplication of state funds, since such function is reserved to the Governor). See also *In re B. Turecamo Contracting Co.*, 260 App. Div. 253, 258, 21 N.Y.S.2d 270, 275, appeal denied, 259 App. Div. 1094, 22 N.Y.S.2d 123 (1940). Note, however, that this was not an ordinary intervention. The District Attorney's conduct was "reasonably called into question."

⁵⁶ *In re Advisory Opinion to the Governor*, 151 Fla. 44, 51-54, 9 So. 2d 172, 175 (1942). See also *In re Advisory Opinion to the Governor*, 150 Fla. 556, 8 So. 2d 26 (1942). The same rationale was followed respecting hiring by an officer on a lower echelon: *Seward v. State*, 75 Idaho 467, 470-71, 274 P.2d 993, 995 (1954) (dictum). For a comparison with the President's powers in emergency, see *Kallenbach*, *supra* note 30, at 480.

⁵⁷ Ala. Const. art. XV, § 271; Ariz. Const. art. XVI, § 1; Ark. Const. art. XI, § 1; Colo. Const. art. XVII, § 1; Fla. Const. art. XIV, § 1; Ga. Const. art. X, § 1; Idaho Const. art. XIV, § 1; Ill. Const. art. XII, § 1; Ind. Const. art. XII, § 1; Iowa Const. art. VI, § 1; Mass. Const. pt. I, ch. II, § 1, art. VII; Mich. Const. art. III, § 4; Miss. Const. art. IX, § 214; Mont. Const. art. XIV, § 1; N.C. Const. art. XII, §§ 1, 4; N.D. Const. art. XIII, § 188; Neb. Const. art. XIV, § 1; N.M. Const. art. XVIII, § 1; N.Y. Const. art. XII, § 1; Ohio Const. art. IX, § 1; Ore. Const. art. X, § 1; Pa. Const. art. 3, § 1; S.C. Const. art. XIII, § 1; S.D. Const. art. XV, § 1; Tenn. Const. art. VIII, § 1; Utah Const. art. XV, § 1; Vt. Const. ch. 2, § 55; Wash. Const. art. X, § 1; Wis. Const. art. IV, § 29; Wyo. Const. art. XVII, § 1; (the preceding provisions relate to the establishment of the militia). Alas. Const. art. I, § 19; Hawaii Const. art. I, § 15; La. Const. art. I, § 8; Md. Const. DR art. 28; N.H. Const. pt. 1 BR art. 24; Va. Const. art. 1, § 13; (the above provisions contain a declaration of the necessity for establishing a militia). Cal. Const. art. VIII, § 1; Kan. Const. art. VIII, § 4; Minn. Const. art. IV, § 4; Mo. Const. art. IV, § 6; Nev. Const. art. XII, § 2; Okla. Const. art. VI, § 6; Tex. Const. art. IV, § 7; (the preceding provisions relate to the calling out of the militia). Conn. Const. art. IV, § 7; Del. Const. art. III, § 7; Ky. Const. § 75; Me. Const. art. V, pt. 1, § 7; N.J. Const. art. V, § 1, ¶ 12; R.I. Const. art. VII, § 3; (the preceding provisions deal with the governor as the commander of the militia). See also *Holcombe*, *supra* note 35, at 403, 404; *Maddox & Fuquay*, *supra* note 29, at 90.

by acting under martial law, unless local law enforcement agencies have refused or completely failed to function.⁵⁸ According to a Florida court: "In a democratic form of government like ours the military establishment may be said to be the dernier resort of governmental authority, that is never called upon except when all other civil authority fails and becomes powerless to preserve public order."⁵⁹ The Mississippi Supreme Court has adopted the same rationale:

A permeating feature in our State Constitution, and in all State Constitutions, is that primary local authority shall be preserved, so far as practically possible. . . . It was foreseen, however, by the framers of the Constitution that . . . local conditions would sometimes arise which would render the local authorities powerless to enforce the laws, or unwilling or afraid to do so. It was to meet such conditions, as one of its purposes, that the constitutional and statutory authority . . . in respect to the execution of the laws was vested in the Governor. . . .

It was never the purpose of the Constitution, therefore, that the militia should be sent to execute the laws, merely because they are not being at all times diligently executed or perfectly enforced

[But if there occurs] a substantial breakdown of local enforcement, then the power and duty of the Governor arises to send the executive agents with which the law has armed him, to wit, the militia, not at all to supersede the law, but to enforce it⁶⁰

In summary, subject to the exceptions noted above and absent a legislative mandate, a governor's duties as the chief executive and his duty to "take care that the laws be executed" are limited to overseeing, not necessarily controlling, the executive machine. He must see that the machine functions effectively; if it breaks down completely, he should take steps to fill the void. If law enforcement breaks down completely, he must use the

⁵⁸ See Rohr, *supra* note 17, at 100-02; Department of Law, *Law Enforcement in Kentucky*, Report to the Committee on the Administration of Justice in the Commonwealth of Kentucky, 52 Ky. L.J. 1, 184-5 (1963) [hereinafter cited as *Law Enforcement in Kentucky*]; Comment, *Constitutional and Statutory Bases of Governors' Emergency Powers*, 64 Mich. L. Rev. 290 (1965).

⁵⁹ *State ex rel. Milton v. Dickenson*, 44 Fla. 623, 629, 33 So. 514, 516 (1902).

⁶⁰ *State v. McPhail*, 182 Miss. 360, 371-74, 180 So. 387, 390-91 (1938). See also *In re Advisory Opinion to the Governor*, 74 Fla. 92, 77 So. 87 (1917); *Begley v. Louisville Times Co.*, 272 Ky. 805, 115 S.W.2d 345 (1938); *McBride v. State*, 221 Miss. 508, 516, 73 So. 2d 154, 157 (1954); *Seaney v. State*, 188 Miss. 367, 373, 194 So. 913, 915 (1940). The same emphasis on local law enforcement was made by other courts: *Wilson & Co. v. Freeman*, 179 F. Supp. 520, 525 (D. Minn. 1959) (on the power of the Governor to declare martial law and call the national guard); *Constantin v. Smith*, 57 F.2d 227 (E.D. Tex. 1932), appeal dismissed, 287 U.S. 378 (1932) (martial law can exist and military power exercised over the property of citizens only when the civil arm of the government has completely broken down) (dictum); *Opinion of the Justices*, 275 Ala. 547, 549, 156 So. 2d 639, 641 (1963); *Franks v. Smith*, 142 Ky. 232, 240, 134 S.W. 484, 488 (1911) (the case dealt with the responsibility of militia officers for unlawful arrest); *Brady v. State*, 229 Miss. 677, 97 So. 2d 751 (1957); *Thomas v. Mead*, 36 Mo. 232 (1865) (the Governor, representing the sovereign in the state is always present in the courts to execute process whenever the power of the marshal and ordinary posse may not be sufficient for the purpose or when the peace and dignity of the state may so require); *Rose Mfg. Co. v. Western Union Tel. Co.*, 251 S.W. 337 (Tex. Civ. App. 1923).

militia. Barring an emergency he may not act concurrently with other executive officers, except upon express legislative authority. This last conclusion is strengthened by the actions of the governors themselves, both "weak" and "strong" governors. They have resorted to popular and party support, through which they achieved legislation authorizing control of the executive branch and state budget. Few attempts have been made to get such control through the courts or through the use of executive orders.⁶¹

II. SCOPE OF INVESTIGATORY AUTHORITY

What investigations then may a governor conduct or authorize? He may, of course, exercise investigatory powers specifically granted to him, such as seeking information that would facilitate his control over the executive branch. For example, about three-fourths of the governors are constitutionally authorized to require written reports from executive officers.⁶² In addition, in a few states including Florida,⁶³ he may be authorized by statute to use subpoena powers to achieve specific regulatory functions entrusted to him. Or he may be authorized by statute to function as an investigator without subpoena powers. Oklahoma, for example, has created a criminal investigation bureau,⁶⁴ one of the purposes of which is to "investigate and detect criminal activity as directed by the Governor";⁶⁵ Kansas has granted its Governor the power to appoint special investigators to enforce the state liquor and criminal laws.⁶⁶

If no legislative authority is available to compel disclosure, regulate, or enforce the criminal laws, it seems that a governor is nonetheless empowered to appoint investigators to gather information that would assist him in the execution of his duties. Such appointees are not public officers; they are merely fact-finders for the governor.⁶⁷ They may be compared to agents and fact-finding commissions that are appointed by Presidents from time to time.⁶⁸ Additionally, a governor may call upon a state officer endowed with subpoena powers and request him to conduct an investigation,⁶⁹ but the purpose of such investigations must be to obtain information to fill a legitimate need of the governor.⁷⁰ Thus, an investigation into wrongdoing or

⁶¹ Note, *Gubernatorial Executive Orders as Devices For Administrative Direction and Control*, 50 *Iowa L. Rev.* 78 (1964).

⁶² Maddox & Fuquay, *supra* note 29, at 81.

⁶³ Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations*, 48 *Minn. L. Rev.* 557, 575 (1964).

⁶⁴ Okla. Stat. Ann. tit. 74, § 152 (1965).

⁶⁵ *Id.* § 154.

⁶⁶ Kan. Stat. Ann. § 75-116 (1964).

⁶⁷ See pp. 642-44, *infra*, for criteria to distinguish public office.

⁶⁸ Such appointments raised arguments of unauthorized creation of office. These were rejected on the ground that the problem was not creation of office but permissible delegation of fact finding functions to trusted friends. Kallenbach, *supra* note 30, at 381. For the criteria used to identify "public officers," see pp. 643-44, *infra*.

⁶⁹ *In re Di Brizzi*, 303 N.Y. 206, 101 N.E.2d 464 (1951).

⁷⁰ See, e.g., *Winter v. Governor's Special Comm.*, 441 P.2d 370 (Okla. 1967). In this case, a committee appointed under statute by the Governor to conduct investigations of the state treasury was limited to statutory grant and purpose; there is no power in either

negligence in the management of a state prison,⁷¹ and an investigation into the relationship between organized crime and state government,⁷² were deemed to be subjects into which a governor may inquire without legislative authorization, since such an inquiry would tend to assist the governor in the exercise of his duty to take care that the laws are faithfully executed and to report to the state legislature.⁷³

The Florida Supreme Court held that Section 14.06 of the Florida statutes empowered the Governor to establish the War on Crime Program. The pertinent part of the section reads:

And the governor is further authorized to employ such persons as may be required from time to time to make investigations as may, in the judgment of the governor, be necessary or expedient to efficiently conduct the affairs of state government, especially to make investigations and report in matters of taxation and finance throughout the state.⁷⁴

The court was of the opinion that these words were

sufficiently broad to warrant the employment by the Governor of persons to investigate suspected racketeers, criminals and corruption in the State because it stands to reason the affairs of the State cannot be conducted "efficiently" in a climate of crime and corruption. [These were] investigations for the Governor into alleged racketeering and official corruption in the State.⁷⁵

The court held that the Governor had authority to employ individuals to serve only as his investigative agents for the purposes stated in the Governor's letter, namely to assist him in his

constitutional duty in taking care that the laws be faithfully executed and to insure that the life, liberty and property of the inhabitants of the state be protected. Any information reflecting a violation of the criminal laws of the state will be referred to local police authorities, county solicitors, state attorneys, grand juries or other duly constituted

of the three branches of government to expose for the sake of exposure. This committee had subpoena powers, but the decision does not rest on the separation of powers doctrine. The same limitation was applied to administrative agencies, 1 K. Davis, *Administrative Law Treatise*, § 3.10 at 210 (1958). Note that the inherent power of Congress to investigate is also limited to the purpose of furthering a legitimate task. *Watkins v. United States*, 354 U.S. 178 (1957); *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956) (congressional committee may investigate a murder but only for a legitimate legislative purpose, and inviting the suspect to tell his side of the story is not such legitimate purpose). The same limitation is applicable to state legislatures: *State ex rel. Fatzer v. Anderson*, 180 Kan. 120, 299 P.2d 1078 (1956); *Sheridan v. Gardner*, 347 Mass. 8, 196 N.E.2d 303 (1964); *Attorney General v. Brissenden*, 271 Mass. 172, 171 N.E.2d 82 (1930); *Nelson v. Wyman*, 99 N.H. 33, 105 A.2d 756 (1954); *Richman v. Neuberger*, 22 N.J. 28, 123 A.2d 217 (1956); Note, *Constitutional Law—Resolutions Authorizing State Legislative Investigations*, 47 N.C.L. Rev. 700 (1969). The same rule is applicable to local legislatures: *Eggers v. Kenny*, 15 N.J. 107, 104 A.2d 10 (1954). This limitation is not based on the separation of powers doctrine, even though the cases deal with use of subpoena powers. See also *Morss v. Forbes*, 24 N.J. 341, 132 A.2d 1 (1957); *In re Bowers*, 203 Misc. 653, 121 N.Y.S.2d 629 (1952), *aff'd*, 281 App. Div. 861, 119 N.Y.S.2d 920 (1953).

⁷¹ *In re Investigating Comm'n*, 16 R.I. 751, 11 A. 429 (1887).

⁷² *In re Di Brizzi*, 303 N.Y. 206, 215-16, 101 N.E.2d 464, 468 (1951).

⁷³ See note 70 *supra*.

⁷⁴ Fla. Stat. Ann. § 14.06 (1961). See also discussion of this statute at pp. 646-47, *infra*.

⁷⁵ *State ex rel. Kirkland v. Kirk*, 198 So. 2d 331, 332 (Fla. 1967).

instrumentalities of county, state or federal government for appropriate action.⁷⁶

No distinction was made by court or Governor between investigation of particular crimes on the one hand and investigation of the general crime problem on the other hand, between specific racketeers or criminals and general corruption, between enforcement of specific criminal laws and the supervision of law enforcers' performances, between efficient conduct of the affairs of state government and the apprehension and fining of a prostitute.⁷⁷

It can be assumed that the Supreme Court of Florida believed the Program's investigations would tend to assist the Governor in the execution of his duties.⁷⁸ Since decisions in Florida⁷⁹ as elsewhere show that no governor is cast in the role of a law enforcer by implication, query whether the decision was intended to include the Program's investigations which were subsequently conducted. The court's decisions could apply to both the general subject of crime in the state, investigation of which would assist the Governor in the execution of his duties, as well as to crimes committed by specific individuals, investigations of which would assist the law enforcement agencies in the execution of their duties. This ambiguity was not clarified by the court's emphasis that the investigators were confined to investigations only.⁸⁰ The emphasis might be misplaced. Whether or not the investigations further the affairs of state government is determined by the subject matter and purpose of the inquiry, rather than the use or absence of use of police powers. Subsequent events show that the Wackenhut Corporation was indiscriminately investigating all types of law violations for the purpose of bringing culprits to justice. Query whether Section 14.06 furnishes the required statutory authority for these activities.

III. LIMITATION ON LEGISLATIVE POWER TO AUTHORIZE INVESTIGATION

A. Concurrent Law Enforcement

Does the existence of constitutional and statutory law enforcement officers preclude the legislature from permitting the governor to employ crime

⁷⁶ Advisory Opinion to the Governor, 200 So. 2d 534, 535 (Fla. 1967).

⁷⁷ Address by George Wackenhut, Annual Stockholders Meeting of the Wackenhut Corp., April 24, 1967, at 4 [hereinafter cited as Wackenhut Address].

⁷⁸ Advisory Opinion to the Governor, 200 So. 2d 534 (Fla. 1967).

⁷⁹ Op. Att'y Gen., March 2, 1967. See note 4, *supra*.

⁸⁰ "In the absence of further definitive legislation they cannot exercise police powers." Advisory Opinion to the Governor, 200 So. 2d 534, 535 (Fla. 1967). The same emphasis was made regarding § 14.01. Advisory Opinion to the Governor, 200 So. 2d 534, 535 (Fla. 1967). On the contrary, it may be argued that if the Governor is authorized to employ investigators of crimes to act as guardians of life, liberty and property, he should have the authority, as a corollary, to equip them with the necessary tools to accomplish their mission, and empower them to use police powers in order to achieve better results. Moreover, if this court-imposed limitation is aimed at avoiding conflicts between the regular law enforcement agencies and the Program's investigators, this aim is not achieved thereby. Conflicts would arise with the actual exercise of investigatory functions not with a mere grant of power. B. Smith, *Police Systems in the United States* 24 (1960) [hereinafter cited as Smith].

detectives to act concurrently with them? It seems that even though the legislature is generally precluded from creating positions for the performance of duties ordinarily executed by constitutional offices, law enforcement is an exception.

In *People v. Clampitt*,⁸¹ an Illinois statute authorizing a court clerk to issue a venire to either the coroner or the sheriff was interpreted to mean that the coroner could replace the sheriff only when the latter could not act or was disqualified from acting. Since this function of the sheriff was defined by the constitution, the legislature could add to but not detract from it. Therefore, any other interpretation would have led to invalidation of the statute.⁸² The same rationale was applied in Illinois and in New York to the sheriff's constitutional duty to administer the county jail.⁸³ Additionally, the existence of constitutionally elected officers may be interpreted as a limitation on legislative power to create appointive offices for the performance of essentially similar functions. Thus, the Washington,⁸⁴ Ohio,⁸⁵ and North Dakota⁸⁶ legislatures could not create an appointive office basically similar to the sheriff's.

It could be argued, therefore, that the existence of constitutional officers whose duty is to detect crime should be interpreted to exclude the creation of similar statutory offices, at least in states where the constitution creates the duties of the sheriffs or other law enforcement officers. If the constitutional duty of sheriffs to control and administer county jails was held exclusive, why should the sheriffs' duty to investigate crimes not be exclusive too? Logically this conclusion is attractive. It seems, however, that, with respect to peace-keeping functions, concurrent law enforcement has always been the rule rather than the exception. A great number of statutory and constitutional officers entrusted with such crime prevention and detection duties act concurrently.⁸⁷ Hence, a sheriff has been denied an injunction against national guardsmen acting as peace officers so long as they did not interfere with him in the execution of his duties. The sheriff, said a Kentucky court, had no monopoly on the right to keep the peace or to act as a peace officer.

The judges . . . the constables, policemen, and marshals are conservators of the peace no less than the sheriff and his deputies. The same may be said of the National Guardsmen when thus on active duty.⁸⁸

These law enforcement agencies are not mutually exclusive; they com-

⁸¹ 362 Ill. 534, 200 N.E. 332 (1936).

⁸² Id. at 536, 200 N.E. at 333.

⁸³ *People ex rel. Walsh v. Board of Comm'rs*, 397 Ill. 293, 301, 74 N.E.2d 503, 508 (1947); *People v. Keeler*, 36 N.Y. 175 (1883).

⁸⁴ *State ex rel. Johnston v. Melton*, 192 Wash. 379, 73 P.2d 1334 (1937).

⁸⁵ *State ex rel. Armstrong v. Halliday*, 61 Ohio 171, 55 N.E. 175 (1899).

⁸⁶ *Ex parte Corliss*, 16 N.D. 470, 473, 114 N.W. 962, 964 (1907).

⁸⁷ *Maddox & Fuquay*, supra note 29, at 519, 592-600; *Phillips*, supra note 18, at 459-64; *Smith*, supra note 80, at 66-181.

⁸⁸ *Middleton v. Denhardt*, 261 Ky. 134, 87 S.W.2d 139 (1935). See also *Gilmore v. Penobscot*, 107 Me. 345, 78 A. 454 (1910).

plement each other. In the area of law enforcement, the existence of constitutional offices does not preclude the legislature from creating concurrent law enforcers or from authorizing the employment of crime detectives, provided the constitutional officers are not hindered in executing their duties.⁸⁹ Moreover, the legislature may permit the hiring of private investigators to supplement regular police work.⁹⁰ Subject to inherent police power to regulate, every person may engage in crime detection.⁹¹ Everyone is permitted to assist in law enforcement, nay, encouraged to do so. The legislature, therefore, is not precluded from authorizing the governor to investigate crimes.

B. *Delegation of Public Functions to Private Persons*

May the legislature permit the "farming out" of criminal investigations? It seems that criminal investigation in the name of the state and for the purpose of prosecuting offenders, without proper supervision and control by a governmental agency, is a public duty that can be created only by the legislature,⁹² subject to constitutional requirements and performed only by public officers. It appears that the Wackenhut Corporation could not be a public officer, that its investigators were not public officers, and that neither the legislature nor the Governor could authorize them to function as such.

1. Public Office

A great deal has been written about what constitutes a public office. In the final analysis, the definition depends on the facts, circumstances and context of each case. A function may be characteristic of a public office for one purpose, and not for another.

To determine if the Program's investigators were public officers, and hence if their position constituted a public office, one might compare the Program's investigators with the police, one of whose main functions is criminal investigations. The police have almost invariably been held to be public officers for a variety of purposes.⁹³ In Missouri, for example, the position of traffic officer was held to be a public office that could be created only by

⁸⁹ *State ex rel. Balsev v. Bowen*, 111 Ohio 561, 146 N.E. 108 (1924).

⁹⁰ *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 429 (1947); *Smith*, supra note 80, at 66, 93-95, 100. See generally Note, *Regulation of Private Police*, 40 S. Cal. L. Rev. 540 (1967).

⁹¹ See generally note 90 supra.

⁹² Under the Constitution of the United States the power to create offices was reserved to Congress. U.S. Const. art. II § 2. Even though it is not clear that Congress can delegate such power, it has done so in the past. *Corwin*, supra note 24, at 70, 72; *Schwartz*, supra note 24, at 40. On the state level, since legislatures have plenary powers except as limited by the Constitution, power to create offices is deemed vested in them. *Smylie v. Williams*, 81 Idaho 335, 341 P.2d 451 (1959); *Tucker v. State*, 218 Ind. 614, 35 N.E.2d 270 (1941); *Phillips*, supra note 18, at 185. The power to create the office of traffic squad policemen was vested in the legislature and could not be delegated. *State ex rel. Field v. Smith*, 329 Mo. 1019, 49 S.W.2d 74 (1932).

⁹³ *Woldby*, *The Public Officer—Public Employee Distinction in Florida*, 9 U. Fla. L. Rev. 47 n.31 (1956). See generally *Annot.*, 84 A.L.R. 309 (1933).

the legislature.⁹⁴ In Florida, the position of county detective,⁹⁵ and in Kentucky, the position of chief of police,⁹⁶ were held to be public offices, the duration of which must comply with the constitutional requirements.

What tests should be applied to determine the existence of a public office? First, discretion in the exercise of duties is one criterion. Therefore, a ministerial function, however awesome,⁹⁷ and an advisory position, however expert,⁹⁸ are not public offices. Second, the nature of the function, rather than the powers bestowed, is an indication of the existence of an office.⁹⁹ Function, rather than the mode of appointment, is also determinative for the purpose of removal from a public office.¹⁰⁰ Third, the most frequently cited criterion is whether the position entails an exercise of a "portion of sovereign power."¹⁰¹

If function and the exercise of sovereign power be a guide, the preservation of peace in the name of the state is a public office.¹⁰² Criminal investigations, as much as arrests, are an exercise of a "portion of sovereign power" when conducted for the state. Such investigations constitute an indispensable activity of a law enforcement agency.¹⁰³ If discretion be a guide,

⁹⁴ *State v. Smith*, 329 Mo. 1019, 49 S.W.2d 74 (1932).

⁹⁵ *State ex rel. Watson v. Hulbert*, 155 Fla. 531, 20 So. 2d 693 (1945) (for the same reason the post of state veterinarian was held to be a public office). See also *Blackburn v. Brorein*, 70 So. 2d 293 (Fla. 1954) (deputy sheriff was an officer for the purpose of determining whether a civil service statute that purported to apply to such sheriff was constitutional); *Curry v. Hammond*, 154 Fla. 63, 15 So. 2d 523 (1944) (city police patrolman was officer; earnings obtained during suspension could not be set off from salary due to him upon reinstatement); *McSween v. State Livestock Sanitary Bd.*, 97 Fla. 750, 122 So. 239 (1929); *Klam v. Boehm*, 72 Idaho 259, 240 P.2d 484 (1952) (chief of police was an officer for the purpose of deciding whether he was liable for tortious acts of his subordinates); *State v. Hord*, 264 N.C. 149, 141 S.E.2d 241 (1965) (policeman was officer for purpose of a North Carolina statute making willful and corrupt neglect to discharge a duty by an officer a misdemeanor). Contra, *Blynn v. City of Pontiac*, 185 Mich. 35, 151 N.W. 681 (1915); *Attorney General ex rel. Hart v. Cain*, 84 Mich. 223, 47 N.W. 484 (1890); *Annot.*, 84 A.L.R. 309 (1933) (position of a policeman serving at the pleasure of a local council was not an officer whose title could be tested by quo warranto proceedings).

⁹⁶ *Cawood v. Hensley*, 247 S.W.2d 27 (Ky. 1952).

⁹⁷ *Blicht v. Buchanan*, 100 Fla. 809, 131 So. 151 (1930) (public executioner).

⁹⁸ But cf. *State ex rel. Pickett v. Truman*, 333 Mo. 1018, 64 S.W.2d 105 (1933); *State ex inf. McKittrick v. Bode*, 342 Mo. 162, 113 S.W.2d 805 (1938).

⁹⁹ *State ex rel. Black v. Burch*, 226 Ind. 445, 80 N.E.2d 294 (1948).

¹⁰⁰ *La Polla v. Board of Chosen Freeholders*, 71 N.J. Super. 264, 176 A.2d 821 (1961).

¹⁰¹ *State ex rel. Holloway v. Sheats*, 78 Fla. 583, 587, 83 So. 508, 509 (1919); *Schobert v. Inter-County Drainage Bd.*, 342 Mich. 270, 69 N.W.2d 814 (1955).

¹⁰² *Maddox & Fuquay*, supra note 29, at 592:

Governments perform many functions in the interest of the well-being of society. Arguments have been raised over the question of whether some function ought to be performed by government, but rarely if ever are objections heard to governmental attention to public safety.

See also cases cited at notes 95 & 96 supra.

¹⁰³ In Georgia, for example, a person exercising or attempting to exercise without authority, the functions of certain designated peace officers is guilty of a misdemeanor. In *Burke v. State*, 76 Ga. App. 612, 47 S.E.2d 116 (1948), the court upheld an indictment consisting, inter alia, of patrolling with arms along a public street for the purpose of enforcing the ordinances of the city of Atlanta, entering a former public school for the

criminal investigations, per se, entail a large measure of discretion. It is the nature of such investigations that they do not lend themselves to distant control.

[D]etectives go their own ways, operating in a sphere where the ordinary administrative checks and disciplinary methods do not apply, enjoying an almost unregulated discretion in the use and application of their efforts, and sometimes thrown largely upon their own resources.¹⁰⁴

This was said about the police. It is doubly forceful when applied to the Wackenhut investigators.

Under the Program, the investigators exercised substantial, if somewhat inexplicit, discretionary decisional powers that must have affected the general population of the state, as well as the particular individuals whose activities were under investigation. It does not seem that they were restricted to complaints. They could decide whether or not to start inquiries or continue investigations. They could, for example, initiate investigations of those they defined to be "radicals," "subversive elements," or "organized crime." The investigators also had discretion regarding whether to initiate criminal prosecution or close the file.¹⁰⁵

It is not clear whether and to what extent private individuals are under a duty to enforce the law in the sense of transmitting information of the commission of crimes to law enforcement agencies. If such a duty exists, it is rarely enforced against persons who are not implicated in the commission of the crime. On the other hand, law enforcement officers are under a duty to so enforce the law. It is known that they do not do so indiscriminately. They exercise a great measure of discretion as to whether or not to initiate investigation, arrest and prosecution or close the file, especially with regard to lesser offenses. Even in the hands of the police, such discretion raises questions because of the potential for abuse.¹⁰⁶ In the hands of private persons, not subject to police discipline and apparent public control, such power is formidable. Here are persons who assist the state in collecting information about individuals, without a clear legal duty to transmit such information to law enforcement agencies.

It is submitted that the Program's investigators were performing functions of public officers not only because of the nature of their function and the degree of their discretion, but mainly because of the potential impact of their activities on the people of Florida. In the context of criminal investigations, the main criterion of a public office should be the actual degree

purpose of making an investigation into an alleged rape and attempting to identify the alleged criminal and attempting to arrest him. These functions were held to be the functions of the police force in Atlanta. Policemen were then held to be officers for the purpose of these functions. See Smith, *supra* note 80, at 122-23. See also Ostenburg, *The Investigative Process*, 59 J. Crim. L.C. & P.S. 152 (1968).

¹⁰⁴ Smith, *supra* note 80, at 240.

¹⁰⁵ Fact Sheet at 5.

¹⁰⁶ *The 50 States and their Local Government* 456 (J. Fesler ed. 1967); Barker, *Police Discretion and the Precept of Legality*, 8 Crim. L.Q. 400 (1966); Smith, *supra* note 80, at 19, 136.

of the power to interfere with the rights of people. It is the actual power and its potential abuse, not the powers officially granted, that should be decisive. The fewer official powers the investigators have, the more they may be inclined to resort to questionable means of gleaning information. The more ambitious they are, the greater the temptation to obtain incriminating evidence regardless of the rights of others. It may be assumed that the investigators used the same methods to which they were accustomed as private detectives. The use of undercover agents, for example, has raised concern even when employed by the police.¹⁰⁷ There is all the more cause for concern when used by unsupervised private detectives.

Many investigations are a mild or severe form of harassment. An investigation does not always take the form of questioning only a particular suspect. Sometimes he may be the last to be questioned. Others connected with him, in private life or business activities, may be approached first. His affairs may be probed into; gossipers may be encouraged; informers may be initiated into the art; he may be followed; his family and friends come under surveillance. Harassment by a private detective might be checked through appeal to law enforcement agencies. However, harassment by a private detective, who is "commissioned" by the governor to act for the state and with whom law enforcement agencies are requested by the governor to cooperate, is a different matter, even though legal private remedies might be available in an extreme case.¹⁰⁸

Harassment aside, the accumulation of information about a person's affairs may tend to encroach upon a right to privacy, broader than the traditional "interest of secrecy, physical integrity and seclusion."¹⁰⁹ This is a right not to have anyone pry into our everyday life, habits and activities.¹¹⁰ It is a right to determine if and to what degree our private affairs will become known to others. This kind of right is in great danger when private individuals are permitted by the government to investigate and gather, in the name of the state, information about any person who they deem suspicious.

Police are subject to special legal restraints because of the potential for abuse of their power and because of the power of their discretion. It is not certain whether the Wackenhut investigators were under the same restraints. For example, it is not clear whether and to what extent such investigators are under a duty to advise a suspect in custody, whether legal custody or not, of his constitutional rights.¹¹¹ There is sufficient authority to suggest

¹⁰⁷ Note, *Police Undercover Agents*, 37 *Geo. Wash. L. Rev.* 634 (1969).

¹⁰⁸ See generally S. Hofstadter & G. Horowitz, *The Right of Privacy* (1964).

¹⁰⁹ Note, *Privacy and Efficient Government: Proposals for a National Data Center*, 82 *Harv. L. Rev.* 400, 407 (1968).

¹¹⁰ *Id.* at 408.

¹¹¹ *Miranda v. Arizona*, 384 U.S. 436 (1966); see *Escobedo v. Illinois*, 378 U.S. 478 (1964). Most state courts have held that confessions received by private detectives and security guards are admissible without a *Miranda* or *Escobedo* warning, at least when a regular policeman is not present. *People v. Wright*, 249 Cal. App. 2d 692, 57 Cal. Rptr. 781 (1967); *People v. Crabtree*, 239 Cal. App. 2d 789, 49 Cal. Rptr. 285, (1966);

that such a duty is not imposed upon them and that confessions obtained without proper warning would be admissible.¹¹² It is not clear whether a voluntary confession of a suspect who was stopped and questioned by such investigators is admissible. Would the answer depend upon their flashing before him or concealing from him their "commission"?¹¹³ Further, it is not clear whether the investigators were acting under the color of law within the meaning of the federal criminal law.¹¹⁴ In *Williams v. United States*,¹¹⁵ an operator of a detective agency possessing a special police officer's card issued by the city of Miami, Florida, was held to be acting under the color of law when, in the presence of a regular policeman, he had extracted a confession by violence. It is not certain whether the Governor's "commission" could be considered equal to Miami's special police card, "a semblance of policemen's power from Florida,"¹¹⁶ and how the investigators would fare under the circumstances of the *Williams* case. Further, would their actions constitute a "state action" within the meaning of the 14th amendment? Are they public officers for the purpose of taking a bribe? Are they subject to laws which punish public officials for refusing to execute their duties?¹¹⁷

The possibility that the above questions will produce different answers in the case of private parties than with respect to public officers leads to the conclusion that the functions which the investigators carried out were those of public officers.

2. Delegation

The Florida Supreme Court seems to have followed the principle that the Governor's power to employ the Wackenhut Corporation and establish the War on Crime Program must be based not only on the "take care" provision but also on additional statutory authorization.¹¹⁸ The Court found this additional authority in Sections 14.01 and 14.06 of the Florida Statutes. The former states that

[t]he Governor may employ as many persons as he, in his discretion, may deem necessary to procure and secure protection of life, liberty and

Knott v. State, 243 Ind. 501, 187 N.E.2d 571 (1963); State v. Robinson, 86 N.J. Super. 308, 206 A.2d 779 (1965); People v. Horman, 22 N.Y.2d 378, 292 N.Y.S.2d 874 (1968); People v. Frank, 52 Misc. 2d 266, 275 N.Y.S.2d 570 (Sup. Ct. 1966); People v. Triamarco, 41 Misc. 2d 775, 245 N.Y.S.2d 795 (Sup. Ct. 1963); see also 1 Antieau, supra note 24, at § 5.99 (1969).

¹¹² Note, Criminal Law—Admissibility of Confessions or Admission of Accused Obtained During Custodial Interrogation by Non-Police Personnel: Are the Miranda Warnings Required?, 40 Miss. L.J. 139 (1968). But cf. *Mathis v. United States*, 391 U.S. 1 (1968) (holding that an Internal Revenue agent must give a Miranda warning during in-custody interrogation).

¹¹³ Compare with the position of the police: *Tiffany, Field Interrogation: Administrative, Judicial and Legislative Approaches*, 43 Denver L.J. 389, 414 (1966).

¹¹⁴ 18 U.S.C. § 242 (1964).

¹¹⁵ 341 U.S. 97, 98 (1951).

¹¹⁶ *Id.* at 100.

¹¹⁷ *State v. Hord*, 264 N.C. 149, 141 S.E.2d 241 (1965).

¹¹⁸ See pp. 629, 639 supra.

property of the inhabitants of the state, also to protect the property of the state.¹¹⁹

Query whether this section is sufficiently explicit to authorize the Governor's appointment of a crime investigation force functioning as did the Program's investigators. Moreover, this section may raise a serious delegation problem if it be interpreted to grant authority to private persons to exercise an unrestricted discretion in applying the law.¹²⁰

The rule against delegation of public authority to private groups has been invoked on the state level more frequently and more successfully than on the federal level.¹²¹ It could be argued that the Wackenhut Corporation was given public power and governmental power to enforce criminal laws, and that the functions which its investigators carried out could not be delegated to a private corporation. However, history furnishes examples of somewhat similar delegations that were upheld by the courts. During the twenties, for example, legislative acts entrusted societies for the prevention of cruelty to animals with the enforcement of laws regulating the ownership and keeping of dogs. Such acts were held not to be unconstitutional because of unlawful delegation. The activities of the societies for the prevention of cruelty to children were also upheld.¹²² The reasons for the decisions were diverse: that such functions were administrative,¹²³ or merely ministerial, similar to garbage collection,¹²⁴ and that the societies were not private corporations but agencies organized under special laws.¹²⁵ All decisions aver that "strictly governmental powers cannot be conferred upon a corporation or individual."¹²⁶ In *Fox v. Mohawk & Hudson River Humane Society*,¹²⁷ the court, after holding an act granting the society's law enforce-

¹¹⁹ Fla. Stat. Ann. § 14.01 (as amended 1965). See also discussion of this statute at p. 639 *supra*.

¹²⁰ *Colorado Anti-Discrimination Comm'n v. Case*, 151 Colo. 235, 250, 380 P.2d 34, 42-43 (1962); *Lewis v. Florida State Bd. of Health*, 143 So. 2d 867, 875 (Fla. 1962) (invalidating regulations of State Board of Health regarding spraying of lawns); *Phillips Petroleum Co. v. Anderson*, 74 So. 2d 544 (Fla. 1954) (invalidating power of administrative official to decide when the operation of a business is injurious to personnel); *State v. Fowler*, 94 Fla. 752, 114 So. 435 (1927) (invalidating a building code); *Lewis Consol. School Dist. v. Johnston*, 256 Iowa 236, 247, 127 N.W.2d 118, 125 (1964); *Opinion of the Justices*, 315 Mass. 761, 52 N.E.2d 974, 978 (1944); *McKibbin v. Corporation & Sec. Comm'n*, 369 Mich. 69, 82, 119 N.W.2d 557, 562 (1963).

¹²¹ Note, *The State Courts and Delegation of Public Authority to Private Groups*, 67 Harv. L. Rev. 1398 (1954). See also Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 231-32 (1937); Note, *Delegation of Governmental Power to Private Groups*, 32 Colum. L. Rev. 80, 92-93 (1932).

¹²² *People ex rel. State Bd. of Charities v. The New York Soc'y for the Prevention of Cruelty to Children*, 161 N.Y. 233, 56 N.E. 1004 (1900). In that case, however, the issue was whether public money could be paid to the society.

¹²³ *American Soc'y for Prevention of Cruelty to Animals v. New York*, 205 App. Div. 335, 199 N.Y.S. 728 (1923); *People ex rel. Westbay v. Delaney*, 73 Misc. 5, 130 N.Y.S. 833 (Sup. Ct. 1911).

¹²⁴ *Storey v. City of Seattle*, 124 Wash. 598, 215 P. 514 (1923).

¹²⁵ *American Soc'y for Prevention of Cruelty to Animals v. New York*, 205 App. Div. 335, 199 N.Y.S. 728 (1923).

¹²⁶ *Id.* at 341, 199 N.Y.S. at 733.

¹²⁷ 165 N.Y. 517, 59 N.E. 353 (1901).

ment powers unconstitutional but rejecting the argument of unlawful delegation, stated, in dictum:

If it were necessary for the disposition of this case . . . I certainly should deny the right of the legislature to vest in private associations or corporations authority and power affecting the life, liberty and property of the citizens, except that of eminent domain . . . and the management and control of reformatory institutions to which persons may be committed by the judicial or other public authorities. There may be other exceptions, but they do not occur to me. Of course, the state . . . may employ individuals or corporations to do work or render service for it; but the distinction between a public officer and a public employee or contractor is plain and well recognized.¹²⁸

The distinction was based on voluntary membership in the private society and on the absence of state supervision over management and membership of the society. These distinctions are of little value as a guide in other specific cases.¹²⁹ A survey of the decisions may suggest that courts tend to permit delegation to a private delegate when the likelihood of abuse is minimized, as where some control is retained by state authorities and when the delegated powers have been traditionally exercised by private groups and are accepted as beneficial to society. For example, pursuant to the *Fox* decision, the New York statute was amended to meet the objections voiced in the decision. The statute was then upheld by the New York Supreme Court¹³⁰ and approved of by the Supreme Court of the United States,¹³¹ which said that the American Society for the Prevention of Cruelty to Animals was organized

to enforce the laws enacted to prevent cruelty to animals [and] has long been recognized by the legislature as a valuable and efficient aid toward the enforcement of those laws. . . . And when the State in the reasonable conduct of its own affairs chooses to entrust the work incident to such licenses and collection of fees to a corporation created by it for the express purpose of aiding in law enforcement, and in good faith appropriates the funds so collected for payment of expenses fairly incurred . . . there is no infringement of any right guaranteed to the individual by the Federal Constitution.¹³²

However, where procedural checks are insufficient and potential abuse great, state courts have intervened. Thus, in *Group Health Insurance v. Howell*,¹³³ it was held that the medical society, a private corporation, could not be granted exclusive power to determine who will engage in the busi-

¹²⁸ Id. at 524-25, 59 N.E. at 356.

¹²⁹ Note, *The State Courts and Delegation of Public Authority to Private Groups*, 67 Harv. L. Rev. 1398, 1408 (1954).

¹³⁰ *People ex rel. Westbay v. Delaney*, 73 Misc. 5, 130 N.Y.S. 833 (Sup. Ct.), aff'd, 146 App. Div. 957, 131 N.Y.S. 1137 (1911). But cf. *Coler v. Society for Prevention of Cruelty to Animals*, 122 N.Y.S. 549 (Sup. Ct. 1908), a decision which remained a minority.

¹³¹ *Nicchia v. People*, 254 U.S. 228 (1920).

¹³² Id. at 230-31.

¹³³ 40 N.J. 436, 193 A.2d 103 (1963).

ness of a medical services corporation. Such power could not be delegated to a

private body which . . . is not subject to public accountability, at least where the exercise of such power is not accompanied by adequate legislative standards or safeguards whereby an applicant may be protected against arbitrary or self-motivated action on the part of such private body.¹³⁴

It is submitted that under the Program public power was unlawfully delegated to private hands.¹³⁵ There can be no objection to legislation that authorizes the employment of private crime detectives to assist law enforcement as employees,¹³⁶ or to the use of such detectives as independent contractors, for example, as informers. As employees they act on behalf of the state and are subject to the control of state officials. As independent contractors they act on their own behalf and are not subject to control by the state. The objection to the Florida scheme is that the investigators were acting on behalf of the state, exercising official functions, but employed by and subject to the control of a private corporation. True, they reported to Mr. Wackenhut, who wore both the hat of the President of the Wackenhut Corporation and the hat of the Director of the Program, but they reported to him as the former and not as the latter.

Just as independent contractors could not act as public officers, neither could the Wackenhut Corporation have acted as such an officer. This objection is not based exclusively on the view that corporations cannot take an oath of office.

[The] chief objection is that the corporations are private in the sense that they proceed from the voluntary action of individual citizens alone . . . that the agents or officers of the corporation are appointed such by the corporators, and that, if such agents are invested by virtue of their agency alone with the power of public officers, it is in substance devolving the choice of public offices on a few of the citizens . . . while under the Constitution, all public officers must be elected or appointed by other public authorities . . .¹³⁷

Today, private corporations may be granted the power to perform public functions. Many a commission and an authority have been set up as proper

¹³⁴ Id. at 445, 193 A.2d at 108; accord, *Fink v. Cole*, 302 N.Y. 216, 97 N.E.2d 873 (1951).

¹³⁵ *Dade County v. State*, 95 Fla. 465, 116 So. 72 (1928); *Bullock v. Billheimer*, 175 Ind. 428, 438-39, 94 N.E. 763, 767 (1911); *Smith v. Gallagher*, 408 Pa. 551, 557, 580-82, 185 A.2d 135, 149-50 (1962). See also *Ex parte Kelly*, 45 Okla. 577, 146 P. 444 (1915) on authorized appointment of Special Assistant to the District Attorney, where full delegation of functions plus management and control was invalidated, and *Commonwealth ex rel. Schumaker v. New York & Pennsylvania Co.*, 378 Pa. 359, 106 A.2d 239 (1954) (invalidating an appointment of a special district attorney as an attempt to abdicate a power vested exclusively in public officials). But note that a judicial appointment of special assistants to the district attorney to meet an emergency was upheld on the ground that the judge had inherent powers to make such appointments under these conditions. *Commonwealth v. Brownmiller*, 141 Pa. Super. 107, 14 A.2d 907 (1940).

¹³⁶ See, e.g., W. Va. Code Ann. § 7-4-2 (1966); *Smith*, supra note 80, at 93.

¹³⁷ *Fox v. Mohawk & H.R. Humane Soc'y*, 165 N.Y. 517, 525, 59 N.E. 353, 355 (1901).

tools for road construction and port administration. The above words of the *Fox* decision, however, are relevant even today. Wherever private corporations were set up as law enforcers, there remained a great measure of control over their operation by governmental agencies and the public. Moreover, they were established for a public, not a private purpose.¹³⁸ The Wackenhut Corporation was established for the private purpose of conducting a detective and security business, and its position vis-à-vis the state was that of an independent contractor. Section 14.01¹³⁹ did not and could not authorize the retainer of a private corporation as an independent contractor for the performance of a public office.

IV. MERITS AND DISADVANTAGES

Over all these considerations looms the larger policy question: Should a governor, even if permitted by law, employ an investigatory force to perform the functions of crime detection? Should he, even if he could, employ an independent contractor to provide investigators and a dollar-a-year man to head a Florida-type program?

A. *The Tradition of Local Law Enforcement*

Powers of government, including law enforcement, were traditionally vested in local authorities.¹⁴⁰ The history of our law enforcement shows a strong and continuous resistance to the establishment of a centralized state¹⁴¹ or federal¹⁴² agency to perform regular police duties. This attitude is universal in this country and can be traced to Great Britain, from whom we obtained, for better or for worse, the model for our law enforcement agencies.¹⁴³

The amazing maze of agencies and officers engaged in law enforcement within states, their myriad powers and duties, and the marked absence of centralized control, evidence their unplanned birth and growth. Such unplanned growth was the result of both the pressing needs of changing times and the obstinate clinging to familiar forms and old fears. The list of officers and institutions entrusted with the task of criminal investigation is long: sheriffs, constables, marshals, coroners and grand juries; attorney generals, county attorneys, district attorneys, and prosecuting attorneys; county

¹³⁸ State ex rel. Thomson v. Giessel, 265 Wis. 185, 60 N.W.2d 873 (1953).

¹³⁹ Fla. Stat. Ann. § 14.01 (1964).

¹⁴⁰ 2 A. de Tocqueville, *Democracy in America* 85-98 (Bradley ed. 1956) [hereinafter cited as de Tocqueville].

¹⁴¹ Smith, *supra* note 80, at 304.

¹⁴² Note the attempt of President Coolidge, which met with violent protests in the Senate, to unite federal and state liquor law enforcement agencies. It was assailed as "an attempt to convert state and local officials into a federal police force." J. Kallenbach, *The American Chief Executive* 446 (1966). See also Note, *Riot Control and the Use of Federal Troops*, 81 Harv. L. Rev. 638, 645-46 (1968).

¹⁴³ A. Lee, *A History of Police in England*, ch. 12 (1901); Hall, *Police and Law in a Democratic Society*, 28 Ind. L.J. 133 (1953) [hereinafter cited as Hall]. Smith, *supra* note 80, at 305 suggests that we have gone farther than the English in decentralizing our law enforcement efforts.

police and city police; state police and state officials whose duty it is to enforce statutes under their jurisdiction.¹⁴⁴

By and large, the main urban crime investigation agency in states is the city police department. Such a department is invariably the creation of statute. It is significant that the establishment of city police departments was not accomplished without a struggle. The legal attacks on statutes regulating such police departments were based mainly on the argument that the state legislature transgressed the boundaries of the state constitutional rights to local self-government. Courts, however, invariably held that enforcement of the law and preservation of peace were matters of state concern and within the authority of state legislatures. Therefore, they could regulate police departments in the cities and counties, and impose upon local authorities the duty to finance their operation.¹⁴⁵ But state operation of local police departments did not last. Disappointment with anticipated improvement resulted in reestablishment of local control.¹⁴⁶

The beginning of this century also saw the appearance of statutory state police. When the sheriff and constable reigned supreme as law enforcement officers, their main occupation was the apprehension of criminals, the execution of court orders and the collection of taxes. With the concentration of population in the towns, with mobility and loss of close personal relationship between the law enforcement officer and the inhabitants, criminal investigation was elevated to prominence. Crime laboratories, identification libraries and expert criminal detection became indispensable to law enforcement activities. These, however, could not be satisfactorily provided by local law enforcement agencies, hence the development of the metropolitan and state police.¹⁴⁷ Yet even state police, though authorized, refrain from acting in areas where locally controlled city police are active.¹⁴⁸

Law enforcement in the states is fragmented both functionally and administratively.¹⁴⁹ When faced with new problems, instead of strengthening constitutionally created law enforcement offices whenever they have proved unsatisfactory,¹⁵⁰ the tendency has been to create new agencies and endow

¹⁴⁴ Maddox & Fuquay, *supra* note 29, at 519, 592-600; Phillips, *supra* note 18, at 459-74; Smith, *supra* note 80, at 66-181.

¹⁴⁵ *Mayor & City Council v. State ex rel. Bd. of Police*, 15 Md. 376 (1860); *Rohr*, *supra* note 17, at 140; *Arnett v. State ex rel. Donohue*, 168 Ind. 180, 80 N.E. 153 (1907); *State ex rel. Atwood v. Hunter*, 38 Kan. 578, 17 P. 177, 180 (1888). See also *Board of Trustees of Policemen's & Firemen's Retirement Fund v. Paducah*, 333 S.W.2d 515 (Ky. 1960); *People ex rel. Drake v. Mahaney*, 13 Mich. 481 (1865); *Gooch v. Town of Exeter*, 70 N.H. 413, 48 A. 1100 (1901); *People ex rel. Wood v. Draper*, 15 N.Y. 532 (1857).

¹⁴⁶ See generally *Law Enforcement in Kentucky*, *supra* note 58, at 71.

¹⁴⁷ *Law Enforcement in Kentucky*, *supra* note 58, at 125-6 (twenty-six states have state police, 23 have highway patrols). Some laws permit cities to contract with state police for police services. E.g., *La. Rev. Stat. § 40:1388* (1951).

¹⁴⁸ Maddox & Fuquay, *supra* note 29, at 599.

¹⁴⁹ *Task Force Report: The Police, The President's Commission on Law Enforcement and Administration of Justice* 69 (1967) [hereinafter cited as *Task Force Report*].

¹⁵⁰ This is true especially in the metropolitan area. On the poor performance of the sheriff-constable system, see Smith, *supra* note 80, at 579; Maddox & Fuquay, *supra* note

them with the powers of peace officers.¹⁵¹ The reasons are not hard to find. Traditionally, law and order was enforced by the people, not superimposed from above by a ruler.¹⁵² To bear arms in defense of home and state is considered a right that some states thought worthy of constitutional protection.¹⁵³ There is also a popular belief, whether justified or not, that police abuse their power.¹⁵⁴ Finally, there is a deep-rooted suspicion of any concentration of power.¹⁵⁵ By investing local government with control over law enforcement, two interrelated results were achieved: decentralization of the police force, and its control by the populace or, at least, by the governmental unit that is the least removed from the voter. These results may hamper efficient police operation, but they are effective means of preventing the creation of a large police unit dominated by a potential despot, a private army.¹⁵⁶

Notwithstanding expert opinion to the contrary, popular sentiment against a centralized police force is not dead.¹⁵⁷ It is submitted that as a matter of policy a grant of power to a governor to organize an investigative force to ferret out information about crimes may require a basic change in the attitudes and beliefs of the citizens of his state and a clear expression of such change.

29 at 519. For a discussion of the problems and some of the solutions see Misner, *Recent Developments in Metropolitan Law Enforcement*, 50 *J. Crim. L.C. & P.S.* 497 (1959-60), 51 *J. Crim. L.C. & P.S.* 265 (1960-61).

¹⁵¹ Smith, *supra* note 80, at 151-53. See generally *Law Enforcement in Kentucky* *supra* note 59, at 114-24.

¹⁵² Hall, *supra* note 143, at 135.

¹⁵³ Ala. Const. art. I, § 26; Alas. Const. art. I, § 19; Ariz. Const. art. II, § 26; Ark. Const. art. II, § 5; Colo. Const. art. II, §§ 12 & 13; Conn. Const. art. I, § 17; Fla. Const. D.R., § 20; Ga. Const. art. I, § I, ¶ 22; Hawaii Const. art. I, § 15; Idaho Const. art. I, § 11; Ind. Const. art. I, § 32; Ky. Const. art. I; La. Const. art. I, § 8; Me. Const. art. I, § 16; Mass. Const. D.R., § XVII; Mich. Const. art. II, § 5; Miss. Const. art. III, § 12; Mo. Const. art. I, § 23; Mont. Const. art. III, § 13; N.M. Const. art. II, § 6; N.C. Const. art. I, § 24; Ohio Const. art. I, § 4; Okla. Const. art. II, § 26; Ore. Const. art. I, § 27; Pa. Const. art. I, § 21; R.I. Const. art. I, § 22; S.C. Const. art. I, § 26; S.D. Const. art. VI, § 24; Tenn. Const. art. I, § 26; Tex. Const. art. I, § 23; Utah Const. art. I, § 6; Vt. Const. art. I, § 16; Wash. Const. art. I, § 24; Wyo. Const. art. I, § 24.

¹⁵⁴ Smith, *supra* note 80, at 328. See also Phillips, *supra* note 18, at 466-67; *id.* at 474 (on resentment of "outside" police intervention and the limited extent of use of state police).

¹⁵⁵ "The presence of armed troops in times of peace is a demonstration of centralized power which sets up fear in the ordinary citizen that his constitutional liberties are somehow being imperiled. Too much history of the past casts its shadow for the people to feel otherwise." *State v. McPhail*, 182 *Miss.* 360, 373, 180 *So.* 387, 390 (1938). See also *Task Force Report*, *supra* note 149, at 7.

¹⁵⁶ See note 155 *supra*.

¹⁵⁷ Neither is it dead in England. Chappel, *Regional Crime Squads*, 1965 *Crim. L. Rev.* 5, 7, 8 (1965). See also Pollard, *The Police Act 1964*, *Pub. L.* 35 (1966); Regan, *The Police Service: An Extreme Example of Central Control Over Local Authority*, *Pub. L.* 13 (1966), in which the author reaches the conclusion that notwithstanding the Home Secretary's enormous powers, the Home Office "[e]vinces great reluctance to prevent local police authorities from doing what they wish."

B. *Conflict of Interests and Public Policy*

By definition, the Wackenhut Corporation was an independent contractor in its relation to the state.¹⁵⁸ The main characteristic distinguishing an independent contractor from an employee is the relative freedom from supervision of the details of his work. The employment of an independent contractor by government has been justified when those services are of a non-governmental and transient nature, because the public does not identify the government with the contractor and, therefore, there is no need for supervision over the manner in which the contractor operates.¹⁵⁹ Yet, in the case of the investigatory services rendered by the Wackenhut Corporation, the manner in which the investigators performed their duties was just as important as the results that they produced, not only because the manner of operation may have had a direct impact on the use and admissibility of the evidence gathered, but also because the public did identify them with the government. The investigations, which were conducted on behalf of the state, and not just the results thereof, must have been attributed to the state. Moreover, the functions of the investigators were not transitory and their tenure not limited.¹⁶⁰

The position of the investigators was unique: They worked in the offices of the Program, a few miles away from the building where other investigators of the Wackenhut Corporation were located.¹⁶¹ They were paid by the Wackenhut Corporation and, it seems, were not necessarily engaged exclusively in work for the Program, as evidenced by the Director's strong admonition not to use the credentials given to them by the Governor to obtain information in connection with investigations conducted by the Corporation for private clients.¹⁶²

In general, he who is employed by the government should be paid by the government.¹⁶³ This rule is a derivative of the prohibition on serving two masters.¹⁶⁴ It is also based on public policy considerations that apply to federal and state government alike. The receipt of payment from an outside source by one rendering services to the state causes split loyalty and a likelihood of a conflict of interests. An outsider obtains a hold over the state employee, who may then tend to favor this outsider over others. In Florida, such a conflict may have arisen whenever a complaint against the Wacken-

¹⁵⁸ See generally F. Mechem, *Outline of Agency* 290-91 (4th ed. 1952); R. Powell, *The Law of Agency* 9 (2d ed. 1961).

¹⁵⁹ *Conflict of Interest and Federal Service, The Association of the Bar in the City of New York, Special Committee on Federal Conflict of Interest Laws and Federal Interests*, 239 (1960) [hereinafter cited as CIF].

¹⁶⁰ The term of the investigators was to expire "[w]hen the cancer of crime is removed . . ." Address by Governor Claude Kirk, *Inauguration of Governor of Florida*, Jan. 3, 1967 [hereinafter cited as *Governor's Address*].

¹⁶¹ *Fact Sheet* at 3.

¹⁶² *Id.* at 4.

¹⁶³ CIF, *supra* note 159, at 58.

¹⁶⁴ F. Mechem, *Outline of Agency* § 501 (4th ed. 1952).

hut Corporation or its employees would have been investigated by the War on Crime Program (but such a possibility was remote). More probable was the danger of abuse of power for private gains by the investigators, the Director or their colleagues in the Corporation. *In Re Stanley*¹⁶⁵ held that it was against public policy to allow a person clothed with special authority, such as a constable, to act simultaneously as a private detective. The court emphasized the extraordinary powers of the constable that are not conferred on private individuals, namely to arrest and to carry arms, and concluded that "[t]o give these powers . . . to a person licensed to act for private persons, creates the distinct possibility of grave abuses."¹⁶⁶ Even though the Director and his investigators had no power to arrest or to carry arms, this rationale applied to them because of their extraordinary powers of investigation.

The danger of abuse did not escape the Director. He took steps to segregate the War on Crime investigators from their counterparts in the Corporation by removing them to offices a few miles apart. He issued strict orders to regular Wackenhut Corporation personnel, requiring them to advise all persons whom they might interrogate while conducting investigations for the corporation's private clients that the matter under investigation was not part of the Governor's War on Crime.¹⁶⁷

One may question the advisability and effect of these precautions. In the era of the telephone and the car, the few miles between offices is not a significant distance. Furthermore, since the Program's investigators were not full-time employees, they probably spent the rest of their working time with the regular investigators. The segregation was, therefore, more apparent than real. As far as the warning is concerned, this negative assertion proves one of the main dangers in the Governor's arrangement. It served as an announcement to an uncooperative interviewee that the Wackenhut Corporation was retained by the Governor, in the event that he was not aware of that fact. Human nature being what it is, a negative assertion that a particular individual was not engaged in general investigation for the Governor amounted to a positive assertion that the corporation that employed him was. Who would risk the displeasure of a private detective who might, next time he came around, present credentials stating that he was the official representative of the Governor?¹⁶⁸ This negative assertion was also a very valuable bonus to the Wackenhut Corporation. It provided a unique distinction, free publicity and a further possibility for conflict of interest. On April 24, 1967, Mr. Wackenhut told the shareholders of the corporation:

¹⁶⁵ 204 Pa. Super. 29, 201 A.2d 287 (1964).

¹⁶⁶ *Id.* at 32, 201 A.2d at 289. Note that both sheriffs and constables are permitted to practice other professions, Smith, *supra* note 80, at 72.

¹⁶⁷ Fact Sheet at 3.

¹⁶⁸ See *State Lodge of Mich. Fraternal Order of Police v. City of Detroit*, 318 Mich. 182, 27 N.W.2d 612 (1947), cert. denied, 332 U.S. 818 (1947); *Fraternal Order of Police v. Harris*, 306 Mich. 68, 10 N.W.2d 310 (1934).

As you know, I was appointed Director of the Governor's War on Crime Because of this unique approach to the crime problem, it has drawn both national and international attention to the Wackenhut Corporation and me. I must confess that the tremendous amount of publicity which we have received came as quite a surprise. . . . [T]he Wackenhut name is now known from coast to coast.

. . . .
I am pleased to announce that our dollar volume of private investigative work has increased 63% during the first quarter of 1967 over the same period a year ago. If we were to include the additional dollar value resulting from the Governor's War on Crime investigations our increase jumps to 208%.¹⁶⁹

The Program posed yet another problem as a result of the possible use of state information by a private organization. The Director took steps to segregate state files from the files of the corporation, as the Governor had ordered him to do. But information stored in a person's brain is not segregated as easily. An investigator who works mornings for the state might find it impossible to forget information received in the morning when working for the corporation in the afternoon. This problem is plaguing the federal government in its employment of part-time consulting personnel,¹⁷⁰ and is insoluble.

Conflict of interest may manifest itself not only in favoritism but also in subversion of public policy. Mr. Wackenhut has furnished an example of just such a possibility. It may well be in the interest of the state not to publicize the results of the efforts of the War on Crime investigators; it well may be in the interest of the state to publish such results with emphasis on future programs, on rehabilitation, on sociological studies, or on reconsideration of the existing criminal legislation. These interests may not be compatible with the interests of the Wackenhut Corporation to demonstrate and advertise its investigative capabilities in order to attract additional business. Mr. Wackenhut did not miss such an opportunity. On April 24, 1967, at the stockholders meeting of the Corporation, he said:

In the short span of 14 weeks . . . we have been eminently successful. I am proud to announce the following statistics

855 complaint letters have been received and phone calls have been averaging 10 per day. Approximately 18% of these communications contained information of substance. 16 matters have been referred to Federal agencies

. . . .
Since January 3, 1967 we have opened 447 cases. We have closed 57 cases. One case remains unassigned and we presently have 389 cases under active investigation.

17 persons have been arrested and are presently awaiting trial on 44 separate criminal counts¹⁷¹

¹⁶⁹ Wackenhut Address, *supra* note 77, at 3, 4.

¹⁷⁰ CIF, *supra* note 159, at 175.

¹⁷¹ Wackenhut Address, *supra* note 77, at 3, 4.

The potential conflict of interest that such a statement represents is clear.

Mr. Wackenhut donated his services to the state. He did not sever his connections with the Wackenhut Corporation and continued to serve as its president. It may safely be assumed that he devoted some of his time to the corporation. Such activity was facilitated by the location of the Program's headquarters in the corporation's offices. An employee's involvement with, and attitude towards, his work and his sense of belonging are all affected by the compensatory system under which he is employed. An employee's feeling of obligation to give service is diminished by a charitable arrangement of a dollar a year payment, and his desire to continue to give such service over a long period is, by necessity, limited. Such services are transitory as far as the employee is concerned, and are or become peripheral to his other activities. Such an arrangement also furnishes a moral justification for the receipt of intangible benefits, which may be hard to assess but which may cause great harm to the state and to the moral stature of the civil service.

The employment of part-time personnel and independent contractors has been justified on the grounds that top management and scientific capabilities are difficult to recruit, that in some fields, especially in science, experts are reluctant or unable to work under close surveillance of a regulated environment, or that efficiency and economy dictate the use of outside services where they are not essentially governmental and are not required on a regular and continuous basis. Difficulty in recruiting may have justified the appointment of Mr. Wackenhut. No other justification applied to him, and none was applicable to his corporation and its investigators. With respect to Mr. Wackenhut, the question remains whether his qualifications were so unique as to warrant his engagement under this "package deal."

It seems that, in the opinion of the Governor, a War on Crime is essentially a matter of investigations, acquisition of information and evidence, and bringing criminals to trial. This attitude is manifest in the Director's attitude towards the problem and his emphasis on investigations with a view to obtaining convictions. In his address to the Wackenhut Corporation's stockholders, he proudly enumerated the convictions produced by his investigators: breaking and entering, robbery, perjury, bribery, conversion of official funds, grand larceny, narcotics violations and prostitution. This description is very disturbing. Mr. Wackenhut treated the state's War on Crime in exactly the same manner as he treated his other customers. His investigators served complainants just as they served other customers.¹⁷² Their aim was to obtain convictions, and "organized crime" seems to have meant any violation of the law. Query whether this attitude can bring about a victory over crime and violence, and, above all, whether a private detective, however capable and experienced, is the right choice as a director for such a War on Crime Program.

¹⁷² *Id.* at 5. In that address he referred to the corporation's "governmental and commercial business."

Regarding the public, the whole arrangement had an unwholesome appearance that tended to raise suspicion in the mind of the public as to the integrity of public servants. Regarding the regulars in law enforcement forces, the extent of the harmful effect of this arrangement on their morale can only be guessed. Not only did the Governor assert the inability of regular law enforcement forces to deal with the problem of crime, but he also emphasized their need for help from "professional crime fighters,"¹⁷³ implying that the regular forces were not. The different compensatory arrangement with experts must have also engendered bitter feelings among the regulars, who are underpaid and overworked.

The launching of this Program may have had a salutary effect, in that it could have generated discussion as to the desirability of centralizing police and eliminating fragmented law enforcement activities, as advocated by many.¹⁷⁴ The problem is real and, indeed, universal.¹⁷⁵ But a program such as this does not provide the solution.

¹⁷³ Governor's Address, *supra* note 160.

¹⁷⁴ Smith, *supra* note 80, at 301-04.

¹⁷⁵ On the murder of an 18-year-old freshman at Eastern Michigan University it was reported: "The police investigation had proved fruitless until last week. Friction among some of the five police agencies working on the case impeded progress, causing Governor William Milliken to observe that the departments had displayed only 'passive cooperation' with one another." *Time Magazine*, Aug. 8, 1969, at 19.