
The Baltimore Police Department: Understanding its status as a state agency

by George A. Nilson

Executive Summary

In recent years, the Baltimore Police Department has come under intense scrutiny following the in-custody death of Freddie Gray in 2015 and the ensuing Department of Justice investigation, which resulted in a Federal Consent Decree. Many have started calling for turning control of the Department back to the City from the State as a way of increasing accountability. This report seeks to understand the history of how the Department became a State Agency 158 years ago and the implications of changing it now.

By 1860, the Know-Nothing Party had taken complete political control of Baltimore City and was abusing its power. The Maryland General Assembly reached the conclusion that the Mayor and City Council had proven themselves incapable of maintaining order in Baltimore and accordingly enacted Public Local Laws making the Baltimore Police Department a State Agency.

These Public Local Laws required that the Baltimore Police Department be managed by a board of four Police Commissioners appointed by the General Assembly. The authority to appoint and remove the Commissioners was turned over to the Governor in 1900. In 1966, when the City moved to having a single Police Commissioner, the power to appoint and

remove the Commissioner remained with the Governor. In 1976, the General Assembly transferred the appointment and removal powers to the Mayor of Baltimore. However, the Maryland General Assembly left intact the State Agency status of the Police Department. This means the General Assembly rather than the City Council is the legislative body responsible for any legislative enactments governing the Baltimore Police Department.

Throughout this 158-year history as a state agency, the funding of the operations of the Police Department has remained almost entirely the responsibility of the City of Baltimore.

While the Mayor and City Council are constrained by the remaining Public Local Laws establishing the Department's continuing status as a State Agency, the Mayor is able to impact the conduct of the Commissioner through the power to appoint and terminate and to control funding for the Department's operation and initiatives. The City Council has some influence in the appointment process (as it has recently demonstrated) and in the budget process.

If the Public Local Laws establishing the Baltimore Police Department as a State Agency were entirely repealed, there would be several impacts.

First, the City Council and Mayor would be free to legislate or micromanage (for good or ill) policing in the City of Baltimore. Second, Police Department employees would become City employees rather than employees of a State Agency, and they would be subject to City—rather than State—ethics and other laws and regulations. Third, the Baltimore Police Department would lose the current protections which exist under State sovereign immunity, which would likely be costly to the City and its taxpayers.

I. Introduction

The Baltimore Police Department is the eighth largest municipal police department in America. It employs nearly 3,000 personnel, including approximately 2,500 sworn officers, about half of whom serve in the patrol division. The Department is responsible for safeguarding life and property, and for promoting public safety through enforcing the law in one of the most violent cities in the country.

The public safety challenges in Baltimore have grown since the in-custody death of Freddie Gray in 2015 and the unrest that followed. The City and Baltimore Police Department are subject to the stringent oversight of a Federal Consent Decree. The Department has had four Commissioners in as many years and has been without a permanent leader for over a year.

Among the many questions and challenges that face the Baltimore Police Department is whether the Department is better off remaining a State Agency or if it should become a City Agency. This report examines this particular issue and provides historical context as to how the Baltimore Police Department was abruptly taken from City control and made a State Agency 158 years ago.

This report seeks to shed light on the following questions:

- How, why, and when did the Baltimore Police Department become a State Agency?
- Are there reasons to change this status so that the Department now becomes a City Agency?
- Are there good reasons for the Department to remain a State Agency?

II. How the Baltimore Police Department became a state agency

The Know-Nothing movement began in the early 1840s in New York and spread throughout the Northeast and Mid-Atlantic.¹ The Know-Nothings in Maryland began as a secret club in the early 1850s; restricted membership to white, male, native-born Protestants; and demanded stricter immigration and naturalization laws. The Know-Nothing party was avowedly political in purpose and relentlessly secret in the conduct of its business. Members earned the party its name by repeatedly answering, “I know nothing,” when asked about their meetings and internal workings.

In the 1852 Presidential election, the Know-Nothings emerged on the national stage and gained national prominence. In Baltimore, the openly Know-Nothing candidate was elected Mayor, and Know-Nothings gained majority control of the City Council and the General Assembly.

The Know-Nothings endured longer in Baltimore than elsewhere, in part due to the misuse of the Police Department to keep the party in power. Throughout the 1850s, the Know-Nothings took their political battle to the streets of Baltimore City with the very unsubtle support of street gangs led by the notorious

Plug Uglies and Blood Tubbers and the tacit approval of the Police Department. Violence on behalf of the Know-Nothings in the 1856 election had reached greater levels than had ever before been experienced in the City, including a dozen killed, 300 wounded, and hundreds more picked up off the street, held in confinement, and then forced into repeated, alcohol-induced voting, a practice known as “cooping.”

Baltimore remained solidly under Know-Nothing political control through the municipal elections of 1858, which were even worse than previous elections. Having secured his election in 1856, Mayor Thomas Swann quadrupled the size of the Police Department, and the officers dedicated themselves to keeping the Know-Nothings in power. Several Democratic candidates for City Council withdrew from the 1858 race and urged their supporters to stay home for their own safety. Swann’s Democratic opponent for Mayor conceded defeat at noon on election day, noting that attempts to vote for him promised “loss of life and the general disorder of the City,” and

urging his supporters to stay home to preserve their safety. Know-Nothing Mayor Swann was re-elected, but the party lost its control of the General Assembly in 1859.

In response to the violence in Baltimore, the Maryland General Assembly, no longer controlled by the Know-Nothings, enacted the Police Act of January 1860. This Act removed control of the Baltimore Police Department from the City and transferred it to a panel of four Police Commissioners appointed by the Maryland General Assembly.

The City, still in the hands of the Know-Nothing party, swiftly challenged the validity of the Act in the courts. Later that same year the Court of Appeals ruled against the City, holding that because the City was a creature of State government, and its police powers derived from State powers, the General Assembly had the constitutional authority to enact the Police Act and reconfigure control of the Baltimore Police Department.

A Timeline of the Baltimore Police Department as a State Agency



- 1784** ● Baltimore Police Department created
- 1852** ● Know Nothings Come to Power
- 1860** ● BPD becomes state agency, run by multiple commissioners appointed by the General Assembly
- 1900** ● Power to appoint commissioners is given to the Governor
- 1966** ● Power to run BPD invested in a single commissioner, still appointed by the Governor
- 1976** ● Mayor given ability to hire and fire the commissioner
- 2008** ● Mayor’s discretion to fire commissioner strengthened

III. Funding and oversight responsibilities

The Baltimore Police Department was established as a State Agency by Subtitle 16 of the Public Local Laws of Baltimore.²

- Section 16-2 provides that the Police Department of Baltimore City is established as an agency and instrumentality of the State of Maryland.
- Section 16-4 states that the affairs and operations of the Department shall be supervised and directed by the Commissioner of Police.
- Section 16-7 gives the Commissioner the power to run and manage the Police Department. It is the Police Commissioner who has the power to issue rules, regulations, orders, and other departmental directives under the local law.
- Section 16-7(12) further provides that the Police Commissioner has the power to “acquire, hold, control and maintain all property, equipment, facilities and premises necessary to the operation of the Department, and to dispose of those in the manner as may be authorized by law.”

In 1966, the legislation was amended to refer to a single Commissioner instead of multiple Commissioners and to give the Governor the right to appoint the Commissioner to a six-year term and to remove him or her for cause. This legislation unambiguously continued the establishment of the Baltimore Police Department as an agency and instrumentality of the State.

Ten years later, the General Assembly shifted the power to appoint and terminate the Police Commissioner from the Governor to the Mayor of Baltimore City. The term

remained at six years and appointment was subject to advice and consent of the Baltimore City Council. Despite this change, the Police Department remained legislatively designated as a State Agency.

The Mayor’s power to hire and fire the Police Commissioner provides him or her considerable authority over how the Department operates and sets its priorities. While the power to hire is somewhat constrained by the need to obtain confirmation from the City Council, the General Assembly initially tempered the power to fire by requiring that it be exercised only for cause. However, following the 2008 decision of the Court of Appeals that Mayor Martin O’Malley exceeded his termination authority in firing Commissioner Kevin Clark without establishing “cause” under the Public Local Law,³ the General Assembly amended the Law, allowing the Mayor to terminate a Police Commissioner under the terms of their employment contract without establishing cause under the statute. That change unquestionably strengthened the Mayor’s authority over the Police Commissioner.

While the Mayor has the power to hire and fire the Police Commissioner, and the Mayor and City Council control the Department’s budget, there are legislative and Charter constraints on their authority. Specifically, both the Mayor and City Council are prevented from micromanaging the Police Department and interfering with the Commissioner’s decisions as to how to best provide effective and constitutional policing in the City. Article II, Section 27 of the City Charter states that although the City is vested with police power to the same extent as the State, no ordinance of the City or act of a municipal officer shall conflict with, impede, obstruct, hinder, or interfere with the powers of the Police Department. This means that the City Council cannot pass ordinances that require the Police Commissioner or Department to take specific actions.

The City Council has an important role in the appointment process and in the annual budgeting process. Also, it frequently passes Resolutions expressing its views as to what changes in police policies and practices should be considered and uses public hearings to shine light on issues and concerns.

For example, in 2014, the City Council passed an ordinance requiring all officers to be equipped with police-worn body cameras within a year. The Mayor vetoed the proposed ordinance because it conflicted with the City Charter. However, the Police Department did equip its officers with body-worn cameras several years later by way of a collaborative protocol.

In vetoing the ordinance, the Mayor relied on the City Law Department's opinion that cited Sections 16-4 and 16-7(12) of the Public Local Laws, Article II, Section 27 of the City Charter, and the Court of Appeals' decision that "the City was denied, in the most positive manner, any right to interfere with or control" the police. The Law Department also noted that the Mayor is similarly constrained: "The Mayor's ability to influence Police policy is focused on and limited to her role in appointing and removing the Commissioner and her role in the ordinance of estimates."⁴

The City Council has an important role in the appointment process and in the annual budgeting process. Also, it frequently passes Resolutions expressing its views as to what changes in police policies and practices should be considered and uses public hearings to shine light on issues and concerns. However, the City Council is not the primary legislative body considering significant policing legislation. The Court of Appeals has observed, and reiterated in the 2008 Clark opinion, that "the General Assembly, and not the Baltimore City Council, has continued to be the legislative body enacting significant legislation governing the Baltimore City Police Department."

Throughout this 158-year history, the funding of the operations of the Baltimore Police Department has remained almost entirely the responsibility of the City of Baltimore. From time to time, the Maryland General Assembly will provide funding for public safety initiatives in the City, but these programs are typically finite in duration and modest in size compared to the overall budget of the Department, which remains the responsibility of City taxpayers. The Department's total budget for this fiscal year is \$509 million, \$169 million higher than nine years earlier. The State's recently announced one-year crime-fighting initiative for the City provides \$13 million in funding support.

IV. Implications and consequences of State Agency vs. City Agency

If the Maryland General Assembly passed legislation that changed the status of the Baltimore Police Department from a State Agency to a City Agency, the Mayor and City Council would be free to dictate directly to the Commissioner how to operate the Police Department and what policing strategies to deploy to improve public safety in Baltimore City. The legislative pendulum would shift from the General Assembly to the Mayor and City Council. In this way, local "oversight" would become more direct, rather than coming into play primarily in budget season or on the occasion that disagreements over police policy rise

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to a level warranting consideration of the Commissioner's termination. Some would say that would be good; others would disagree.

With the City having paid the majority of the Police Department's budget costs over the last 158 years, it is hard to imagine that relative funding responsibilities would change materially as a result of the Department becoming a City Agency.

There would be a variety of administrative and human resources issues resulting from changing the status of 3,000 Department employees from State Agency employees to City Agency employees. It is beyond the scope of this report to unearth these issues and evaluate them, but they would have to be understood and managed. The State Ethics law and oversight responsibilities would shift from the State Ethics Commission to the substantially similar City Ethics Code and City Board of Ethics. At present, Police Department personnel policies and practices are created and administered by the Department and its Commissioner for the relatively unique world of a public safety agency. The City would have to decide if these employees would be subject to the comparable—but often very different—rules governing employees of City agencies generally. Such issues include secondary employment, compensatory time, overtime, discipline, etc. These issues could be managed and resolved, but if not managed well and wisely, they could present serious obstacles.

The most significant impact of a change from State Agency status to City Agency status relates to the legal immunities that currently offer some protection to the Police Department and Baltimore City when citizens claim to have been mistreated by police officers. Currently, the Police Department is protected by State sovereign immunity that provides a greater level of protection than local immunity. If the Police Department becomes a City Agency, it would lose the protection of State sovereign immunity and be exposed to significantly higher damages awards in civil lawsuits.⁵

This issue was raised when, during the 2017 General Assembly Session, Delegate Curt Anderson (D) sought counsel on the potential impact of making the Police Department a City Agency. Sandra Benson Branley, Counsel to the General Assembly, explained the change that would occur to the existing liability protections in her advice letter of March 3, 2017 to Anderson:

“Making the BPD a City agency will result in the BPD having only local governmental immunity. Unlike State sovereign immunity, which provides ‘total protection’ for State constitutional torts, local governmental immunity does not provide any immunity for State constitutional torts. ‘Unlike in a Sec. 1983 action and unlike in an action for some common law torts, neither the local government official nor a local governmental entity

has available any governmental immunity in an action based on rights protected by the State Constitution.’ *DiPino v. Davis*, 354 Md. 18, 51 (1999). In addition, the City could become liable for negligent hiring and supervision, which have lower burdens of proof than a federal pattern and practice claim requires.

In summary, by designating the BPD an agency of Baltimore City and thus taking away sovereign immunity available to State agencies, the bill [HB1504] would (1) allow direct lawsuits against both the BPD and the City for State constitutional torts committed by BPD officers (where damages are uncapped); (2) allow direct claims against the City in federal court under 42 U.S.C. Sec. 1983 for a civil rights violation (which is uncapped federal constitutional liability); and (3) allow direct tort claims against the BPD and the City for other State common law torts. As a result, it is reasonable to conclude that the City would be exposed to significantly higher damage awards.”⁶

It is impossible to estimate how much of an increase in civil liability amounts would occur if the Police Department became a City Agency, but it is likely that the increase would be substantial. Some would argue that higher awards against the City and the Department would have the beneficial effect of deterring “bad conduct.” Others would say that funding for public safety is not limitless, and that more money paid out to individuals as a result of civil lawsuits means less money for much-needed reforms and additional policing resources for the community.

Endnotes

- 1 This discussion of the Baltimore-specific history of the Know-Nothing Party derives from Suzanne Sangree, “Voting Knowing Nothing: A Baltimore Case Study” Address at the Hopkins Faculty Club, 8 November 2016.
- 2 The Baltimore City Charter and Public Local Laws were amended pursuant to State legislation.
- 3 Mayor and City Council of Baltimore, et. al v. Kevin P. Clark, Court of Appeals of Maryland, March 20, 2008.
- 4 Mayor and City Council of Baltimore, et. al v. Kevin P. Clark, Court of Appeals of Maryland, March 20, 2008.
- 5 It is conceivable that the General Assembly could pass legislation that would afford the Police Department the same limitations on liability, but in light of the Attorney General’s 2017 opinion, this seems unlikely.
- 6 Sandra Benson Branley to Del. Curt Anderson, Re: House Bill 1504, 3 March 2017.

About the Author

George A. Nilson has practiced law in Maryland for nearly five decades, 30 of those years in private practice with DLA Piper, nearly 10 in senior positions with the Maryland Attorney General’s office, and 10 years as Baltimore’s City Solicitor from 2006 to 2016.

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