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## Vox Populi: Robert McCulloch, Ferguson, and the Roles of Prosecutors and Grand Juries in High-Profile Cases

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*Vox Populi:*

**Robert McCulloch, Ferguson & the Roles of  
Prosecutors and Grand Juries in  
High-Profile Cases**

*Frank O. Bowman, III\**

ABSTRACT

*The decisions of St. Louis County Prosecuting Attorney Robert McCulloch during the grand jury investigation of the shooting of Michael Brown by Officer Darren Wilson in Ferguson, Missouri, have been criticized on a variety of grounds. In an article written for a Missouri Law Review symposium on the shooting and its aftermath, titled “‘No, You Stand Up’: Why Prosecutors Should Stop Hiding Behind Grand Juries,” Professor Ben Trachtenberg takes Mr. McCulloch to task for allowing the grand jury to deliberate without making a recommendation about whether charges should be filed. Professor Trachtenberg asserts that, at the close of the evidentiary presentation to the grand jury, Mr. McCulloch did not believe there to be probable cause and that, accordingly, McCulloch should either not have allowed the grand jury to deliberate at all or should at the least have recommended against indictment due to lack of probable cause. Professor Trachtenberg strongly intimates that Mr. McCulloch behaved unethically, and he asserts forthrightly that McCulloch acted out of political self-interest and failed to properly fulfill the functions of his office.*

*Whatever the merits of other criticisms of Mr. McCulloch, Professor Trachtenberg’s particular criticisms are unfounded. This Article makes the case that, so far as appears from the public record, Mr. McCulloch conducted the Brown-Wilson investigation in compliance with Missouri law, violated no ethical rule, and, at least in his office’s relations with the grand jury, proceeded professionally and in a manner calculated to promote the public interest.*

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## I. INTRODUCTION

In an article earlier in this Issue, my good friend and valued colleague Ben Trachtenberg argues that St. Louis County Prosecuting Attorney Robert P. McCulloch acted improperly during the grand jury investigation of the shooting of Michael Brown by Officer Darren Wilson.<sup>1</sup> Professor Trachtenberg criticizes Mr. McCulloch's decision to ask the grand jury to make a probable cause determination on whether Officer Wilson committed a criminal homicide without providing advice to the grand jury on whether the prosecutor's office believed probable cause to exist. In Professor Trachtenberg's colorful phrasing, Mr. McCulloch was "hiding behind the anonymous lay persons on the grand jury," and "abdicated the usual role of the prosecutor, choosing instead to delegate his responsibilities to untrained citizens with inadequate guidance."<sup>2</sup> In the body of the article, Professor Trachtenberg strongly intimates that Mr. McCulloch's approach violated standards of professional ethics.<sup>3</sup>

Reluctant though I am to take public issue with Professor Trachtenberg, who combines a penetrating intellect with sparkling wit, I cannot in good conscience leave his case against Mr. McCulloch unanswered. Silence would be unfair to Mr. McCulloch and, more importantly, risks perpetuating a number of pernicious misconceptions about grand juries and the relationship of prosecutors to them. Put plainly, so far as appears from the public record, Mr. McCulloch conducted the Brown-Wilson grand jury investigation in compliance with Missouri law, violated no ethical rule, and, at least with respect to his office's relations with the grand jury, proceeded in an entirely professional and sensible manner.

In what follows, I express no view about the heterogeneous array of discontents – many entirely justified – that exploded into national prominence after the Brown shooting and that are consequently, if confusingly, lumped under the heading of "Ferguson." Likewise, I express no view about Mr. McCulloch's personality (which is undoubtedly brusque), his public remarks about the governor<sup>4</sup> (which were, at the least, impolite), the conduct of his office in other cases, his standing with the electorate of St. Louis County, or his media strategy during the Brown-Wilson investigation, including questions about the timing of the announcement of the grand jury decision. Nor do I indulge in speculation about Mr. McCulloch's racial opinions, the effect of the circumstances of his police officer father's death in the line of duty, or other personal matters about which, having never met the man, I cannot possibly know. Professor Trachtenberg criticizes Mr. McCulloch for particular aspects of his conduct of the Brown-Wilson grand jury investigation. I think

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1. Ben Trachtenberg, *No, You "Stand Up": Why Prosecutors Should Stop Hiding Behind Grand Juries*, 80 MO. L. REV. 1099 (2015).

2. *Id.* at 1100.

3. *Id.* at 1105–07.

4. *Id.* at 1099, 1109.

that criticism unfounded. This Article addresses that point, and that point only.

## II. GRAND JURIES AND PROSECUTORS IN MISSOURI

In the United States, felony criminal prosecutions are instituted in one of two ways: by indictment, which is a formal charge approved by a grand jury upon its finding that the offense stated in the indictment is supported by probable cause, or by information (sometimes called a complaint), which is a formal charge prepared by a prosecutor and filed directly with the court with no prior review by a citizen body. In federal court, the U.S. Constitution requires that all felony prosecutions begin with a “presentment or indictment of a grand jury.”<sup>5</sup> This provision of the Fifth Amendment is not binding on the states.<sup>6</sup> Therefore, although all states have some provision for grand juries,<sup>7</sup> less than half use them regularly, and none requires a grand jury indictment in all felony cases.<sup>8</sup> The most usual arrangement – and the one employed by Missouri – is that grand juries may be empanelled, but prosecutors can elect either to introduce evidence to a grand jury and seek its imprimatur on an indictment or they can file charges directly with the court in an information.<sup>9</sup>

Missouri law governing grand jury practice is limited. Article I, Section 16 of the Missouri Constitution states:

That a grand jury shall consist of twelve citizens, any nine of whom concurring may find an indictment or a true bill: Provided, that no grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies; but when so assembled such grand jury shall have power to investigate and return indictments for all character and grades of crime; and that the power of grand juries to inquire into the willful misconduct in office of public officers, and to find indictments in connection therewith, shall never be suspended.<sup>10</sup>

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5. U.S. CONST. amend. V.

6. *Hurtado v. California*, 110 U.S. 516, 521 (1884) (“And the words ‘due process of law’ in the amendment do not mean and have not the effect to limit the powers of state governments to prosecutions for crime by indictment . . .”).

7. For a listing of the statutory provisions relating to grand juries in all fifty states and the District of Columbia, see Univ. of Dayton Sch. of Law, *Size of Grand Jury*, FED. GRAND JURY, <http://campus.udayton.edu/~grandjur/stategj/sizegj.htm> (last visited Dec. 26, 2015).

8. Univ. of Dayton Sch. of Law, *Grand Jury Functions*, FED. GRAND JURY, <http://campus.udayton.edu/~grandjur/stategj/funcsgj.htm> (last visited Dec. 26, 2015).

9. *State v. McGee*, 757 S.W.2d 321, 325 (Mo. Ct. App. 1988) (“There can be no doubt that under § 545.010, RSMo 1986, prosecution of a felony may be by information or indictment and a prosecutor is entitled to exercise his discretion as to which course of action he selects.”).

10. MO. CONST. art. I, § 16.

Missouri statutes do little more than reiterate the provisions of the constitution. They contain only two significant rules regarding the authority of grand juries: (1) grand juries “may make inquiry into and return indictments for all grades of crimes and shall make inquiry into all possible violations of the criminal laws as the court may direct”;<sup>11</sup> and (2) an indictment may not be returned by a grand jury unless nine of its twelve members concur.<sup>12</sup>

Curiously, neither the Missouri Constitution nor its statutes specify the standard of proof grand juries should apply in returning an indictment. It is commonly said, and grand juries are routinely instructed, that they are to determine whether there is probable cause to believe the defendant committed the offense charged in an indictment.<sup>13</sup> But a grand jury’s decision to return an indictment is not reviewable for insufficiency of the evidence,<sup>14</sup> so, in practice, grand jurors can apply whatever standard seems good to them without fear of reversal.

Note that Missouri remains firmly in the long Anglo-American tradition of employing grand juries both as a screening mechanism in cases in which the government proposes charges and as an investigative body.<sup>15</sup> Both Missouri’s constitution and statutes make clear that a grand jury’s powers to investigate are not derivative of any prosecutorial authority. By statute, a Missouri prosecutor has only three functions in relation to grand juries: (1) he may “examin[e] witnesses in their presence”;<sup>16</sup> (2) he may “appear before the grand jury . . . for the purpose of giving information relative to any matter cognizable by” the grand jury;<sup>17</sup> and (3) if “required by any grand jury,” he must “attend them for the purpose of . . . giving them advice upon any legal matter.”<sup>18</sup>

The Missouri Rules of Criminal Procedure add a fourth prosecutorial duty. Rule 23.01(a) requires that indictments “shall be in writing, *signed by the prosecuting attorney*, and filed in the court having jurisdiction of the of-

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11. MO. REV. STAT. § 540.031 (Cum. Supp. 2013); *see also* MO. REV. STAT. § 540.240 (2000) (stating that grand juries are “authorized to find and present bills of indictment for either felonies or misdemeanors committed against the laws of the state”).

12. MO. REV. STAT. § 540.250, .260 (2000).

13. *State v. Mattic*, 84 S.W.3d 161, 166 (Mo. Ct. App. 2002).

14. *State v. Ivey*, 442 S.W.2d 506, 508 (Mo. 1969); *State v. Selle*, 367 S.W.2d 522, 526 (Mo. 1963).

15. Gregory W. Vleisides & Catherine A. Donnelly, *Indictments, Informations, and Grand Jury Proceedings*, in CRIMINAL PRACTICE 1, 3 (4th ed. 2005). Indeed, both the state constitution and Section 540.031 of the state code strongly suggest that, once a grand jury is empaneled, its investigative authority exists independent even of the judiciary, at least in cases involving misconduct by public officials. *See* MO. CONST. art. I, § 16; MO. REV. STAT. § 540.031.

16. MO. REV. STAT. § 540.130 (2000); *see also id.* § 540.140.

17. *Id.* § 540.140.

18. *Id.* § 540.130.

fense.”<sup>19</sup> Without the prosecutor’s signature, a Missouri indictment is legally invalid.<sup>20</sup> This requirement may seem ministerial, but it is a critical grant of prosecutorial control over charging decisions. As the U.S. Court of Appeals for the Fifth Circuit observed about the corresponding requirement of the federal rules:

The provision of Rule 7, requiring the signing of the indictment by the attorney for the Government, is a recognition of the power of Government counsel to permit or not to permit the bringing of an indictment. If the attorney refuses to sign, as he has the discretionary power of doing, we conclude that there is no valid indictment. It is not to be supposed that the signature of counsel is merely an attestation of the act of the grand jury. The signature of the foreman performs that function. It is not to be supposed that the signature of counsel is a certificate that the indictment is in proper form to charge an offense. The sufficiency of the indictment may be tested before the court. Rather, we think, the requirement of the signature is for the purpose of evidencing the joinder of the attorney for the United States with the grand jury in instituting a criminal proceeding in the court. Without the signature there can be no criminal proceeding brought upon an indictment.<sup>21</sup>

In sum, in both federal and Missouri courts, no prosecution can be initiated by the grand jury acting alone. *Unless and until an indictment approved by the grand jury is signed by the prosecutor, there is no “charge” against the defendant, no “prosecution” has been initiated, and the defendant has no case to answer.* This point is critical to understanding how Professor Trachtenberg has misread the Missouri Rules of Professional Conduct, which are binding on Mr. McCulloch, as well as the ABA’s Standards for Criminal Justice: Prosecution Function, which are merely precatory and bind no one.<sup>22</sup>

19. MO. R. CRIM. P. 23.01(a) (emphasis added).

20. See, e.g., *State v. Horn*, 79 S.W.2d 1044, 1045 (Mo. 1935) (quoting *State v. Bruce*, 77 Mo. 193, 195 (Mo. 1882)) (“We are satisfied that no paper can be regarded as an indictment without the signature of the prosecuting attorney, and the certificate of the foreman of the grand jury that it is a true bill. Both are required, and neither is a mere formality that may be dispensed with.”). See also *State v. Elgin*, 391 S.W.2d 341, 343–44 (Mo. 1965) (acknowledging rule that a prosecutor must sign indictments, but upholding validity of indictment signed by an assistant prosecutor). The Missouri rule is analogous to Federal Rule of Criminal Procedure 7(c)(1), which requires that an indictment “be signed by an attorney for the government.” FED. R. CRIM. P. 7(c)(1).

21. *United States v. Cox*, 342 F.2d 167, 171–72 (5th Cir. 1965).

22. The American Bar Association (“ABA”) has no independent authority to create legally binding ethical rules. However, its model rules are sometimes adopted in whole or in part by state supreme courts or state bar ethics regulators, thus rendering them binding on lawyers in the adopting state. See *Model Rules of Professional Conduct: Preface*, ABA, [http://www.americanbar.org/groups/professional\\_](http://www.americanbar.org/groups/professional_)

### III. ETHICAL RULES AND ADVISORY STANDARDS ON GRAND JURY PRACTICE

Missouri Supreme Court Rule 4-3.8(a), which is identical to ABA Model Rule 3.8(a), states that a “prosecutor in a criminal case shall refrain from *prosecuting* a charge that the prosecutor knows is not supported by probable cause.”<sup>23</sup> Professor Trachtenberg strongly implies that Mr. McCulloch violated this standard.<sup>24</sup> However, it is absolutely plain that McCulloch did not.

A violation of Missouri Rule 4-3.8(a) can only occur if a prosecutor: (1) “prosecut[es] a charge” and (2) does so when he “knows [the charge] is not supported by probable cause.”<sup>25</sup> But there can be no “charge” in a grand jury matter until an indictment is approved by the grand jury and signed by the prosecutor. Thus, Mr. McCulloch did not “prosecute a charge” against Officer Wilson. He therefore could not have violated Missouri Rule 4-3.8(a), regardless of what he may have thought about the strength of the evidence against Wilson.

Professor Trachtenberg also cites Standard 3.9(a) of the ABA Standards for Criminal Justice: Prosecution Function, which states:

A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.<sup>26</sup>

Once again, by definition, Mr. McCulloch did not “institute, or cause to be instituted, or permit the continued pendency of criminal *charges*.”<sup>27</sup> In a

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responsibility/publications/model\_rules\_of\_professional\_conduct/model\_rules\_of\_professional\_conduct\_preface.html (last visited Jan. 27, 2016). In the case of the ABA’s prosecution standards, Missouri has not adopted them. Moreover, as to the charging standards, as one commentator observes, “It is unclear whether these charging Standards purport to establish ethical guidelines for prosecution, or merely guidelines for a prosecutor’s exercise of judgment and policy in the charging function.” Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1261 (2011).

23. MO. SUP. CT. R. 4-3.8(a); MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (2013).

24. Trachtenberg, *supra* note 1, at 1104 (“Model Rule 3.8 provides a category of cases in which allowing grand jury deliberations would not only be bad policy but would also risk violating the ethical rules of the legal profession.”).

25. MO. SUP. CT. R. 4-3.8(a).

26. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-3.9 (3d ed. 1993); Trachtenberg, *supra* note 1, at 1104.

27. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-3.9.

grand jury case, the only way he could do any of those things is by signing an indictment previously approved by the grand jury, and then, per Missouri Rule of Criminal Procedure 23.01(a), filing it with the court.<sup>28</sup> He did neither.<sup>29</sup>

Note that both the binding Missouri ethics rule and the precatory ABA standard are violated only if a prosecutor “knows” that a proposed charge is “not supported by probable cause.”<sup>30</sup> The evidence that Mr. McCulloch “knew” that no possible homicide charge against Officer Wilson was “supported by probable cause” is ephemeral, at best. Professor Trachtenberg’s only proof of Mr. McCulloch’s state of mind comes from an exchange between himself and Mr. McCulloch at a presentation at the University of Missouri School of Law in March 2015. Professor Trachtenberg asked Mr. McCulloch, “Do you believe that it would have been in the public interest for Darren Wilson to have been indicted?”<sup>31</sup> To which McCulloch responded:

No, I don’t think it would have been right based on all the evidence, as we know it now or we knew it by the end of the grand jury presentation. It would not have been right . . . for them to have returned a true bill on that, or for us to have filed a charge.<sup>32</sup>

Observe four points about this exchange. First, Mr. McCulloch was asked about his considered views in March 2015, not about what he was

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28. See MO. R. CRIM. P. 23.01(a).

29. There is now a fourth edition of the ABA Prosecution Function Standards, and the text of analogous section of the new edition appears below.

Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges

(a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.

(b) After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-4.3 (4th ed. 2015). It also refers to seeking or filing “criminal charges” and thus does not change the gravamen of the former rule or the argument here. See *id.*

30. MO. SUP. CT. R. 4-3.8(a); MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (2013).

31. Robert McCulloch, Prosecuting Att’y St. Louis Cty., Address at the University of Missouri School of Law (Mar. 31, 2015), [https://www.youtube.com/watch?v=QBP\\_7UTjy4A](https://www.youtube.com/watch?v=QBP_7UTjy4A) (the relevant question and answer occurs from 1:01:30–1:05:34).

32. Trachtenberg, *supra* note 1, at 1105 (quoting McCulloch, *supra* note 31).



thinking back in November 2014 when the grand jury concluded its deliberations. Second, Mr. McCulloch was quite conscious of the differing roles of grand jury and prosecutor, distinguishing between the grand jury's act of returning a true bill, and the prosecutor's subsequent responsibility to decide whether to file a charge. Third, Mr. McCulloch was not asked, and did not give, his opinion about probable cause. Fourth, what McCulloch *was* asked was whether an indictment "would have been in the public interest."<sup>33</sup>

Prosecutors quite often – and quite properly – decide that the public interest dictates not pursuing charges as to which there may be probable cause. There are a host of legitimate reasons for declining to file such cases.<sup>34</sup> One of key importance in the Brown-Wilson shooting is that, while a prosecutor can, ethically, file charges supported by mere probable cause, he may not, ethically, pursue a case to trial unless he is in possession of admissible evidence amounting to proof beyond a reasonable doubt. That is the point of the second half of ABA Standards for Criminal Justice: Prosecution Function Standard 3.9(a) quoted by Professor Trachtenberg: "A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges *in the absence of sufficient admissible evidence to support a conviction*."<sup>35</sup>

Thus, in a situation like this one, where the factual investigation was exhaustive and effectively complete at the time the charging decision was called for, even if a grand jury finds probable cause to believe that an offense has occurred, a prosecutor ought not to "institute" charges by signing and filing the indictment absent proof beyond a reasonable doubt. So far as can be de-

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33. McCulloch, *supra* note 31.

34. Prosecutors may properly decline to file cases where the evidence establishes probable cause but not proof beyond a reasonable doubt, where the case is of a type better handled by another jurisdiction, where the case is not among the subject matter priorities of the prosecutor's office, where the severity of the case falls below a declination threshold set by the office, where some of the evidence has been procured by police misconduct, and for many other reasons. *See generally*, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-4.4 (4th ed. 2015) (listing appropriate considerations for filing decisions).

35. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-3.9 (3d ed. 1993). The Third Edition of ABA's Prosecution Function Standard 3-3.9(f), the one quoted by Professor Trachtenberg, is poorly drafted and muddies the distinction between the standard for filing a case and the standard for pursuing it to a criminal conviction. *See id.* Given the time constraints imposed by the U.S. Supreme Court on filing decisions, particularly where a defendant is in custody, prosecutors must often file charges before a complete investigation is possible. Such charges may properly be filed, and will be reviewed by a court, based on the existence of probable cause. Nonetheless, if the complete investigation fails to produce evidence sufficient to establish guilty beyond a reasonable doubt, the prosecutor should not pursue the case to trial, and should dismiss the action. This distinction is given more recognition in the current Fourth Edition of the ABA's Prosecution Function Standard. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-4.3 (4th ed. 2015).

terminated from the Trachtenberg-McCulloch exchange, at the close of the grand jury investigation Mr. McCulloch might have believed either: (a) that no probable cause existed that Officer Wilson committed a homicide, or (b) that the evidence established probable cause, but did not, and never would, amount to proof beyond a reasonable doubt.<sup>36</sup> If McCulloch held either view, he acted entirely in accord with Standard 3.9(a) since he never instituted, or caused to be instituted, a criminal charge.

Moreover, the Trachtenberg-McCulloch exchange admits a third interpretation. It may well be that – whatever Mr. McCulloch’s off-the-cuff retrospective assessment in March 2015 – back in November 2014, at the close of the grand jury presentation, he remained uncertain about the strength of the case against Officer Wilson (or thought the case weak but wanted confirmation of that impression from outside the law enforcement community) and sought an evaluation by a neutral cross-section of the community – the grand jury. In seeking the grand jury’s view, Mr. McCulloch acted in accordance both with venerable understandings of a grand jury’s proper function and with the most recent version of the ABA’s prosecution standards.

As the leading treatise on American criminal procedure observes:

[G]rand jury participation [in an investigation] often helps in maintaining community confidence in the integrity of the investigatory process, a particularly valuable asset when the person under investigation is a public official. The community tends to be suspicious of partisan influences in such investigations, especially where the investigation results in a decision not to prosecute.<sup>37</sup>

Standard 4.6(b) of the current edition of the ABA Standards opines: “In addition to determining what criminal charges to file, a grand jury may properly be used to investigate potential criminal conduct, and *also to determine the sense of the community regarding potential charges.*”<sup>38</sup> If Mr. McCulloch was wise, he would have wanted the grand jury’s opinion in the Brown-Wilson case, particularly since it concerned a matter where the working relationship of prosecutors with police officers might distort his own judgment, or at least be seen to have done so. Even if Mr. McCulloch was not wise, and was not acting for this reason, we as a community should want prosecutors to do as McCulloch did. By permitting the grand jurors to delib-

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36. See McCulloch, *supra* note 31.

37. WAYNE R. LAFAYE ET AL., 3 CRIMINAL PROCEDURE § 8.3(g) (4th ed. 2015). The authors go on to observe: “As one court noted, ‘Where corruption is charged, it is desirable to have someone outside the administration [i.e., the grand jury] act, so that the image, as well as the fact of impartiality in the investigation can be preserved and allegations of cover-up or white-wash can be avoided.’” *Id.* Although the Brown-Wilson case is not, strictly speaking, one involving “corruption,” the point is, if anything, more valid.

38. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-4.6 (4th ed. 2015) (emphasis added).

erate without recommending any particular verdict, the prosecutor gave lay representatives of the community a voice, and, critically, did so without trying to predetermine the outcome.

#### IV. THE VOICE OF THE PROSECUTOR

There is one point on which Professor Trachtenberg stands on firmer ground. Both the ABA Prosecution Function Standards and the National District Attorneys Association's ("NDAA") National Prosecution Standards advise that a prosecutor should "recommend that a grand jury not indict if the prosecutor believes that the evidence presented does not warrant an indictment under governing law."<sup>39</sup> If we assume that Mr. McCulloch firmly believed, before the grand jury's deliberations, that the evidence did not warrant an indictment, these standards suggest that he should have told the grand jury his views (even though no statute or binding disciplinary rule required that he do so).

But there is a reason the ABA and NDAA provisions are "standards," not statutes. They provide guidance for typical cases, and for typical cases their objectives are both laudable and reasonably plain. However, if adherence to the letter of these standards would not promote their objectives, or indeed might have the reverse effect, blind adherence is neither required nor meritorious.

The point of this particular rule is to protect the subjects of meritless grand jury investigations from the personal, professional, and reputational injuries that inevitably flow from the mere fact of an indictment, even if the case is ultimately dismissed. If a prosecutor recommends against indictment, a grand jury is less likely to return one. Of course, in an ordinary case where the existence of a grand jury investigation is either secret or of no interest to anyone beyond those immediately involved in the case, the target's interests are entirely satisfied if no indictment is returned by the grand jury or filed with the court. So long as no charge results, whether the prosecutor was active or passive is of no consequence to the target and of no interest to the public. Nonetheless, the ABA and NDAA standards recognize that a prosecutor's views will generally be influential with the grand jury, and thus they counsel prosecutors to exercise their influence to reduce the likelihood of meritless indictments.

However, there are cases – and the Brown-Wilson shooting is emphatically one of them – in which neither the interests of the grand jury target nor the public interest is served by the prosecutor providing an opinion about the

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39. NATIONAL PROSECUTION STANDARDS, Standard 4-8.1(d) (Nat'l Dist. Att'ys Ass'n, 3d ed. 2012), <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>. ABA Prosecution Function Standards have nearly identical wording. Standard 4.6(a) states: "A prosecutor should advise a grand jury of the prosecutor's opinion that it should not indict if the prosecutor believes the evidence presented does not warrant an indictment." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-4.6.

merits of prospective charges to a grand jury. Let us assume, as does Professor Trachtenberg, that Mr. McCulloch had made up his mind before the grand jury's deliberations that no probable cause existed to charge Officer Wilson. In the Ferguson maelstrom, McCulloch's silence on that point before the grand jury created no risk that Wilson would suffer an additional increment of professional, personal, or reputational injury of the type an ordinarily anonymous defendant might incur from the return of an indictment. After all, by November 2014, Officer Wilson's name and face, many details of the shooting, and the pendency of a grand jury investigation were common currency around the planet. And if, as Professor Trachtenberg supposes, Mr. McCulloch was firmly of the view that no probable cause existed and resolved not to prosecute Wilson, then McCulloch's silence before the grand jury did not even create a heightened risk that Wilson would be formally charged. Either the grand jury would decline to indict or, in the unlikely event it returned a true bill, Mr. McCulloch would decline to sign and file it.<sup>40</sup>

Far from injuring Officer Wilson, Mr. McCulloch's silence before the grand jury ultimately provided him some benefit. A verdict of "no true bill" issued in accordance with the recommendation of a Prosecuting Attorney widely accused of being too sympathetic to police officers would have been worth less to Officer Wilson than the same verdict by a grand jury that reached its conclusions independently.<sup>41</sup> Moreover, and frankly more importantly, in the unusual circumstances of the Brown-Wilson case, the public interest in a grand jury decision that was not only impartial, but perceived to be so, was of paramount concern.

In this regard, it is significant that, in the on-campus exchange with Mr. McCulloch that inspired his article, Professor Trachtenberg asked about McCulloch's view of the "public interest."<sup>42</sup> I would suggest that Mr. McCulloch's procedural course is best explained with precisely that frame of reference. Assume that, at the close of the evidentiary presentation to the grand jury, McCulloch had indeed concluded that no probable cause existed. He had four choices: (1) present the grand jury with proposed charges and legal instructions and recommend that the grand jury indict on charges he did not believe to be supported by probable cause; (2) withdraw the matter from

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40. Of course, if McCulloch really was resolved not to prosecute Officer Wilson, return of a true bill would truly have put him in a cleft stick, forcing him to decide whether to take responsibility for overruling the grand jury's opinion or to take what he presumably thought an unwinnable case to trial. But the grand jury did not return an indictment, so we will never know what he might have done.

41. Some have argued that Mr. McCulloch's office swayed the grand jury toward Officer Wilson in the way it presented evidence. See, e.g., Noam Scheiber, *St. Louis Prosecutor Bob McCulloch Abused the Grand Jury Process*, NEW REPUBLIC (Nov. 25, 2014), <https://newrepublic.com/article/120422/bob-mcculloch-abused-grand-jury-process-ferguson>. I express no opinion here on that point, but it is irrelevant to the question of whether Mr. McCulloch's decision not to make a recommendation to the grand jury on charging did or did not benefit Officer Wilson.

42. McCulloch, *supra* note 31.

the grand jury's consideration and bar them from deliberating on the ground that he believed no probable cause existed;<sup>43</sup> (3) present them with proposed charges and legal instructions, but advise them that he did not believe the facts supported any charge; or (4) present them with proposed charges and legal instructions and render no opinion on what they should do.

The first option would have been a gross ethical violation.<sup>44</sup> The second would have guaranteed a riot and immediate charges of a prosecutorial whitewash. The third would probably have produced a riot, together with allegations of prosecutorial manipulation of the grand jury. Only the fourth choice, the one McCulloch made, held out a reasonable prospect that the public would accept a decision not to file as the product of neutral, unbiased citizen deliberation based on a complete record. As it turned out, a riot happened anyway. And Mr. McCulloch was accused of manipulating the grand jury anyway. But given the visceral emotional commitment of one segment of the public to the view that Wilson had murdered Brown, nothing but an indictment would have averted all disturbances. Faced with an array of suboptimal choices, the process McCulloch employed maximized the credibility of the grand jury's verdict among those members of the public who retained open minds on the merits of the case.

Professor Trachtenberg ridicules Mr. McCulloch for permitting the grand jury to deliberate at all, characterizing it as "hiding behind the anonymous lay persons on the grand jury," and "choosing . . . to delegate his responsibilities to untrained citizens with inadequate guidance."<sup>45</sup> This seems to me a curious view of the grand jury as an institution and of grand jurors as persons. The role of a grand jury, after all, is not merely to provide an audience for the testimony of the witnesses their subpoena authority empowers the prosecutor to summon. In the end, theirs is the grave responsibility of considering what they have heard and rendering a judgment representative of a cross-section of the community about whether the evidence is sufficient to put a fellow citizen on trial and in peril of loss of freedom, reputation, or even life. The law takes the grand jury's performance of this screening function

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43. Strictly speaking, a prosecutor could not prohibit a grand jury from deliberating or returning an indictment if it wanted to do so. A grand jury can do both those things without the prosecutor's permission. Of course, the grand jurors customarily do not know that, and as noted above, even if a "runaway" grand jury were to return an unsolicited indictment, it could not be legally filed without the prosecutor's assent in the form of a signature. *See* FED. R. CRIM. P. 7(c)(1).

44. Advising a grand jury to find probable cause when a prosecutor did not believe it to exist would violate an attorney's general obligation of candor with a tribunal. MO. SUP. CT. R. 4-3.3(a)(1), (d). It would also violate Standard 4.3(a), which states, "A prosecutor should *seek* or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause . . . ." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-4.3 (4th ed. 2015) (emphasis added). However, the ABA's Prosecution Standards are merely advisory.

45. Trachtenberg, *supra* note 1, at 1100.

very seriously. For example, in Missouri, if an indictment is filed, the grand jury's return of a true bill is deemed conclusive on the question of whether probable cause exists, and thus a defendant is entitled to no judicial review of probable cause in a preliminary hearing.<sup>46</sup>

Whenever one speaks of the importance of the screening function of grand juries, there is apt to be a good deal of world-weary head shaking and amused tittering about how grand juries will indict items of luncheon food if asked by the prosecutor. Implicit in such talk, and indeed in Professor Trachtenberg's characterization of grand jurors as "anonymous lay persons" and "untrained citizens with inadequate guidance," is an image of grand juries as crowds of credulous yokels too dim to form independent judgments or too weak-willed to express them. No prosecutor who has practiced with any frequency before grand juries entertains any such disparaging view.

Grand juries, in my fairly extensive experience with them,<sup>47</sup> take their responsibility of standing between government and individuals very seriously.<sup>48</sup> They are, as a nearly invariable rule, attentive, perceptive, and bright. They listen carefully to legal instructions, but precisely because they are not legally trained, they see things that lawyers sometimes do not. They sometimes do decline to indict in cases where the prosecutor would like them to do so. Particularly in a long investigation, their reactions to the developing case can have a profound effect on the prosecutor's views.<sup>49</sup> And, in the end, their

46. *State v. Blackmon*, 664 S.W.2d 644, 649 (Mo. Ct. App. 1984) ("A defendant's substantive rights are not affected by a preliminary hearing. In fact, such a hearing is not even a part of the constitutional right to due process."); *State v. Day*, 506 S.W.2d 497, 500 (Mo. Ct. App. 1974) (citing *Coleman v. Alabama*, 399 U.S. 1 (1970)) ("But *Coleman v. Alabama* does not hold that an accused is entitled to a preliminary hearing as a matter of constitutional right, and in fact, he is not.").

47. I have practiced as a Trial Attorney for the U.S. Department of Justice before federal grand juries in the Middle District of Pennsylvania and the Eastern District of Kentucky, as a Special Assistant U.S. Attorney before grand juries in the Eastern District of Pennsylvania, and as an Assistant U.S. Attorney before grand juries in the Southern District of Florida. I also have some experience with state grand juries in Colorado.

48. It is certainly true that grand juries almost always return indictments when asked to do so by prosecutors. But that is hardly surprising. The standard of proof for a true bill is mere probable cause. Prosecutors are ethically bound not to present cases unless they are convinced probable cause exists. And both ethics and common sense dictate that cases not be brought before grand juries unless the prosecutor believes proof beyond a reasonable doubt exists or can reasonably be anticipated before the matter goes to trial. If grand juries were finding no true bills in cases recommended for indictment by the government with any frequency, that would suggest a shocking dereliction of duty by prosecutors.

49. One might fairly ask how a prosecutor can know what grand jurors are thinking before they are asked to vote on an indictment. Certainly no official interim poll is taken, and there should not be any informal off-the-record discussion between prosecutors and grand jurors about a pending case. Nonetheless, grand jurors often ask questions of prosecutors on the record as the investigation progresses, sometimes

collective view, expressed in the final vote on proposed charges, is as good a reading as a government lawyer can get of the voice of the people. Accordingly, every prosecutor with an ounce of sense does precisely what the ABA suggests and, particularly in difficult cases, relies on them “to determine the sense of the community regarding potential charges.”<sup>50</sup>

That said, Professor Trachtenberg’s charge that Mr. McCulloch was “hiding” behind the decision of the grand jury might have some force if McCulloch had simply announced the return of a no true bill and maintained the customary secrecy of grand jury proceedings. Missouri statutes preclude the issuance of grand jury reports<sup>51</sup> and bar grand jurors from disclosing “any evidence given before the grand jury” or the names of witnesses who testified, on pain of prosecution.<sup>52</sup> It appears that the custom of Missouri prosecutors before the Brown-Wilson case was to treat the specific prohibition of juror disclosure as a general bar to disclosure of grand jury matters by anyone, absent a court order, except in the context of pre-trial discovery in cases where an indictment resulted. Had Mr. McCulloch adhered to that norm, the public really would have been obliged to rely on the unexplained conclusions of twelve anonymous strangers and blind faith that Mr. McCulloch’s prosecutors had not led the jury astray.

Instead, Mr. McCulloch did something quite extraordinary. Rather than obtaining a court order for release of the grand jury materials,<sup>53</sup> he announced a novel interpretation of provisions of the state Sunshine Act that require the release to the public of investigative records once an investigation becomes inactive. He declared that copies of grand jury materials in the Prosecuting Attorney’s files were investigative records, and thus once the grand jury de-

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about the law, sometimes about the status of the investigation, sometimes about whether certain witnesses will appear or specific evidence will be produced. Moreover, grand jurors are often permitted to ask questions of witnesses. A good deal can be gleaned from all these questions.

50. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-4.6 (4th ed. 2015).

51. Missouri grand juries have no authority to issue a written report of their investigations other than those pertaining to public buildings. MO. REV. STAT. § 540.031 (Cum. Supp. 2013); *In re* Interim Report of the Grand Jury, 553 S.W.2d 479, 481 (Mo. 1977) (en banc).

52. MO. REV. STAT. § 540.320 (2000).

53. Mr. McCulloch’s office initially sought a court order releasing the grand jury records in the event of a declination to indict. Joel Currier, *Court: Judge Hasn’t Agreed to Release Ferguson Grand Jury Evidence If No Indictment*, ST. LOUIS POST-DISPATCH (Nov. 23, 2014, 11:10 PM), [http://www.stltoday.com/news/local/crime-and-courts/court-judge-hasn-t-agreed-to-release-ferguson-grand-jury/article\\_d7774a87-205e-55e5-9138-7817d6bfd82c.html](http://www.stltoday.com/news/local/crime-and-courts/court-judge-hasn-t-agreed-to-release-ferguson-grand-jury/article_d7774a87-205e-55e5-9138-7817d6bfd82c.html). However, his office later abandoned that motion in favor of releasing the information under the Missouri Sunshine Act. Heather Cole et al., *‘Data Dump’ After Ferguson May Be Hard Act to Follow*, MO. LAW. WKLY. (Nov. 28, 2014), <http://molawyersmedia.com/2014/11/28/data-dump-after-ferguson-may-be-tough-act-to-follow/>.

clined to indict, they were subject to public disclosure.<sup>54</sup> Whether Mr. McCulloch's reading of the Sunshine Act is correct may well be doubted. What cannot be doubted is that he strained the law nearly to the breaking point to lay the whole grand jury record – all the testimony, all the exhibits, all the legal advice – before the world.<sup>55</sup> Far from “hiding” behind the grand jury, Mr. McCulloch gave anyone who cared to do so an unprecedented opportunity to evaluate both the facts of the case and the prosecution's conduct.

It is, of course, true that for Mr. McCulloch (or any other prosecutor) faced with the ticklish task of investigating a high-profile, potentially incendiary, case, there is a considerable advantage to be gleaned from having the final decision about whether or not to bring charges bear the imprimatur of a grand jury. The grand jury's verdict confers a democratic stamp of approval on a choice that, if it issued from the prosecutor alone, is more easily attacked as biased or self-serving. And abstaining from a recommendation to the grand jury further reinforces the message of grand jury independence. This is a “political” advantage, if one wants to call it that. But being a public prosecutor is, unavoidably and quite properly, a political business. It is political in the personal sense inasmuch as elected prosecutors will inevitably keep at least one eye on the effects of their legal decisions on their electoral fortunes. But the prosecutor's job is also “political” in the larger sense that a criminal justice system in a democratic polity cannot function if the public sees it as merely a collection of rules enforced by the state's monopoly on official coercion. A democratic criminal justice system depends on its legitimacy. It must not only produce outcomes that are “correct” in some narrow legal sense, but must employ processes the public perceives to be fair.

I do not doubt that Mr. McCulloch was fully aware that a “no true bill” rendered without a recommendation from his office provided enhanced insulation from claims of unseemly prosecutorial protectiveness of the police. But strange though it may seem in these cynical days, merely because something is politically wise does not make it ethically wrong. Mr. McCulloch was handed the one kind of case every prosecutor most dreads: factually complicated, legally debatable, universally publicized and – because whatever choice you make will enrage a large and vocal constituency – potentially lethal both to your own career and the long-term credibility of the institutions you represent. That he dealt with it by adopting a process far more thorough, open, and neutral than is customary seems to me a sign, not of political cowardice, but of considerable sagacity – in the service of his personal interests, to be sure, but also of the justice system more broadly.

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54. Cole et al., *supra* note 53. See also Joseph E. Martineau et al., *Grand Jury Records – Can the Public Get Them?*, LEWIS RICE (Aug. 21, 2015), <http://www.lewisrice.com/publications/grand-jury-records-can-the-public-get-them-2/>.

55. Joe Millitzer et al., *Prosecutor Robert McCulloch Releases Grand Jury Evidence in Michael Brown Case*, FOX2NOW ST. LOUIS (Nov. 25, 2014 8:28 AM), <http://fox2now.com/2014/11/24/prosecutor-robert-mcculloch-releases-grand-jury-evidence-in-michael-brown-case/>.



## V. CONCLUSION

Nothing I have said here will rehabilitate Robert McCulloch in the eyes of those who believe Officer Darren Wilson murdered Michael Brown, and that Mr. McCulloch, whether because of bigotry, pro-police bias, cynical political calculation, or simple professional misjudgment, refused to prosecute a meritorious case. This Article takes no position on the legal question of whether probable cause existed to charge Officer Wilson with a crime, or on the question of whether such a charge, if filed, could have been proven beyond a reasonable doubt to a St. Louis County jury. Opinion on those questions is likely to remain intractably divided. I have nothing to say about them here. My sole point is that Professor Trachtenberg's particular criticisms of Mr. McCulloch are misconceived.