

Fall 2015

## No, You “Stand Up”: Why Prosecutors Should Stop Hiding Behind Grand Juries

Ben L. Trachtenberg

Follow this and additional works at: <http://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Ben L. Trachtenberg, *No, You “Stand Up”: Why Prosecutors Should Stop Hiding Behind Grand Juries*, 80 MO. L. REV. (2015)  
Available at: <http://scholarship.law.missouri.edu/mlr/vol80/iss4/12>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.

# No, You “Stand Up”: Why Prosecutors Should Stop Hiding Behind Grand Juries

*Ben Trachtenberg\**

## ABSTRACT

*This Article argues that prosecutors should not allow grand juries to consider indicting defendants whom the prosecutors themselves believe should not be indicted. To illustrate the problems with this practice, this Article uses the example of St. Louis County Prosecutor Robert P. McCulloch – who encouraged deliberations by the grand jury that heard evidence concerning the shooting death of Michael Brown in Ferguson, Missouri, despite personally believing that Brown’s killer, police officer Darren Wilson, should not be indicted. The arguments against allowing grand juries to conduct such needless deliberations include: (1) the exercise wastes the time of citizens forced to serve on grand juries; (2) the deliberations might, despite the prosecutor’s wishes, result in indictments contrary to the interests of justice; and (3) by “passing the buck” to the grand jury, the prosecutor evades accountability for his own decisions.*

## I. INTRODUCTION

As he prepared to present evidence to the St. Louis County grand jury that would consider whether to indict Darren Wilson for the shooting death of Michael Brown, St. Louis County Prosecutor Robert P. McCulloch criticized Missouri Governor Jay Nixon for what McCulloch called “doublespeak” concerning McCulloch’s role. Nixon had suggested that perhaps McCulloch should recuse himself from the Ferguson case but stopped short of using emergency powers to remove him. “Just make a decision,” McCulloch said to Nixon, via media interviews. “Stand up, man up.”<sup>1</sup> McCulloch added that Nixon’s indecision “undermines everything except the cover that he’s pulled over his head.”<sup>2</sup>

---

\* Associate Professor of Law, University of Missouri School of Law. I thank Professor S. David Mitchell and the *Missouri Law Review* for inviting me to participate in the *Review*’s impressive symposium.

1. See Kim Bell, *McCulloch: Grand Jury to Get Evidence in Ferguson Case Through Mid-October*, ST. LOUIS POST-DISPATCH (Aug. 20, 2014), [http://www.stltoday.com/news/local/crime-and-courts/mcculloch-grand-jury-to-get-evidence-in-ferguson-case-through/article\\_a2893384-0bcf-51a9-b479-9c7e9496c6a1.html](http://www.stltoday.com/news/local/crime-and-courts/mcculloch-grand-jury-to-get-evidence-in-ferguson-case-through/article_a2893384-0bcf-51a9-b479-9c7e9496c6a1.html).

2. *Id.* A critique of using “man up” to mean “take responsibility and do your job well” is beyond the scope of this Article. I will note only that associating compe-

Ironically, it was McCulloch's apparent desire for "cover" that eventually helped to undermine public confidence in the grand jury's work. And it was his own failure to "stand up" and take responsibility for the decisions of his office – instead of hiding behind the anonymous lay persons on the grand jury – that deprived Missouri of what the people pay for when they hire a prosecutor. Like some other prosecutors before him in high-profile cases, McCulloch abdicated the usual role of the prosecutor, choosing instead to delegate his responsibilities to untrained citizens with inadequate guidance.

This Article will discuss the phenomenon of prosecutors declining to recommend action to grand juries in politically sensitive cases. After describing the reasons that prosecutors might prefer to receive a decision from unguided grand jurors – the primary one being an ability to disclaim responsibility for unpopular decisions, particularly when no indictment is returned – the Article will argue that prosecutors should resist the temptation to avoid difficult decisions. If a prosecutor believes no indictment is appropriate, she should say so. Indeed, leaving the grand jury to do what it will without any prosecutorial recommendation risks the return of unfounded indictments. It also removes public accountability from one of the most important and sensitive acts of executive discretion. A prosecutor who shifts responsibility to a grand jury need not explain her reasoning with the same care and thoroughness as one who makes her own decision about what action – including a decision not to seek an indictment – is appropriate under the facts and law.

## II. PASSING THE BUCK

In at least a handful of prominent cases, of which the Michael Brown shooting is the most famous recent example, prosecutors have evaded their usual duty of deciding whether a specific case is worthy of prosecution. When a run-of-the-mill case reaches a prosecutor's office (say, when police arrest participants in a bar fight, or a motorist is caught with cocaine, or a dead body is found in suspicious circumstances), some lawyer in the office decides whether to pursue criminal charges. Depending on the case and the size of the office, top management – including the head prosecutor for the jurisdiction – will have more or less direct involvement. As a formal matter, whatever lawyer makes the decision (i.e., whether to prosecute and, if so, what crime to charge) generally acts under the authority of the head of the office – an elected district attorney, a U.S. Attorney, or some such official.

Some cases go forward, with the prosecutor's office obtaining an indictment or bringing charges another way, such as by information.<sup>3</sup> Other

---

tent leadership in government and the legal profession with stereotypical masculinity (and, by implication, linking incompetence with femininity) is not without its problems. See, e.g., Jane Martinson, *Why It's Not OK To "Man Up,"* GUARDIAN (Mar. 5, 2013), <http://www.theguardian.com/lifeandstyle/shortcuts/2013/mar/05/not-ok-to-man-up> ("What would 'woman up' or 'person up' even mean?").

3. See YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 950–51 (13th ed. 2012).

cases end with a decision not to prosecute. Perhaps the bar fight was insufficiently serious to justify assault charges. Maybe the cocaine was found in violation of the Fourth Amendment. The coroner might determine that the death was a suicide. For some crimes in which prosecution is feasible, the office may simply have more important priorities. And in other cases, the suspect simply is not guilty, or there is not enough proof to obtain a conviction.

In nearly all of the scenarios described above, some person at the prosecutor’s office (acting on behalf of the chief prosecutor) takes responsibility for deciding whether to bring charges. If charges are filed, the office is asserting that probable cause exists, and the office is also announcing its implicit policy judgment that a prosecution in this case is a sensible use of public resources.<sup>4</sup> The charging decision can be contested, whether in the criminal court by defense counsel or in the court of public opinion by anyone who wishes to criticize the prosecutor’s actions. And if the office decides not to prosecute, then critics of the prosecutor’s decision may complain as much as they wish.<sup>5</sup>

But sometimes the prosecutor passes the buck. In some cases, prosecutors have investigated whether criminal charges are appropriate, referred cases to grand juries, and then – after presenting evidence to the grand juries – made no recommendation on whether indictments are appropriate.<sup>6</sup>

For example, after the July 2014 death of Eric Garner at the hands of police in Staten Island, New York, a Richmond County grand jury declined to indict NYPD Officer Daniel Pantaleo.<sup>7</sup> Daniel M. Donovan, the county district attorney who oversaw the investigation and the grand jury process, released a statement afterward in which he claimed that in “New York, the District Attorney does not make opening statements, closing statements or argu-

4. NATIONAL PROSECUTION STANDARDS, Standard 4-2.4 52–53 (Nat’l Dist. Att’ys Ass’n, 3d ed. 2012), <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

5. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Critics generally cannot, however, seek a judicial remedy. See *id.* Outside of very rare exceptions, the public at large cannot obtain a court order requiring a prosecutor to bring charges. See *id.* Courts simply lack authority to demand that executive power be used in this way. *Id.* (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

6. Seth Klamann, *How a Grand Jury Works, and What the Ferguson Panel Can Decide*, COLUMBIA MISSOURIAN (Nov. 30, 2014), [http://www.columbiamissourian.com/news/how-a-grand-jury-works-and-what-the-ferguson-panel/article\\_a07f9916-e860-518c-8426-be24d507fa57.html](http://www.columbiamissourian.com/news/how-a-grand-jury-works-and-what-the-ferguson-panel/article_a07f9916-e860-518c-8426-be24d507fa57.html).

7. See J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), [http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?\\_r=0](http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0).

ments to the grand jury, nor attempt to influence its decision.”<sup>8</sup> Although this claim cannot be fully literally accurate – the prosecutor attempts “to influence” the grand jury simply by presenting charges and showing evidence – it provides strong evidence that Donovan did not recommend to the Richmond County grand jury that it indict, or that it decline to indict, Pantaleo.

Similarly, despite personally believing that Wilson should not be indicted for any crime,<sup>9</sup> McCulloch declined to recommend to the St. Louis County grand jury whether it should return an indictment.<sup>10</sup>

### III. WHY THE BUCK SHOULD STOP WITH THE PROSECUTOR

When prosecutors believe that the grand jury should indeed return an indictment, a policy in which prosecutors present evidence and then allow grand jurors to deliberate without any recommendations about appropriate charges might be reasonable. After all, the very inclusion of a charge for the grand jury’s consideration can be seen as an implicit statement that a sensible grand juror might well vote in favor of an indictment. And perhaps the lack of an explicit recommendation adds to whatever independence the grand jury might possess.<sup>11</sup> By contrast, when a prosecutor believes that no indictment is appropriate for a certain crime, she should not allow a grand jury to deliberate on whether to indict for that offense. It follows that when a prosecutor believes that no indictment of any kind is appropriate for a suspect, the grand

---

8. Daniel M. Donovan, Jr., Richmond Cty. Dist. Att’y, Statement Regarding the No True Bill in *The Matter of the Investigation into the Death of Eric Garner*, OFF. RICHMOND CTY. DIST. ATT’Y 4 (Dec. 3, 2014), <http://rcda.nyc.gov/pdf/press/2014/ps12032014.pdf>.

9. McCulloch has said that “it would not have been right” for Wilson to be indicted. See 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 1:01:40–1:05:34).

10. See Alex Altman, *Grand Jury Process Raises Questions About a Ferguson Indictment*, TIME MAG. (Sept. 18, 2014), <http://time.com/3399022/ferguson-michael-brown-darren-wilson-grand-jury/>; Jennifer S. Mann, *Legal Experts React to Grand Jury Process in Michael Brown Shooting*, ST. LOUIS POST-DISPATCH (Nov. 26, 2014), [http://www.stltoday.com/news/local/crime-and-courts/legal-experts-react-to-grand-jury-process-in-michael-brown/article\\_6565383d-b856-599e-93f9-dbabefa4bdb5.html](http://www.stltoday.com/news/local/crime-and-courts/legal-experts-react-to-grand-jury-process-in-michael-brown/article_6565383d-b856-599e-93f9-dbabefa4bdb5.html).

11. That said, I do not mean to argue that recommendations are not appropriate when prosecutors believe indictments should be returned. Given the immense influence that a prosecutor has over a grand jury, it seems naïve to pretend that grand jurors (who see evidence selected by the prosecution and receive instructions on the law from the prosecution) are truly independent actors in most cases. Prosecutors might as well be explicit about what they want.

jury should not be asked to consider any charges whatsoever against that person.<sup>12</sup>

Why not present the evidence and allow the grand jury to deliberate even when the prosecutor believes no charges are appropriate? The most straightforward answer is that once a prosecutor is convinced that no charges should be brought, further deliberations not only waste the time of grand jurors (who are being asked to evaluate whether to return an indictment that the person in charge of prosecuting the case does not even want) but also risks injustice.<sup>13</sup> Also important is that while wasting the time of grand jurors, the prosecutor concurrently evades accountability for her decision.

This conclusion – that prosecutors should not allow grand juries to consider indicting defendants whom the prosecutors themselves do not believe should be indicted – is supported by multiple sources of guidance for the behavior of prosecutors, including American Bar Association (“ABA”) standards and “National Prosecution Standards” promulgated by the National District Attorneys Association (“NDAA”).

In the Model Rules of Professional Conduct, the ethical rules published by the ABA that serve as the basis of lawyer law in the overwhelming majority of states, Model Rule 3.8 concerns the “Special Responsibilities of a Prosecutor.”<sup>14</sup> The first provision states that the “prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”<sup>15</sup> Accordingly, when a prosecutor “knows” that probable cause does not exist, it would be professional misconduct for her to bring charges. Because a prosecutor would therefore have a duty in such cases to immediately seek the dismissal of any indictment a grand jury might return,<sup>16</sup> it is unfair for the prosecutor to waste the time of citizen grand jurors by asking them to consider whether to indict.

12. There is no problem when a prosecutor presents evidence to a grand jury without yet knowing whether an indictment is desired. Among other reasons, it is often the grand jury process itself that informs the prosecutor of what action is appropriate. The grand jury also serves useful investigatory functions and allows prosecutors to obtain sworn testimony and thereby “lock in” the stories of various witnesses.

13. Potential sources of injustice include indicting someone despite the absence of probable cause, as well as indicting someone when probable cause exists but circumstances simply make it unfair for a prosecution to proceed.

14. See MODEL RULES OF PROF'L CONDUCT R. 3.8 (2013).

15. *Id.* at 3.8(a). The Missouri provision is identical. See MO. SUP. CT. R. 4-3.8(a).

16. Prompt dismissal would not, however, eliminate all harm caused by the indictment. As then-Attorney General Robert H. Jackson said in his famous speech to federal prosecutors, “The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard.” Robert H. Jackson, *The Federal Prosecutor*, ROBERT H. JACKSON CTR. (Apr. 1, 1940), <https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/>.

Of course, there are many situations in which a prosecutor might believe an indictment is inappropriate that are not covered by this rule. For example, a prosecutor might disfavor an indictment for prudential reasons, despite the existence of probable cause. Or the existence of probable cause might be uncertain, meaning the prosecutor cannot be said to “know” that charges would not be “supported by probable cause.” Nonetheless, 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.

The ABA Standards for Criminal Justice: Prosecution Function<sup>17</sup> lead to the same conclusion. Pursuant to Standard 3.6(c), “A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.”<sup>18</sup> The commentary for this provision explains that “the prosecutor’s duty to seek justice obligates the prosecutor to recommend to the grand jury that it not indict where the prosecutor believes the evidence would not warrant the initiation of criminal charges in the absence of a grand jury.”<sup>19</sup> Further, Standard 3.9(a) provides,

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>20</sup>

In addition to ABA rules and standards, this conclusion is supported by rules written by prosecutors themselves. The NDAA, of which McCulloch is a past president and a member of the board of directors,<sup>21</sup> has published “National Prosecution Standards.”<sup>22</sup> NDAA Standard 4-8.1(d) provides, “To the extent permitted by the jurisdiction’s law or rules, a prosecutor appearing before a grand jury . . . [s]hould recommend that a grand jury not indict if the

---

17. See generally ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-3.5–6 (3d ed. 1993), [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/prosecution\\_defense\\_function.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf).

18. *Id.* at Standard 3.6(c).

19. *Id.* cmt.

20. *Id.* at Standard 3.9(a).

21. See *Roster of Officers and Board Members 2014–2015*, NAT’L DIST. ATT’YS ASS’N, <http://www.ndaa.org/pdf/BoD-March-2015.pdf> (last visited Oct. 19, 2015).

22. See generally NATIONAL PROSECUTION STANDARDS (Nat’l Dist. Att’ys Ass’n, 3d ed. 2012), <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

prosecutor believes that the evidence presented does not warrant an indictment under governing law . . . .”<sup>23</sup>

In the case of Darren Wilson’s shooting of Michael Brown, McCulloch believed – after all the evidence was presented to the grand jury – that no indictment was appropriate. During the question and answer portion of McCulloch’s March 31, 2015 presentation at the University of Missouri School of Law, McCulloch was asked, “Do you believe that it would have been in the public interest for Darren Wilson to be indicted?”<sup>24</sup> 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>25</sup>

After McCulloch explained that he began the grand jury process before all the evidence was available, meaning that the presentation of evidence started well before he knew whether an indictment would be appropriate, McCulloch was asked a follow-up question: “[A]t the end, after the grand jury had seen all the evidence, you presented all the evidence . . . if you believed at that time that it would not have been appropriate for the grand jury to return a true bill . . . why not recommend that to the grand jury?”<sup>26</sup>

In response, McCulloch said that prosecutors should not even present evidence to a grand jury if they know in advance that no indictment should be returned.<sup>27</sup> By contrast, after the presentation of evidence occurs, he said it would be wrong to terminate the process without grand jury deliberations.<sup>28</sup> “Once it’s submitted to the grand jury, then they’re making the decision,” he said.<sup>29</sup>

As it happens, the grand jury acted in the way that McCulloch hoped it would; it declined to indict Wilson for any crime.<sup>30</sup> That result, however,

23. *Id.* at Standard 4-8.1(d).

24. This question, along with the follow-up question quoted below, was asked by the author of this Article. McCulloch, *supra* note 9 (quoted portions begin around 1:01:30).

25. *Id.*

26. *Id.* The questioner also referenced the ABA and NDAA standards quoted above. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-3.5; NATIONAL PROSECUTION STANDARDS (Nat’l Dist. Att’y Ass’n, 3d ed. 2012), <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

27. McCulloch, *supra* note 9.

28. *Id.*

29. *Id.*

30. See Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>.

was by no means certain. Grand jurors are human beings, and predicting human behavior is never an exact science. Also, the more confident one is that a grand jury will not return an indictment, the more confident one is that the deliberation process is a waste of the participants' time. In other words, by allowing the St. Louis County grand jury to consider whether to indict Wilson, McCulloch either risked indicting someone for a crime despite his own belief that it "would not have been right" to charge him, or he wasted the time of twelve Missouri citizens who reported for grand jury service under threat of contempt of court and received minimal compensation.<sup>31</sup>

Beyond wasting time, the grand jury deliberations shielded McCulloch (at least temporarily) from accountability. McCulloch said during his March 31, 2015 presentation that at the close of evidence, he did not think the grand jury would have been right to indict Wilson.<sup>32</sup> By allowing the grand jury to deliberate regardless, McCulloch evaded the need to state publicly that he personally was deciding not to prosecute Wilson for killing Brown. Instead, he argued that he was simply obeying the will of the grand jury. As he said in his November 24, 2014 press conference:

It is important to note here and say again that they [the grand jurors] are the only people, the only people who have heard and examined every witness and every piece of evidence. They discussed and debated the evidence among themselves before arriving at their collective decision. After their exhaustive review of the evidence, the grand jury deliberated over two days, making their final decision. They determined that no probable cause exists to file any charge against Officer Wilson and returned a "no true bill" on each of the five indictments.<sup>33</sup>

Near the end of the press conference, after being asked whether he was avoiding "taking a stand," he reiterated the primacy of the grand jury.

Everything was presented. Everything was given to the grand jury. It was all put in front of them. And the twelve people made a decision

---

31. See MO. REV. STAT. § 494.450 (Cum. Supp. 2013) ("A person who is summoned for jury service and who willfully fails to appear and who has failed to obtain a postponement in compliance with section 494.432 or as an excuse pursuant to section 494.430, or to respond to the juror qualification form shall be in civil contempt of court . . ."). The St. Louis County website reports "if you are selected as a juror in a particular case, the pay [is] \$18.00 per day, plus mileage." *St. Louis County Jury Information*, ST. LOUIS CTY., MO., <http://stlouisco.com/YourGovernment/CountyDepartments/StLouisCountyCircuitCourt/JuryInformation/jurypay> (last visited Oct. 19, 2015).

32. McCulloch, *supra* note 9.

33. *Ferguson, Missouri Grand Jury Decision Announcement*, C-SPAN (Nov. 24, 2014), <http://www.c-span.org/video/?322925-1/ferguson-missouri-grand-jury-decision-announcement> (the quoted text starts around 9:00).

that based upon all that evidence, that as tragic as this is, it was not a crime. Not one where charges should have been filed.<sup>34</sup>

Among the most important jobs of a prosecutor is to decide what cases merit criminal charges. Not all offenses can be prosecuted, even when the evidence is overwhelming.<sup>35</sup> And in some cases, certain segments of the public may desire a prosecution that would, if brought, offend the interests of justice.<sup>36</sup> When a prosecutor is elected, as those in Missouri are, the choice of what cases to bring is one of the key factors that a sensible voter might consider when deciding whether an incumbent is worthy of reelection. When a prosecutor allows a grand jury to consider indicting someone whom she herself believes should not be indicted, the prosecutor makes an already opaque process even more difficult for voters to monitor. By contrast, a forthright statement that a certain case is not one the prosecutor believes merits criminal charges – especially if accompanied in high-profile cases by a reasoned explanation – informs the public about how a powerful official is exercising her discretion under the law.<sup>37</sup>

#### IV. RECUSAL IS AN HONORABLE SOLUTION

If a prosecutor believes that political realities – that is, the desire to win reelection – preclude her from offering a straightforward defense of her decision not to bring charges in a particular case, she is free to recuse herself. Indeed, the NDAA recognizes the need for recusal when a prosecutor’s “personal interests” could compromise her judgment, or even cause a “fair-minded, objective observer” to decide that the prosecutor’s judgment “*may* be compromised.”<sup>38</sup> Pursuant to NDAA Standard 1-3.3, “The prosecutor should

34. *Id.* (beginning around 41:30, near the end of the video).

35. See Jackson, *supra* note 16 (“If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning[.] What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.”).

36. See *id.* (“In times of fear or hysteria[] political, racial, religious, social, and economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views.”).

37. For an example of a public statement by a Missouri prosecutor explaining his decision not to file charges in a shooting death case, see Letter from Daniel K. Knight, Boone Cty. Prosecuting Att’y, to Ken Burton, Chief of Colum. Police Dep’t (Oct. 23, 2013), <https://www.showmeboone.com/pa/common/pdf/Media-Release-20131023.pdf> (fourteen-page letter released to public summarizing evidence, reviewing applicable law, and explaining decision not to prosecute).

38. NATIONAL PROSECUTION STANDARDS, Standard 1-3.3 (Nat’l Dist. Att’y’s Ass’n, 3d ed. 2012) (emphasis added), <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

excuse himself or herself from any investigation, prosecution, or other matter where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor's neutrality, judgment, or ability to administer the law in an objective manner may be compromised."<sup>39</sup>

NDAA Standard 1-3.5 explains how one can "excuse himself" when necessary: "Where an actual or potential conflict of interest exists that would prevent the prosecutor's office from investigating or prosecuting a criminal matter, the prosecutor's office should appoint, or seek the appointment of a 'special prosecutor,' or refer the matter to the appropriate governmental authority as required by law."<sup>40</sup>

This guidance accords with general principles concerning lawyers' conflicts of interest. Model Rule of Professional Conduct 1.7 includes among "concurrent conflicts of interest" a situation in which "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."<sup>41</sup> In the case of a prosecutor, the client is the public at large, or perhaps the state. If, as argued above, a diligent prosecutor owes the public a duty to explain her decision not to bring charges in a high-profile case, then a prosecutor who fears the electoral consequences of providing a candid explanation may well be "materially limited."

The use of special prosecutors to diffuse allegations of partiality (or to respond to actual partiality) is not merely theoretical. Recent Missouri history presents many examples of elected prosecutors seeking the appointment of special prosecutors because of actual conflicts or the appearance of a conflict that might cause reasonable observers to question someone's impartiality. Cases include the "Maryville rape case,"<sup>42</sup> the one-car accident at Addison's restaurant involving Moniteau County Prosecutor Shayne Healea,<sup>43</sup> a sodomy case involving a friend of the Boone County prosecutor,<sup>44</sup> charges against Kansas City Councilman Michael Brooks, who was accused of choking a

39. *Id.* at Standard 1-3.5.

40. *Id.*

41. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2013). The text of the Missouri definition is identical. See MO. SUP. CT. R. 4-1.7(a)(2).

42. See David Zucchini & Matt Pearce, *Special Prosecutor Appointed to Investigate Missouri Rape Case*, L.A. TIMES (Oct. 21, 2013), <http://articles.latimes.com/2013/oct/21/nation/la-na-nn-maryville-prosecutor-20131021>.

43. See Kouichi Shirayanagi, *Missouri Attorney General Names Special Prosecutor in Addison's Crash Case*, COLUMBIA MISSOURIAN (Nov. 4, 2014), <http://www.columbiamissourian.com/a/181178/missouri-attorney-general-names-special-prosecutor-in-addisons-crash-case/>.

44. See Alan Burdziak, *Special Prosecutor to Handle Sodomy Cases*, COLUM. TRIB. (Nov. 11, 2014), [http://www.columbiatribune.com/news/crime/special-prosecutor-to-handle-sodomy-cases/article\\_d42ceb60-30f5-5018-bce2-2d9592a3add3.html](http://www.columbiatribune.com/news/crime/special-prosecutor-to-handle-sodomy-cases/article_d42ceb60-30f5-5018-bce2-2d9592a3add3.html).

legislative aide,<sup>45</sup> and the decision not to bring new charges against Ryan Ferguson after the Missouri Court of Appeals set aside his murder conviction,<sup>46</sup> among others.<sup>47</sup>

Put simply, recusal is an honorable and practical option. If a prosecutor is sufficiently afraid of public wrath that she would hide behind a needless grand jury procedure, that is, if she would allow the grand jury to deliberate despite her own belief that no indictment should be returned, then another prosecutor can and should handle the case.

## V. CONCLUSION

When Governor Nixon declined to remove McCulloch from the Wilson case in August 2014 but reserved the right to do so later if circumstances should require it, McCulloch vigorously objected.<sup>48</sup> “The [worst] thing that can happen is we get deeply into this and he says he’s taking me off the case. Knowing him as well as I do, he doesn’t make a decision until he’s cornered and absolutely has to make one,” McCulloch said.<sup>49</sup> To avoid uncertainty, McCulloch offered Nixon advice. “Make a decision and make it clear.”<sup>50</sup>

That November, when McCulloch’s office finished presenting evidence to the St. Louis County grand jury, and McCulloch concluded that no charges could rightly be brought against Darren Wilson for killing Michael Brown, McCulloch should have taken his own advice. He should have thanked the grand jurors for their service, reiterated their important role in his investigation, and then sent them home, sparing them two days of needless deliberations. He then should have stood up and announced his decision to the public – whether in writing, at a press conference, or both – instead of hiding behind a dozen anonymous citizens.

---

45. See Lynn Horsley, *Platte County Prosecutor Will Consider Assault Case Against Councilman Michael Brooks*, KAN. CITY STAR (Dec. 18, 2014), <http://www.kansascity.com/news/government-politics/article4644285.html>.

46. See Alan Burdziak, *Special Prosecutor Named in Ryan Ferguson Case at Knight’s Request*, COLUMBIA MISSOURIAN (Nov. 9, 2013), [http://www.columbia-tribune.com/news/local/special-prosecutor-named-in-ryan-ferguson-case-at-knight-s/article\\_1cffe302-48cb-11e3-bd7b-001a4bcf6878.html](http://www.columbia-tribune.com/news/local/special-prosecutor-named-in-ryan-ferguson-case-at-knight-s/article_1cffe302-48cb-11e3-bd7b-001a4bcf6878.html).

47. See, e.g., MacKenzie Elmer, *Special prosecutor rules Ellingson death was accidental*, DES MOINES REG. (Sept. 8, 2014), <http://www.desmoinesregister.com/story/news/crime-and-courts/2014/09/08/brandon-ellingson-missouri-piercy/15287639/> (concerning coroner’s inquest of the drowning death of Brandon Ellingson while in custody of state troopers).

48. See Bell, *supra* note 1 (“That is kind of a meaningless statement in terms of resolving this issue . . .”).

49. *Id.*

50. *Id.*



