

Special Prosecutors: Investigations and Prosecutions of Police Use of Deadly Force

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With grand juries in Ferguson, Missouri and Staten Island, New York voting not to indict the police officers involved in the deaths of Michael Brown and Eric Garner, respectively, many are questioning whether local prosecutors are adequately presenting these cases to the grand juries. Many have expressed concern that the potential symbiotic relationship between prosecutors and law enforcement officers deters criminal prosecutions against police officers who take the life of another in the line of duty. Prompted by these events and others, [some](#) have called for special prosecutors to investigate cases of alleged law enforcement criminality, believing that the appointment of a special prosecutor would remove this potential bias, and perhaps more importantly, improve the appearance of impartiality in the eyes of an [increasingly concerned public](#).

A special prosecutor—or sometimes referred to as “independent counsel” or “special counsel”—is an attorney who generally supersedes the local prosecuting attorney in particular criminal cases. Historically, special prosecutors have been appointed to try criminal cases in two instances: first, when the case poses a conflict of interest or some other disqualification for the prosecuting attorney (such as when he himself is a criminal defendant), and, two, to handle political or controversial prosecutions that government officials fear will not be prosecuted absent a special counsel. While the institution of special prosecutors was made prominent by Kenneth Starr and the [independent counsel office](#) established under the Ethics in Government Act of 1978 (which expired in 1999), special prosecutors have long played a role in state investigations and prosecutions covering everything from public corruption to violation of prohibition laws.

The process for appointing special prosecutors varies widely from state to state. One reason for this divergence is the constitutional status of each state’s prosecuting attorneys. Depending on the state, the attorney general, the district attorney, or both, are allocated prosecuting authority in their state constitutions. Some states, such as [New York](#), vest broad authority to request a special prosecutor in the Governor. New York’s Attorney General Eric Schneiderman recently requested that Governor Cuomo should exercise this authority to appoint the AG to investigate and prosecute future cases of police use of deadly force on any unarmed person. Many states, including [Washington](#) and [Missouri](#), permit appointment by the court presiding over the case, either through statute or the courts’ inherent common law power. In [New Mexico](#), the state attorney general is authorized to bring a prosecution “upon failure or refusal of any district attorney to act in any criminal case.” Interestingly, in [California](#), the grand jury itself may call for a special prosecutor who is chosen by the Attorney General. [Connecticut](#) appears to be the only state that currently has a law on the books expressly requiring a special prosecutor in cases of police use of deadly force. Under that law, whenever a police officer uses deadly force upon another person and that person dies, the state’s Division of Criminal Justice is authorized to appoint a special prosecutor to investigate and potentially prosecute the case.

Since the investigation and prosecution of local crime is generally the province of the states, there is a potential concern that Congress would be unduly interfering with state criminal justice systems by requiring the appointment of special prosecutors in state deadly force cases. This raises the question as to what constitutional authority Congress might rely upon to implement these changes.

In the twin cases *United States v. Morrison* and *United States v. Lopez*, the Supreme Court rejected the argument that local crime had a sufficiently substantial effect on interstate commerce to bring it within the scope of Congress’s Commerce Clause authority. It would appear that a similar argument that police shootings substantially affect interstate commerce would be equally unavailing. Likewise, it might be argued

that Congress can rely on its authority under Section 5 of the Fourteenth Amendment to remedy purported constitutional violations, including unreasonable seizures under the Fourth Amendment, perpetrated by law enforcement officers. Under this theory, Congress must identify a pattern of constitutional violations by state actors, but it is far from clear whether the unconstitutional use of deadly force has been pervasive enough to trigger Congress's Section 5 remedial power. Finally, Congress might rely on the Spending Clause to condition the acceptance of federal law enforcement grants upon the states' adoption of special prosecutor laws. This route might alleviate concerns that Congress is interfering with the states' criminal justice processes as the states can choose whether to adopt the proposed changes.

This Spending Clause model was employed in the recently introduced [Grand Jury Reform Act of 2014](#). This bill would provide that in order for a state to be eligible for federal funding under the [Edward Byrne Memorial Justice Assistance Grant](#) (JAG) program, it must adopt various measures in instances where a law enforcement officer uses deadly force. When such a death occurs, the Governor would be required to appoint a special prosecutor to present evidence on behalf of the state before a judge at a preliminary hearing to determine if probable cause exists that the officer committed a crime. The appointment of the special prosecutor would be done by random selection from the other prosecuting attorneys in the state, excluding the prosecutors of the locality in which the death took place.

While the 113th Congress is coming to an end, this and similar proposals are likely to be taken up in the 114th Congress.