

PROSECUTORS SHOULD NOT TAKE MONEY FROM POLICE UNIONS

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EXECUTIVE SUMMARY

Over the past several months, protests against police violence and the criminalization of communities of color have increased focus and attention on calls to defund the police and limit their political influence. This development has forced elected prosecutors to reckon with their role in a system that has long failed in its mission to build trust and keep people safe.

Increasingly across the country, elected prosecutors are committing to policy changes that will reduce incarceration and the harm wrought by the criminal legal system—including declining to charge people who do not pose a public safety threat and focusing on diversion and rehabilitation instead of prosecution. But these important efforts are often vigorously challenged by law enforcement and their unions, who use their public platform and political influence in an effort to thwart progress.

On the whole, police unions and their political advocacy are antithetical to prosecutors who endeavor to seek justice in a system with very little of it. Accordingly, elected prosecutors should maintain their professional and ethical independence from law enforcement and neither seek nor accept campaign contributions from police unions and other law enforcement organizations.

Polling from Data for Progress and The Justice Collaborative Institute showed support for the separation between prosecutors and the police:

- ▶ 56% of respondents strongly or somewhat support ethics rules that would prohibit prosecutors from taking campaign contributions from police and police unions. Fewer than 25% oppose the idea.

- ▶ 54% of respondents strongly or somewhat support state laws to prohibit such campaign donations.

INTRODUCTION

Weeks before Wesley Bell, who is Black, was sworn in as the newly elected St. Louis County prosecuting attorney in late 2018, a group of assistant prosecutors in the office joined the St. Louis Police Officers Association, the labor union representing local police, in an act of protest against Bell and his policy proposals. Intended as an act of aggressive rebellion, joining the police union sent a clear signal by these assistant prosecutors that they stood on the side of the police union against their new boss. The head of the Ethical Society of Police, which represents police officers of color, said that the move was largely about race: “We can sugarcoat it all we want. They’ve been under Bob McCulloch [the outgoing District Attorney] for almost 30 years, and they’ve never come together to unionize. Suddenly, when Wesley Bell wins ... [these assistant DAs] want to become a union.”

This incident in St. Louis reflects a wider concern about the relationship between prosecutors and police unions. The legal system is structured to position prosecutors and police as intimate professional allies: police investigate and interview witnesses while prosecutors use that information to determine charges, generate plea deals, and, in very few cases, go to trial. Police departments and their unions generally want prosecutors who will maximize the power and central importance of the police. Thus, in the political realm, police support prosecutor candidates—through public

statements, political support, and campaign contributions—who take a tough-on-crime approach to law enforcement, with a minimalist approach to police accountability.

Police unions exercise their power, in part, by making financial contributions to campaigns for prosecutors, among other political candidates, as part of their general political quest to prevent criminal legal system reforms. While it is currently legal for prosecutor candidates to take such political contributions, some prosecutors think that there is too much potential for conflict when prosecutors are required to reign in misconduct and charge officers with crime.

Wielding this type of political influence allows police unions to inject additional pressure into the already-present conflict for prosecutors who are supposed to maintain independence from police agencies and who are duty bound to protect the public from unconstitutional, violent, or otherwise harmful policing. As scholars and advocates have noted, this dynamic means that prosecutors are often reluctant to charge officers for misconduct, excessive force, or murder. They are also unlikely to challenge all but the most flagrant unconstitutional and dishonest behavior by police officers who testify in their cases.

Indeed, merely voicing support for protesters against police violence can generate fierce pushback, like when the Boston Police Patrolman’s Association called Suffolk County District Attorney Rachel Rollins’s comments in support of Black Lives Matter protesters “dangerous, divisive, and wholly unwarranted.”

PROSECUTORS ARE ETHICALLY BOUND TO AVOID CONFLICTS OF INTEREST

There is little question that prosecutors and police work closely together. Police are almost always the first point-of-contact for people entering the criminal legal system. They investigate cases, interview witnesses, and instigate arrests, often without input from prosecutors. In many cases—like “buy and bust” cases where undercover police purchase drugs to make an arrest—police are also deciding which kinds of cases and people are worthwhile. They might be the only witness to support the arrest. Legal scholar Daniel Richman notes that a prosecutor “generally will not even know that a crime has been committed until [the police] informs [her].” And prosecutors regularly rely on the testimony of police to win their cases or negotiate plea deals.

Under traditional conflict-of-interest law, it is hard to see how prosecutors switching sides from working with police to prosecuting them does not raise a conflict, especially when the elected prosecutor has taken money from the union that represents the officers. Prosecutors are charged with representing the entire community, not just the police. The American Bar Association directs that, “[w]hen investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor’s clients.” In other words, prosecutors are not “on the same side” as the police and, while their interests may align, they are not the same. Current Contra Costa District Attorney Diana Becton recently told NPR that

such a separation between police and prosecutors is essential today when there is widespread community distrust of police because of historical racism: “We need to do everything that we can in this moment to avoid not only actual conflict but to avoid the appearance of conflict if we hope to rebuild public trust and confidence in our system at a time when it is so, so sorely needed.”

The conflict of interest between prosecutors and police is most dramatically illustrated to the public when they see prosecutors decline to charge officers who have killed or injured community members. But it exists regardless of whether prosecutors decide to charge or decline to charge officers. In the vast majority of places, the elected prosecutor who works with the local police department is also the office that investigates, charges, and tries the case. In 2015, The Guardian US found that 85% of cases involving a police officer who shoots and kills a civilian are resolved with a secretive grand jury process controlled by the locally elected prosecutor. Very few cases against police officers are handled independently.

For example, a grand jury refused to indict Timothy Loehmann, the white police officer who shot and killed 12-year-old Tamir Rice in 2014, who was playing with a toy gun in a park. Timothy McGinty, then the Cuyahoga County prosecutor, was not only in charge of presenting the case to the grand jury, he also defended the police officers who were responsible for killing Tamir Rice and proceeded to feed information to the public in a clear effort as a way to justify the shooting. This behavior is in direct opposition to the way prosecutors treat civilians whom they charge with crimes.

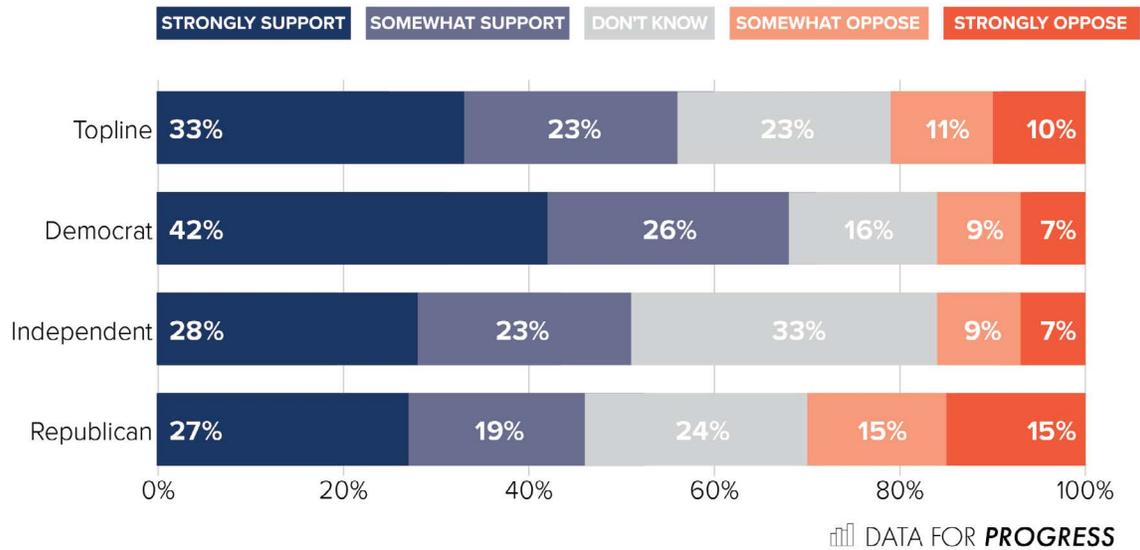
McGinty was ousted from office in 2018. Yet, the example reflects the importance of not only impartiality and independence, but also the appearance of such impartiality, during investigations and charging decisions involving

the police. McGinty’s control of the entire process, including the media portrayal of the event, reveals the depths of his involvement and the special way he involved himself to help a police officer defendant. Naturally, the clear favoritism shown to the police in the Tamir Rice case led to the loss of faith by the community overall, who felt they could not trust the prosecutorial gatekeeper who claimed to ensure public safety but appeared to do so selectively.

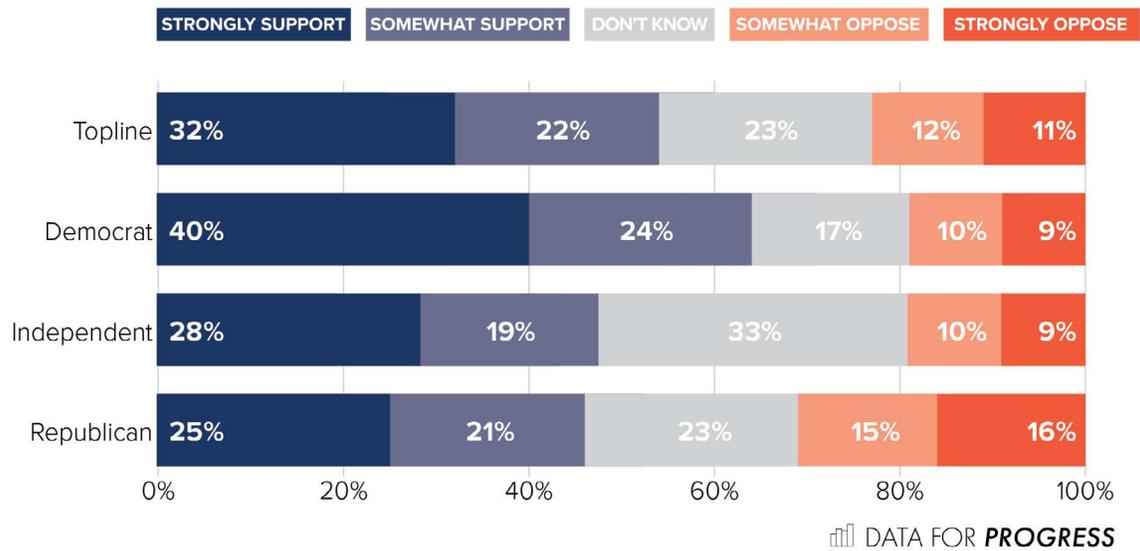
Prosecutors are also one of the few actors who can recognize and act on information when police officers are untruthful. They are in the best position to prevent “testilying,” the habit of some police officers to perjure themselves to ensure a defendant is convicted. Prosecutors are generally the only people who can take action against police who commit perjury or who lie in police statements or other reports. They have a choice not to call the officer as a witness, or to decline to prosecute a case where an officer has lied or has violated the rights of a potential defendant. However, choosing to do this takes independence and bravery on the part of a prosecutor given how heavily they rely on police to make their cases, and how much scrutiny they may receive if they decline to prosecute certain cases.

The truthfulness of police also becomes an issue when the accused is entitled to information that might impeach an officer-witness. Many prosecutors maintain “Brady lists”—lists of police officers whose truthfulness may be subject to question because of past acts—which would include disciplinary records as well as instances of lying that were never the subject of discipline. As ministers of justice, elected prosecutors are required to ensure that police officers with a history of dishonesty known to the office that would be relevant at trial are identified to defense counsel. This is part of the job requirement of prosecutors: ensuring fair trials and due process.

Do you support or oppose state bar associations, which license and govern conduct for lawyers, making an ethical rule forbidding elected prosecutors from taking campaign donations or endorsements from police or other law enforcement unions?



Do you support or oppose state governments prohibiting law enforcement unions from donating to prosecutor campaigns?



POLICE UNION SUPPORT DOES NOT REPRESENT THE BEST INTERESTS OF THE COMMUNITY

In theory, prosecutors are elected specifically to run their office in a way that both protects public safety and represents the values and interests of their community. While we have seen how often this power is abused by prosecutors, there are many current DAs and DA candidates who have promised to do better. As democratically-elected officials, prosecutors should be using their power and discretion in ways that ensure police act constitutionally and that citizens are not incarcerated because they are poor or people of color. Increasingly, counties across the country are voting for prosecutors who reflect a more progressive philosophy that is focused on making the criminal legal system less punitive, especially toward communities of color.

In contrast, police unions have consistently refused to evolve, continuing to loudly support tough-on-crime policies and punitive measures, and insist on military equipment and tactics such as no-knock warrants that too often end in the death of civilians. As a result, the unions use their considerable political and financial power to endorse and support prosecutorial candidates who will be “tough-on-crime,” and oppose those who are seeking more racial justice and equality.

The attacks from police unions can be personal and extreme. When, former public defender Chesa Boudin ran for district attorney in San Francisco, the San Francisco police union not only spent \$650,000 to attack Boudin through ads and

opposition research, they also insulted Boudin in the media, calling him the “#1 choice of criminals and gang members.” The San Francisco Police Officers Association has opposed the district attorney’s office for some time, including Boudin’s predecessor George Gascon, who assembled a Blue Ribbon panel to review the police department’s systemic bias. The SFPOA also opposed a bill Gascon had championed that reduced some charges from felonies to misdemeanors and passed with 80% of the vote in San Francisco. This is perhaps unsurprising, as Boudin, since taking office, has promised not to bring charges against anyone arrested by police who have prior misconduct on their record.

CONCLUSION

The elected prosecutor’s responsibilities to protect the public, seek justice, and uphold community values will necessarily place her at odds with the police, particularly when there is a shooting investigation. Given this reality, prosecutors should take pains to ensure that they keep the public’s trust, especially in an era where there is a growing consensus that prosecutors and other officials must address historical inequalities and racism in the criminal legal system. Recognizing that change is needed, a group of California district attorneys have already supported ethical rules that would prevent prosecutors from receiving police campaign contributions. A similar proposal is pending in Alameda County, California. Refusing political donations from police unions is a common-sense move to restore public trust and return integrity to the prosecutorial process.

POLLING METHODOLOGY

From 6/26/2020 to 6/27/2020, Data for Progress conducted a survey of 1,388 likely voters nationally using web panel respondents. The sample was weighted to be representative of likely voters by age, gender, education, race, and voting history. The survey was conducted in English. The margin of error is +/- 2.6 percent.

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