

# EATON COUNTY TRIAL COURTS

HON. THOMAS K. BYERLEY  
PROBATE COURT JUDGE  
CHIEF JUDGE - TRIAL COURTS

HON. JANICE K. CUNNINGHAM  
CIRCUIT COURT JUDGE

HON. JOHN D. MAURER  
CIRCUIT COURT JUDGE

EATON COUNTY COURTHOUSE  
1045 INDEPENDENCE BLVD.  
CHARLOTTE, MI 48813  
(517) 543-7500  
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HON. JULIE H. REINCKE  
DISTRICT COURT JUDGE

HON. JULIE A. O'NEILL  
DISTRICT COURT JUDGE

May 3, 2019

Peggy Toms  
Livingston County Circuit Court  
204 S. Highlander Way  
Suite 4  
Howell, MI 48843

Re: **In the Matter of: Petition to Impanel a Citizens Grand Jury  
Livingston County Circuit Court File No. 18-29968-PZ**

Dear Ms. Toms:

Enclosed please find an Opinion and Order Denying Petition to Impanel Citizens Grand Jury for filing in this matter, as well as my proof of mailing. This order resolves this matter and closes the case.

Please contact me should you have any questions. Thank you for your assistance.

Sincerely yours,



Angie Curtiss  
Judicial Administrative Assistant  
to Honorable John D. Maurer

Enclosure

STATE OF MICHIGAN  
IN THE LIVINGSTON COUNTY CIRCUIT COURT

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*In re* Petition to Impanel  
Citizens Grand Jury

Case No. 18-29890-PZ

Hon. John D. Maurer

HON. DANIEL A. BURRESS  
Petitioner

THOMAS KIZER, JR.  
Special Prosecutor

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**OPINION & ORDER DENYING PETITION TO IMPANEL  
CITIZENS GRAND JURY**

At a session of Court, held in the City of Howell,  
County of Livingston, State of Michigan, on the  
3<sup>rd</sup> Day of May, 2019

Present: HONORABLE JOHN D. MAURER, Circuit Judge

The Court having reviewed Petitioner's, the Hon. Daniel A. Burress, Petition to Impanel a Citizens Grand Jury, hereby DENIES the Petition for the reasons stated below.

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This Court has the unquestioned ability to draw and summon a citizen grand jury or, in the alternative and upon a finding of probable cause, to order an inquiry by a one person grand jury. *See generally* MCL 767.3; MCL 767.7-.7a-g. Also, the fact that a private citizen has brought the petition is of no consequence, it is allowed under MCL 767.3. However, given separation of powers principles and mootness, the Court cannot grant the relief requested, despite the disturbing and heinous behavior that provided the basis for the petition.

If separation of powers stands for anything, it stands for the principle that the “whole power of one of the[] departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution.” *Makowski v. Governor*, 495 Mich. 465, 482–8 (2014), as amended on reh'g (Sept. 17, 2014), quoting *Local 321, State, Co. & Muni. Workers of America v. City of Dearborn*, 311 Mich. 674, 677, 19 N.W.2d 140 (1945) (citation and quotation marks omitted). Those principles are as old as the Republic:

“[T]he great security,” wrote Madison, “against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.” Federalist No. 51, pp. 321–322.

*Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting).

Although the Court has the power under statute to impanel a grand jury, the Court cannot, in good conscience, do so when an active case has been filed by the Attorney General of the State of Michigan. The Michigan State Police have investigated the conduct of Judge Theresa Brennan and those associated with her. The Attorney General’s Office has charged Judge Brennan with perjury, tampering with evidence, and common law misconduct in office. Judge Brennan has exercised her right to a preliminary examination and a ruling by the examining magistrate is expected in June. Impaneling a grand jury would necessarily mean the subpoenaing of witnesses, examination of physical evidence, and the use of public resources, all activities and costs that are already being incurred by the People through the Attorney General Office. The Attorney General, albeit in a delayed fashion, has exercised its inherent power of the Executive Branch to criminally prosecute someone who allegedly committed crimes in the State of Michigan. *See* MI CONST Art. 5, § 1 (“[T]he executive power is vested in the governor.”); *see*

also *Morrison*, 487 U.S. at 706 (“Governmental investigation and prosecution of crimes is a quintessentially executive function.”) (Scalia, J., dissenting), citing *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *United States v. Nixon*, 418 U.S. 683, 693 (1974). This is not to suggest, however, that the statutes giving the courts the power to impanel a grand jury is unconstitutional, but when the Executive Branch is acting in a lawful capacity, it is an inexorable command of the United States and Michigan constitutions to not interfere. Granting the petition here would be such interference.

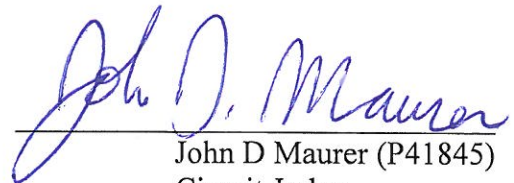
Beyond issues with the fundamental principle of separation powers, there is the practical problem, but no less important, of having dual prosecutions for the same conduct. Of course, the counterargument is that the Office of the Attorney General has failed to charge all the crimes it could have, especially given how troubling the conduct was in this case. *See generally* Judicial Tenure Commission Master’s Report No. 99 & Decision and Recommendation for Discipline No. 99. But the executive’s power to determine who and what to prosecute is extremely discretionary. *See People v. Ford*, 417 Mich. 66, 93 (1982) (Holding that it was not an abuse of prosecutorial discretion to prosecute a more serious charge when a less serious charge could have been brought); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (1973) (Holding that it was not an abuse of prosecutorial discretion to not charge corrections officers for role in Attica Prison Riots); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“[A] citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution”). Given the Executive Branch’s wide discretion and, more importantly, because the crimes Judge Brennan has been charged with carry potentially lengthy prison sentences, for all practical purposes the intent of the petition for a citizens grand jury (or a one-man grand jury) has been accomplished. Judge Brennan is currently in the midst of

proceedings to hold her accountable for her actions that have stained the name of the Livingston County Courts and undermined the People's confidence in the judiciary.

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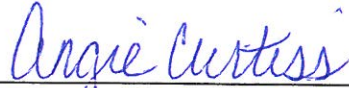
Therefore, IT IS ORDERED that the Petition to Impanel a Citizens Grand Jury is DENIED.

This order resolves the last pending claim and closes the case.

  
John D Maurer (P41845)  
Circuit Judge

**PROOF OF MAILING**

Angela L. Curtiss swears on the 6th day of May, 2019 that she served a copy of the foregoing Opinion and Order Denying Petition to Impanel Citizens Grand Jury upon Daniel A. Burress and Thomas J. Kizer Jr. via first class mail, postage fully prepaid.



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Angela L. Curtiss

In Re: Petition to Impanel Citizens Grand Jury  
File No. 18-29968-PZ