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Mueller's Options, Short Of Indictment

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Federal grand juries normally do not issue investigative reports for public or congressional consumption. Federal grand juries vote up or down on whether probable cause exists to indict an individual or an entity. If so, the charging document, called a "bill of indictment," is "returned" and filed of public record. If not, the federal prosecutor will decline to seek a vote of the grand jury on proposed charges or, more rarely, the grand jury may vote not to return an indictment (called a "no bill"), and the matter ends there.

That is to say, in our criminal justice system, matters before a grand jury generally are to remain secret. The U.S. Supreme Court declared this norm to be "older than our Nation itself." Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959). The rule of grand jury secrecy has important policy rationales: (1) preventing innocent and/or uncharged subjects and targets of an investigation from being smeared by the release of grand jury information for which there will be no trial at which allegations can be challenged; (2) insulating grand jurors and grand jury witnesses, including government agents or informants, from pressure, tampering, exposure, embarrassment, or retaliation; (3) not alerting suspects and targets of the investigation prematurely who might then seek to flee or obstruct justice; and (4) preventing government investigative techniques from being compromised. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-19 (1979); United States v. Procter & Gamble Co., 356 U.S. 677, 681 n. 6 (1958).

Thus, as codified in the Federal Rules of Criminal Procedure, absent an indictment and subsequent prosecution, the government generally cannot publicly disclose the evidence submitted to a grand jury. Fed.R.Crim.P. 6(d)-(e). Indeed, the U.S. Department of Justice is not even obliged to tell a subject or target of a grand jury investigation that the investigation is over and that no charges will be sought! See U.S. Attorneys Manual at § 9-11.155. This long-standing, strict rule of grand jury secrecy explains the surprise some federal criminal practitioners expressed about former FBI Director James Comey'spublic comments regarding the Hillary Clinton email grand jury investigation. See, e.g., "Did James Comey Break Rules by Drafting Hillary Clinton Statement? FBI Experts Are Divided," Newsweek (Sept. 1, 2017)..

Three Potential Paths To Disclosure

But suppose special counsel Robert Mueller's investigation unearths evidence that falls short of the legal standard to indict (probable cause), or falls short of the DOJ policy standard required to seek an indictment (admissible evidence probably sufficient to obtain and sustain a conviction). U.S. Attorneys'

Manual at § 9-27.220, Comment (Jan. 2017). Suppose further that — as a matter of national security or noncriminal malfeasance — this evidence would likely be of great interest to the public and/or relevant to congressional committees investigating parallel and related matters. Do potential disclosure options exist notwithstanding the general rule of grand jury secrecy? Yes.

It must be noted upfront that the statute and DOJ regulations enabling the appointment of a special counsel like Mueller provide no carveout to the rule of grand jury secrecy. 28 U.S.C. § 515; 28 C.F.R. § 600.1 et seq. Thus Mueller stands in a different posture than Kenneth Starr, appointed under the Office of Independent Counsel statute to run the Whitewater/President Clinton investigation; that statute permitted disclosure of evidence before the grand jury to Congress. 28 U.S.C. § 595(c) ("An independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel's responsibilities under this chapter, that may constitute grounds for an impeachment."). Nonetheless, if appropriate, Mueller has several potential paths to the disclosure of the grand jury's evidence.

First, on occasion, some courts have recognized a limited, common law exception to grand jury secrecy for grand jury reports that address issues of public or community concern, where the conduct reported falls short of a crime but the public interest in the contents of the report outweighs the harm to any individuals. Compare, e.g., In re Sitting Grand Jury in Cedar Rapids, 734, F. Supp. 875, 876-77 (N.D. Iowa 1990) (court orders public filing of grand jury report concerning actions by a public entity but redacts references to two individuals by name); In re Presentment of Special Grand Jury Impaneled January, 1969, 315 F.Supp. 662, 675-679 (D.Md. 1970) (With some modification, court orders release of grand jury report concerning possible corruption related to federal construction project); In Matter of Application of Johnson et al., 484 F.2d. 791 (7th Cir. 1973) (public distribution of report regarding fatal confrontation between Chicago police and Black Panthers) with Application of United Electrical, Radio & Machine Workers of America et al., 111 F. Supp. 858, 865-69 (S.D.N.Y. 1953) (court expunges report containing accusatory pronouncements for which publicly condemned individuals had no way to clear their names).

Second, courts have upheld access to grand jury materials by congressional committees given the legislature's constitutional power to impeach. For example, during the impeachment investigation of federal judge Hastings, a court held that the House Judiciary Committee was entitled to receive the record of grand jury proceedings both under the provisions of Rule 6(e) and in furtherance of its investigation under the Impeachment Clause. In re Request for Access to Grand Jury Materials, 833 F.2d 1438, 1443-46 (11th Cir. 1987); see also In re Petition, 735 F.2d 1261, 1267-68 (11th Cir. 1984) (approves release of grand jury materials concerning federal judge to a federal judicial disciplinary investigation pursuant to statute concerning whether the judge should be recommended for impeachment by the Congress, otherwise disciplined, or granted a clean bill of health).

Similarly, during the Watergate scandal involving President Nixon, U.S. District Judge John Sirica ruled that the court possessed the inherent power to deliver grand jury materials to the House Committee on the Judiciary. His was order upheld by the court of appeals in denying mandamus relief. In re Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1227-30 (D.D.C.), mandamus denied sub nom. Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974).

Third, a little-known statute provides for top DOJ officials to request the impaneling of a "special grand jury" that may issue a report concerning "noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action." 18 U.S.C. §§ 3331(a), 3333(a)(1); accord generally In

re Grand Jury Proceedings, Special Grand Jury 89-2, 813 F.Supp. 1451, 1460 (D.Co. 1992) (“The power to release a report permits the special grand jury to publicize violations of the public trust where a public official’s misconduct may be insufficient to establish a violation of criminal law.”). “Public officer or employee” is broadly defined to include any officer or employee of the United States, any State, the District of Columbia, any territory or possession of the United States, or any political subdivision, or any department, agency, or instrumentality. 18 U.S.C. § 3333(f). Of note for complex white collar corruption and fraud grand jury investigations, the special grand jury may sit for as much as, and sometimes beyond, three years. Id. at §§ 3331(a)-(b), 3333(e).

While reports involving public officials must connect "misconduct," "malfeasance," or "misfeasance" with "organized criminal activity," "organized criminal activity" [is] … much broader than "organized crime;" it includes "any criminal activity collectively undertaken." U.S. DOJ Criminal Resource Manual at § 159. Moreover, serious nonfeasance in office counts: “The ‘misconduct,’ ‘malfeasance,’ or ‘misfeasance’ … must, to some degree, involve willful wrongdoing as distinguished from mere inaction or lack of diligence on the part of the public official. Nonfeasance in office, however, if it is of such serious dimensions as to be equatable with misconduct, may be a basis for a special grand jury report. Id. (citing S.Rep. No. 617, 91st Cong., 1st Sess. (1969), reprinted in 1970 U.S.C.C.A.N. 4007).

A special grand jury cannot investigate solely for the purpose of writing a report; it “functions essentially like a regular grand jury … after the ‘completion’ of the criminal investigation … a report may be submitted to the court.” U.S. DOJ Criminal Resource Manual at § 159. Upon receipt of the special grand jury’s report, the court is to examine it and the grand jury minutes and “shall” issue an order accepting and filing the report of public record if the court is satisfied that: (1) the report is supported by the preponderance of the evidence put before the grand jury; (2) any person named in the report and a reasonable number of witnesses in his behalf has been afforded a prior opportunity to testify before the grand jury; and (3) the 31-day statutory period for a named official or employee to answer the report or file an appeal has expired. 18 U.S.C. §§ 3333(b)(1)-(2), 3333(c)-(d).

Of course, courts can reject a special grand jury’s report. See, e.g., In re Grand Jury Proceedings, Special Grand Jury 89-2, supra, 813 F.Supp. at 1461 (“”[T]he Report [concerning the Rocky Flats Nuclear weapons plant] cannot properly be disclosed because it is partially based on facts not revealed in … the … investigation, … the conclusions … are not supported by a preponderance of the evidence … the Report levels serious accusations at persons easily identified”). But if the report is accepted, then upon issuance of the court’s disclosure order and the expiration of statutory time periods, the United States attorney is to “deliver the report for appropriate action to each public officer or body having jurisdiction, responsibility, or authority over each public officer or employee named in the report.” 18 U.S.C. § 3333(c), (d).

For an investigation such as Mueller’s — highly sensitive, of intense public interest, and with implications for the legitimacy of our electoral process — it is notable that the fruits of his team’s work may not be limited to seeking the return of indictments.

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