

Criminal Defense Internal Investigations ANALYSIS

HOW THE FEDERAL GRAND JURY PROCESS WORKS

By Laurel Brandstetter, Esq.

The formation of a grand jury by Special Counsel Robert S. Mueller III as part of the Russia investigation has drawn attention to a process that is usually conducted out of the spotlight. Federal grand juries are a standard but often secluded part of the government's investigation and prosecution of possible criminal acts. It may be helpful to pull back the curtain, look beyond the headlines, and examine the basic elements of the federal grand jury process, its common uses, and potential outcomes.

BACKGROUND

In early August, it was reported that Special Counsel Mueller empaneled a grand jury in Washington D.C. to further his investigation into efforts by Russia to influence the 2016 presidential election and possible connections to the campaign of President Donald Trump. Establishing a grand jury is one of the powers given the Special Counsel as part of his appointment in May by Acting U.S. Attorney General Rod J. Rosenstein.

From one perspective, use of a grand jury merely allows government prosecutors to do their jobs, including Special Counsel Mueller. Grand juries are used in cases ranging from investigation of low level drug offenders to the heads of major corporations. A grand jury allows the prosecutor to issue subpoenas, summon witnesses, and execute sealed search warrants.

The initial formation of a grand jury and the use of its powers show that a criminal investigation is

taking place, but may indicate nothing more. The grand jury empaneled by Special Counsel Mueller may or may not lead to actual indictments of people associated with the President's election campaign or others.

GRAND JURY MEMBERS AND LOCATION

Citizens from the community become members of a grand jury. Like a trial jury, the members consider the evidence and vote to make decisions. Federal grand jury members may serve up to eighteen months. They are paid a minimal amount, \$40 or \$50 per day, and may receive reimbursement for travel costs.

Grand juries are empaneled from citizens within the judicial district or division where the grand jury sits and where the criminal conduct is likely to have occurred. Grand jury members are selected much as trial juries are selected – from voter registration and drivers' license data. A federal grand jury often has twenty-three members and sixteen must be present to hear testimony, deliberate, vote, or take action of any sort. Twelve must vote in favor of a formal criminal charge (an "indictment") before it is officially issued.

Grand jurors watch and listen as government prosecutors question witnesses and present evidence. The grand jurors review the recommendations and any final reports prepared by the prosecutors, and they can ask questions and make suggestions for changing the content of a report. Grand jurors vote to approve or disapprove

criminal charges or reports recommended by the prosecutors. If grand jurors agree that “probable cause” exists to establish that an individual committed a crime, then an indictment can be issued and the individual may face a trial in court.

Special Counsel Mueller’s use of a grand jury in Washington D.C. indicates there is evidence of potential criminal conduct or a conspiracy involving activity within that judicial district.* By way of further example, if criminal conduct was believed to have occurred at Trump Tower in Manhattan, the Special Counsel could use a grand jury sitting in the Southern District of New York.

KINDS OF GRAND JURIES

A common “sitting grand jury” meets regularly to hear a variety of cases in a judicial district or division. On a given day, these grand juries could hear cases presented by different prosecutors concerning a wide range of criminal conduct – from murder to drug offenses to public corruption and organized crime. There are also “specially appointed grand juries” that meet once each week or monthly and are dedicated only to the needs of a particular investigation.

Because of grand jury secrecy, it is unknown whether Special Counsel Mueller is using a sitting grand jury in the District of Columbia or whether he has convened a grand jury dedicated solely to the Russia inquiry. News outlets are reporting that Mueller may be relying upon a regularly sitting grand jury previously empaneled in the District of Columbia. The type of grand jury actually used to preside over the investigation becomes significant

* Special Counsel Mueller is also using a second federal grand jury in the Eastern District of Virginia to investigate a variety of potential crimes involving former national security advisor Michael T. Flynn. The Eastern District of Virginia was selected either because Mr. Flynn formerly operated a consulting business in that location or because he worked at the Pentagon, which sits in the Eastern District of Virginia.

when considering potential outcomes. Specially appointed grand juries can have greater power than a sitting grand jury to issue a written report addressing noncriminal conduct.

GRAND JURY SECRECY

The role of a grand jury remains shrouded in mystery because of the strict secrecy rules governing everyone involved in the process. Grand juries are not open to the public. Jurors, government prosecutors, witnesses who testify, court reporters and other staff are prohibited from disclosing “matters occurring before the grand jury.” Exceptions to the secrecy rules are limited and routinely denied by the courts.

Accordingly, Special Counsel Mueller and members of the grand jury in his investigation cannot: publicly disclose the type of grand jury empaneled to hear the case; identify witnesses summoned to appear before the grand jury; or reveal the substance and nature of subpoenas or search warrants issued for records. Media reports about these issues should be viewed skeptically.

GRAND JURY POWERS

The powers of a grand jury are significant and far-reaching. This is the main reason that prosecutors routinely rely upon the grand jury process as part of their criminal investigations.

Use of a grand jury permits prosecutors to:

- Subpoena witnesses and take testimony under oath;
- Issue subpoenas for records or other tangible evidence;
- Compel testimony of witnesses who may otherwise invoke the privilege against self-incrimination by the grant of immunity; and
- Issue search warrants under seal for tangible evidence.

Many investigations involving high level government officials, members of organized crime, or other complex matters could not be effectively pursued without the extensive powers and secrecy of the grand jury process.

ROLES AND RIGHTS IN THE GRAND JURY

A grand jury is not an “adversarial” process. This means that the government prosecutor and the person under investigation do not have equal roles. The prosecutor leads the process and the grand jury members vote on the outcomes. The attorneys representing the people under investigation or representing witnesses providing testimony are not permitted to observe or interject during the proceedings. Judges are also not part of the grand jury process and do not preside over the testimony of witnesses. The testimony is given under questioning by the prosecutor. Testimony cannot be challenged or tested by defense counsel and is often not subjected to the same level of proof or corroboration common during a trial in court.

Legal privileges, such as confidentiality, do generally apply to grand jury proceedings. For example, should Special Counsel Mueller attempt to ask about a journalist’s source of information or about a communication between a lawyer and client, so long as the privilege is properly invoked, it will be enforced and the protected information will not be revealed to the grand jury or relied upon by the government.

POTENTIAL GRAND JURY OUTCOMES

Federal grand juries most often issue indictments or charging documents against the individuals or corporations under investigation. In 1985, Chief Judge Sol Watchler (New York) famously told the New York Daily News that “district attorneys now have so much influence on grand juries that ‘by and large’ they could get them to ‘indict a ham sandwich.’” Judge Watchler sought to make prosecutors more accountable for their actions and proposed doing away with use of the grand jury to bring criminal indictments.

One reason indictments are easily secured is that the standard of proof is low. According to the handbook issued to federal grand juries, “a finding of probable cause is proper...when the evidence presented to the grand jury, without any explanation being offered by the accused,

persuades 12 or more grand jurors that a federal crime has probably been committed by the person accused.”

In limited circumstances, a grand jury may issue a “grand jury report”. Generally, this applies only to a special grand jury and must be authorized by majority vote. The report is then submitted to the district court, potentially for public release. The grand jury report must concern:

- Noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation for removal or disciplinary action; or
- Organized crime conditions in the district.

Grand jury reports can be powerful and harmful to those identified in the report. Often individuals named in a grand jury report are not provided adequate opportunity to address the allegations against them. In the federal context, the issuance of a report is limited by the type of grand jury presiding over the matter, the conduct at issue, and the individuals involved. There is inconclusive information to support the notion that Special Counsel Mueller has, in fact, empaneled a special grand jury and even more doubt as to whether the conduct at issue or the individuals involved would fall under the reporting categories contemplated by federal statute.

WHAT TO EXPECT FROM THE RUSSIA INVESTIGATION GRAND JURY

The grand jury empaneled by Special Counsel Mueller can be expected to use the full extent of its powers. The federal prosecutors working in the Special Counsel’s office will certainly ask the grand jury to subpoena witnesses and evidence, issue search warrants, and take testimony from witnesses. Media reports indicate that some of these activities have already taken place.

Of course, it is too early to predict anything else with confidence. The secrecy of the grand jury process will keep everyone guessing, perhaps for

many months. However, the normal activity expected to take place as part of the grand jury process should not be interpreted to mean that criminal indictments are or are not likely to happen.

If the grand jury process concludes with a recommendation for criminal indictment against one or more individuals, this will only be the start of a much longer prosecution in federal court. ♦

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