CONSTITUTIONAL ACCOUNTABILITY CENTER

The Russia Investigation: What Happens to the Grand Jury if Mueller Is Fired?

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On May 17, 2017, Deputy Attorney General Rod Rosenstein appointed Robert Mueller to serve as Special Counsel and to conduct an investigation into possible links and coordination between the Russian government and individuals associated with the campaign of President Donald Trump, "any matters that arose or may arise directly from the investigation," and any federal crimes committed with the intent to interfere with the Special Counsel's investigation, such as obstruction of justice.[1] As part of that investigation, Special Counsel Mueller asked a federal judge to impanel a grand jury,[2] and over the last year that grand jury has approved indictments of multiple individuals associated with the Trump campaign or the Russian government.[3]

In recent months, news reports have suggested that President Trump has considered, or is considering, firing Special Counsel Mueller or those overseeing him, or otherwise attempting to derail Mueller's investigation.[4] This Issue Brief explores what the grand jury impaneled as part of that investigation might be able to do—and what it could not do—were Mueller to be fired.

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[1] Rod J. Rosenstein, Acting Att'y Gen., Appointment of Special Counsel To Investigate Russian Interference with the 2016 Presidential Election and Related Matters, Order No. 3915-2017 (2017); *see* 28 C.F.R. § 600.4(a) ("The jurisdiction of a Special Counsel shall also include the authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses; and to conduct appeals arising out of the matter being investigated and/or prosecuted.").

[2] David Jackson, Kevin Johnson & Erin Kelly, *Special Counsel Robert Mueller's Grand Jury Raises Stakes in Russia Investigation*, USA Today (Aug. 3, 2017), https://tinyurl.com/y9m92rpy.

[3] Andrew Prokop, *All of Robert Mueller's Indictments and Plea Deals in the Russia Investigation So Far*, Vox (Mar. 1, 2018), https://www.vox.com/policy-and-politics/2018/2/20/17031772/mueller-indictments-grand-jury; *see generally* David Yassky & Bennett L. Hershman, *Trump Can Fire Mueller, But Not a Grand Jury*, Politico (Feb. 14, 2018), https://tinyurl.com/yaww7uau.

[4] Maggie Haberman & Michael S. Schmidt, *Trump Sought To Fire Mueller in December*, N.Y. Times (Apr. 10, 2018), https://tinyurl.com/yatpxzkt. Some commentators have questioned whether Trump can directly order the firing of Mueller.

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The Founders enshrined the grand jury in the Fifth Amendment to the Constitution, providing that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[5] At the time of the Founding, grand juries enjoyed "broad powers,"[6] and they often operated independently of prosecutors, engaging in their own investigations and issuing their own reports detailing their findings. In carrying out these functions, early grand juries were "akin to . . . modern-day blue ribbon commissions and special prosecutors called to investigate in areas where regular government officials may have conflicts of interest."[7] As James Wilson said, the grand jury "may suggest publick improvements and the modes of removing publick inconveniences: they may expose to publick inspection, or to publick punishment, publick bad men, and publick bad measures."[8]

Although federal grand juries today work at the behest of federal prosecutors and rarely if ever exist or perform work without a prosecutor's close oversight and direction, no legal rules prohibit a modern grand jury from engaging in the independent investigation and reporting typical of earlier grand juries. In fact, courts have recognized that the Federal Rules of Criminal Procedure do not, except when expressly indicated, take away the powers traditionally enjoyed by grand juries. Nor do they eliminate the traditional discretion of district courts to determine when it is appropriate to disclose grand jury materials.

Given the potentially broad powers of the grand jury, and the discretion enjoyed by the district court judge overseeing the grand jury, it is significant that Mueller's firing would not, in and of itself, result in the discharge of the grand jury impanelled at his request. Under the Federal Rules of Criminal Procedure, only the district court judge who impaneled the grand jury can discharge it, and she enjoys broad discretion in determining whether and when to do so. Further, while Mueller's firing would prevent the grand jury from continuing to issue indictments and would, as a practical matter, limit its ability to engage in investigative activities, it might still be able to take action that could advance Mueller's work. Most significantly, the grand jury could, with the approval of the district court, prepare a report that could be disclosed either publicly or to Congress. Such a report could potentially shed critical light on what Mueller's investigation has thus far uncovered.

This Issue Brief explores these possibilities in detail. First, it describes the history of the grand jury's role from the time of the Founding, explaining that for most of its existence, the grand jury exercised far more investigatory, accusatory, and reporting power than it does today. Second, it describes the modern legal framework, explaining why modern federal grand juries exercise much less independence than they previously did, but noting that they still retain some important common law powers, including reporting powers. Third, it describes two important recent examples of grand juries that authored reports that were eventually released, at least to some parties. Fourth and finally, this Issue Brief discusses the extent to which something similar could happen with the grand jury in the Russia investigation.

Though there are few precedents for a modern grand jury taking such independent action, we are already in uncharted territory. If the President were to fire the individual at the helm of an investigation into crimes allegedly perpetrated by him and his associates, the grand jury—exercising its traditional role—

See, e.g., Marty Lederman, *Why Trump Can't (Lawfully) Fire Mueller*, Just Security (June 13, 2017), https://www.justsecurity.org/42044/trump-lawfully-fire-mueller/. That question, while important, is outside the scope of this Issue Brief.

[5] U.S. Const. amend. V.

[6] *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 424 (1983).

[7] Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J.1131, 1184 (1991).

[8] 2 James Wilson, *Collected Works of James Wilson* 996 (K. Hall & M. Hall eds., 2007).

may be the last bulwark to ensure that the investigation gets completed and justice is done. Even if practical obstacles prevented the grand jury from continuing its investigation, a report detailing what the Mueller investigation has thus far uncovered could meaningfully advance the ongoing investigation. This possibility highlights that firing Mueller, while politically treacherous and deeply disruptive to the rule of law, may not even produce the outcome the President desires—a complete end to the ongoing Special Counsel investigation.

I. History of the Grand Jury

"The grand jury has always occupied a high place as an instrument of justice in our system of criminal law—so much so that it is enshrined in the Constitution."[9] Specifically, the Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[10] In other words, under the Fifth Amendment, the government may not indict an individual for a federal felony except with the consent of a grand jury.[11]

"[A]n English institution," the grand jury was "brought to this country by the early colonists and incorporated in the Constitution by the Founders."[12] "[T]he grand jury's original function was . . . to give a centralized government the benefit of local knowledge in the apprehension of criminals."[13] In the colonies, this meant that grand juries could "resist[] perceived unjust expressions of royal authority through criminal prosecutions."[14] After independence, the grand jury retained the "structural role" of "moderating federalism" by allowing "local communities to express their views about federal criminal laws and enforcement priorities."[15]

Importantly, by the time of the Founding, the grand jury in England had "acquired an independence . . . free from control by the Crown or judges."[16] The grand jury was considered to be an important bulwark "to prevent the government from prosecuting persons for political purposes."[17] As the Supreme Court has explained, the grand jury's function "was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon

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[9] *Sells Eng'g, Inc.*, 463 U.S. at 423.

[10] U.S. Const. amend. V.

[11] *Blair v. United States*, 250 U.S. 273, 280 (1919) ("By the Fifth Amendment a presentment or indictment by grand jury was made essential to hold one to answer for a capital or otherwise infamous crime.").

[12] *Costello v. United States*, 350 U.S. 359, 362 (1956); *see also United States v. Calandra*, 414 U.S. 338, 342 (1974) ("The institution of the grand jury is deeply rooted in Anglo-American history.").

[13] Note, *The Grand Jury as an Investigatory Body*, 74 Harv. L. Rev. 590, 590 (1961).

[14] Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 Cornell L. Rev. 703, 730 (2008).

[15] *Id.* at 729.

[16] *Costello*, 350 U.S. at 362.

[17] Robert Gilbert Johnston, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. Crim. L. & Criminology 157, 159 (1974).

credible testimony or was dictated by malice or personal ill will."[18] These powers "reflect[] [the grand jury's] special role in insuring fair and effective law enforcement."[19]

To carry out its function, the English grand jury retained "wide investigative powers and gained prominence in fighting government corruption by issuing presentments against royal officials."[20] Indeed, because "England did not have an organized police force until 1824 or a public prosecutor system until 1879, English grand jurors conducted their own investigations."[21]

The same was true of early colonial grand juries. Colonial grand juries had wide powers, including "present[ing] suspected criminals," "plann[ing] the scope and direction of their investigations," and "gather[ing] their own evidence."[22] Indeed, colonial grand juries often did more than simply investigate crime; they also offered reports on matters of local public policy. Grand juries "recommended such things as the suppression of 'dram shops,' advised against the further erection of wooden bridges because of the fire hazards, called attention to the 'ruinous state' of public works due to the [revolutionary] war, and recommended the establishment of police systems."[23] In carrying out these functions, early grand juries were "akin to . . . modern-day blue ribbon commissions and special prosecutors called to investigate in areas where regular government officials may have conflicts of interest."[24] As James Wilson said, the grand jury "may suggest publick improvements, and the modes of removing publick inconveniences: they may expose to publick inspection, or to publick punishment, publick bad men, and publick bad measures."[25]

After the adoption of the Constitution, early grand juries—both federal and state—also acted as a real check on prosecutors. In an early example, the U.S. Attorney for Kentucky moved for a grand jury to consider charges against Aaron Burr for his alleged attempt to trigger a war between the United States and Spain, but the grand jury refused to indict.[26] Instead, it issued a written declaration stating that Burr did not have "any design inimical to the peace and well-being of the country."[27] When a second grand jury in the Mississippi Territory was similarly asked to consider treason charges against Burr, it

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[18] *Hale v. Henkel*, 201 U.S. 43, 59 (1906), *overruled on other grounds by Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964); *see also Calandra*, 414 U.S. at 342-43 ("In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action.").

[19] *Id.* at 343; *see Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1972) ("the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions").

[20] Michael F. Buchwald, *Of the People, by the People, for the People: The Role of Special Grand Juries in Investigating Wrongdoing by Public Officials*, 5 Geo. J.L. & Pub. Pol'y 79, 84 (2007).

[21] Susan M. Schiappa, Note, *Preserving the Autonomy and Function of the Grand Jury:* United States v. Williams, 43 Cath. U. L. Rev. 311, 328 n.89 (1993).

[22] *Id.* at 328.

[23] Richard D. Younger, *The People's Panel: The Grand Jury in the United States, 1634-1941*, at 42 (1963).

[24] Amar, *supra* note 7, at 1184.

[25] Wilson, *supra* note 8, at 996.

[26] Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 Am. Crim. L. Rev. 701, 734 (1972).

[27] *Id.* at 734-35 (quoting J.J. Combs, *The Trial of Aaron Burr for Treason* xxii (1864)).

not only declined to indict him, but also declared that his arrest had been made "without warrant [or] other lawful authority" and represented a "grievance destructive of personal liberty."[28]

On top of their important role in checking prosecutorial zeal, grand juries had "the power to file charges without the approval of a prosecutor by issuing a 'presentment.'"[29] A "presentment is a charge the grand jury brings on its own initiative," and contrasts with an indictment, which "is almost always first drawn up by a prosecutor and then submitted to the grand jury for approval."[30] Grand jury presentments were treated as a "mandate to a district attorney to initiate a prosecution."[31]

Thus, up until the twentieth century, grand juries often completed their own investigations and filed their own presentments, even without a prosecutor's help or approval. As the Supreme Court described the institution in 1895, "in this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and, after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment."[32] Indeed, before the modern era of government-directed prosecution, all grand juries "operated as completely independent, self-directing bodies of inquisitors, with power to pursue unlawful conduct to its very source, including the government itself."[33]

An early and prominent example of an independent grand jury investigation took place in New York in 1872. The Tweed Ring was a collection of politicians led by William Tweed, also known as Boss Tweed, that took control of nearly every lever of power in New York City during the 1870s and used their power to funnel public money for their own personal gain.[34] This cabal was ultimately brought down by a grand jury, which exercised its "broad authority to subpoena witnesses and books" in order to "obtain evidence [of corruption] in spite of the elaborate efforts of . . . politicians to hide their operations."[35] As one historian has described it, "[a]fter obtaining what assistance they could from reform leaders, [the grand jury] set out to find evidence against city officials without the assistance of experts from the district attorney's office."[36] The twenty-one jurors split into committees, and these committees "visited banks to check on the accounts of public officials, called at the homes of witnesses who were unable to come to the jury, and checked the operations of each of the city departments."[37] They worked for "four arduous

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[28] *Id.* at 735-36 (quoting Combs, *supra* note 27, at xxxiv).

[29] Buchwald, *supra* note 20, at 85.

[30] Renee B. Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 Yale L.J. 1333, 1334 (1994).

[31] Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 Creighton L. Rev. 821, 837 (2000); *see* Lettow, *supra* note 30, at 1339 ("if the grand jury will take it upon themselves to present the offence in that court, it will be the duty of the district attorney to reduce that presentment into form, and the point in controversy will thus be put in a train for judicial determination" (quoting 1 Op. Att'y Gen. 22, 23 (1794))).

[32] *Frisbie v. United States*, 157 U.S. 160, 163 (1895); *see Calandra*, 414 U.S. at 343 (traditionally the grand jury "has been accorded wide latitude to inquire into violations of criminal law," "may determine alone the course of its inquiry," and "may compel the production of evidence or the testimony of witnesses as it considers appropriate").

[33] Roots, *supra* note 31, at 822.

[34] Younger, *supra* note 23, at 182-83.

[35] *Id.* at 184.

[36] *Id.* at 185; *see* Roots, *supra* note 31, at 833 (a New York jury "toppled" Boss Tweed "[w]ithout the prosecutor's assistance").

[37] Younger, *supra* note 23, at 185.

months" despite "[s]ocial and political pressures brought to bear by those who feared indictment," and in the end brought indictments of Tweed and twelve other politicians.[38]

Grand juries from this era even investigated where prosecutors attempted to stand in their way. For example, a grand jury in a 1900 probe of gambling in New York City faced a district attorney who refused to prosecute. The grand jury therefore "took complete control of [its] investigation[]," and "began to subpoena their witnesses directly, refusing to go through the district attorney's office."[39] Moreover, it went directly to the judge for legal assistance.[40] In the end, the grand jury indicted the Police Chief and issued a final report "rebuk[ing] the district attorney for his attitude toward it and for inefficiency in conducting his office."[41]

In addition to robust investigatory powers, the traditional grand jury also "had a reporting function apart from, and in addition to, its indicting functions."[42] Indeed, "[the] grand jury practice of issuing reports on matters of public concern was followed in the American colonies."[43] In a 1952 New Jersey Supreme Court decision, that court observed that grand juries "[m]any times" make reports to the court concerning, among other things, "the operation of public institutions within the county."[44] In that case, the court approved a grand jury report "critical of lax and indifferent public officials."[45] While sometimes controversial,[46] this reporting function has also been celebrated as "one of the most valued and treasured restraints upon tyranny and corruption in public office."[47]

In sum, for much of American history, the grand jury was a powerful institution that independently investigated crimes, issued its own presentments, and sometimes issued reports detailing both criminal and non-criminal concerns. As described in the next section, the federal grand jury has shed many of these powers over time, but only some of these changes are the result of formal legal changes to our criminal justice system.

II. The Modern Federal Grand Jury

The federal grand jury has transformed in many ways since the Founding, primarily for two reasons. First, the Federal Rules of Criminal Procedure now prohibit federal grand juries from issuing their own presentments or indictments, thus restricting a key power of the traditional grand jury. Second, the increasing complexity of federal criminal law and the consequent reliance of grand juries on prosecutors

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[38] *Id.* at 185-86.

[39] *Id.* at 188-89.

[40] *Id.* at 189.

[41] *Id.* at 189-90.

[42] Richard H. Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 Colum. L. Rev. 1103, 1106 (1955).

[43] *Id.* at 1110.

[44] *In re Presentment by Camden Cty. Grand Jury*, 89 A.2d 416, 441 (N.J. 1952).

[45] Kuh, *supra* note 42, at 1114.

[46] *Id.* at 1105.

[47] *Id.* at 1114 (quoting New York Governor Thomas Dewey).

for legal and procedural assistance has made federal grand juries much less likely to investigate and report independently. That said, despite these practical impediments, the law still leaves open the possibility that a grand jury could issue its own report that a district court judge could choose to release publicly.

The Federal Rules of Criminal Procedure were enacted in 1946 and included several provisions governing grand jury procedures. Rule 6 provides that "[w]hen the public interest so requires, the court must order that one or more grand juries be summoned."[48] Grand juries are to be composed of "16 to 23 members."[49] While attorneys for the government, witnesses, and a court reporter may be present when the grand jury is in session, only the jurors may be present while the grand jury is deliberating or voting.[50] A grand jury may indict only if at least 12 jurors concur.[51] Finally, though grand juries typically serve for 18 months, "[a] grand jury must serve until the court discharges it."[52] The Rules do not provide any standard for when a district court judge should discharge a grand jury before 18 months, and it allows a judge to extend the customary 18-month period by up to 6 months if "an extension is in the public interest."[53]

In some respects, the federal grand jury still retains broad powers. Its jurisdiction includes "the investigation of possible violations of federal criminal law triable in the district in which it is sitting."[54] Moreover, a grand jury may "investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not,"[55] and its investigations "may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors."[56]

However, the Rules were also designed to encourage grand juries to "act . . . from charges made by the United States attorney," not "from their own knowledge or observation."[57] Thus, Rule 7 requires all felonies to be "prosecuted by an indictment," and for an "indictment . . . [to] be signed by an attorney for the government."[58] According to the advisory committee notes, "presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts."[59] To indict today, a federal prosecutor must assent.[60]

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[48] Fed. R. Crim. P. 6(a)(1).

[49] *Id.*

[50] *Id.* 6(d)(1) & (2).

[51] *Id.* 6(f).

[52] *Id.* 6(g).

[53] *Id.*

[54] Charles Doyle, *The Federal Grand Jury*, Cong. Research Serv. 3 (May 7, 2015).

[55] *United States v. Williams*, 504 U.S. 36, 48 (1992).

[56] *Branzburg*, 408 U.S. at 701.

[57] Lester B. Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 346 (1958).

[58] Fed. R. Crim. P. 7(c)(1).

[59] Fed. R. Crim. P. 7(a) advisory committee's note 4.

[60] In 1965, three Fifth Circuit judges argued that the rule requiring the prosecutor's signature was merely a clerical rule to authenticate the grand jury's indictment, and that the Rules were not intended to give prosecutors a veto over the grand jury's indictment. See *United States v. Cox*, 342 F.2d 167, 173-81 (5th Cir. 1965) (en banc) (Rives, Gewin, and Bell, JJ.,

Likewise, the modern grand jury typically no longer carries out its own investigations and rarely issues reports. Though "never abolished by federal statute," the grand jury's common law powers to investigate and report "eroded more informally" because most grand jurors "remain ignorant of their power and limit their role to considering charges put forward by the federal prosecutor."[61] As one scholar has explained, grand jurors today rely on the prosecutor "to educate them about the law in general and the evidence in a particular case," and so modern prosecutors "dominate the federal grand jury process."[62] This is especially so in the federal system, where a large proportion of crimes are complex violations of laws like antitrust, bank fraud, corruption, and organized crime.[63] Today, the grand jury almost never refuses to indict when a prosecutor wishes to do so, and similarly almost never recommends prosecution when the prosecutor disagrees.

Indeed, "[i]n many cases, the government will have already conducted an investigation and the attorney for the government will present evidence to the panel," while "[i]n other cases, the investigation will be incomplete and the grand jury, either on its own initiative or at the suggestion of the attorney for the government, will investigate."[64] In every case, the government attorney will arrange the appearance and the order of witnesses, and the grand jury will—as a matter of necessity—rely on the prosecutor for legal advice and to draft indictments.[65]

With regard to grand jury reports, the Federal Rules of Criminal Procedure explicitly prohibit grand jurors from disclosing a matter occurring before the grand jury, and grand jurors can face penalties for doing so.[66] These secrecy rules and norms are, of course, critical to the grand jury's function: they "protect against tampering with grand jurors or grand jury witnesses," "prevent the flight of the person under investigation" and "protect[] the innocent accused from undue publicity."[67] Thus, a grand jury could not, on its own, make public the results of any investigation it undertook without violating Rule 6(e).

However, federal law permits a district court to authorize the release of a grand jury report or other grand jury materials in certain circumstances. Rule 6(e)(3)(E) permits a court to "authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter" in certain enumerated instances, including "preliminarily to or in connection with a judicial proceeding."[68] The Advisory Committee Notes explain that this rule was intended to "continue[] the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure."[69] Thus,

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concurring in part and dissenting in part). Whatever the merits of that argument, however, the consensus view is now that prosecutors get such a veto.

[61] Buchwald, *supra* note 20, at 86. Notably, at common law, grand juries had the power to *exclude* a prosecutor from their presence at any time. *See Hale*, 201 U.S. at 64 (at common law, "none but witnesses have any business before the grand jury, and that the solicitor may not be present, even to examine them").

[62] Buchwald, *supra* note 20, at 85.

[63] Judith M. Beall, *What Do You Do With a Runaway Grand Jury?: A Discussion of the Problems and Possibilities Opened Up By the Rocky Flats Grand Jury Investigation*, 71 S. Cal. L. Rev. 617, 632 (1998).

[64] Doyle, *supra* note 54, at 7.

[65] *Id.*

[66] Fed. R. Crim. P. 6(e)(2).

[67] Beall, *supra* note 63, at 634.

[68] Fed. R. Crim. P. 6(e)(3)(E) & (E)(i).

[69] Fed. R. Crim. P. 6(e) advisory committee's note 1.

Rule 6(e) is generally understood to have codified the traditional practice of grand juries maintaining secrecy, but of district courts having discretion to determine the extent of that secrecy. And the Supreme Court has "repeatedly stressed that wide discretion must be afforded to district court judges in evaluating whether disclosure is appropriate."[70]

For that reason, numerous courts of appeals have concluded that the list of permissible reasons for releasing grand jury materials in Rule 6(e)(3)(E) is not exclusive, and that district courts have inherent authority to release grand jury materials as part of their role in overseeing grand juries. For example, the Eleventh Circuit has pointed out that though the Rule "provides little guidance as to when a court is free to go beyond the rule," "it is certain that a court's power to order disclosure of grand jury records is not strictly confined to instances spelled out in the rule."[71] Courts, it concluded, may "act outside Rule 6(e) in . . . exceptional circumstances consonant with the rule's policy and spirit."[72] Likewise, the Seventh Circuit recently concluded that the "text and history of the Rules indicate that Rule 6(e)(3)(E) is permissive, not exclusive, and it does not eliminate the district court's long-standing inherent supervisory authority to make decisions as needed to ensure the proper functioning of a grand jury."[73] And the Second Circuit has held that historic importance can be a reason to disclose grand jury materials, and emphasized that this power is "consonant with the role of the supervising court and will not unravel the foundations of secrecy upon which the grand jury is premised."[74]

Indeed, a recent decision by Chief Judge Beryl Howell—the district court judge overseeing Mueller's grand jury—reiterated that district courts have inherent authority to release grand jury materials in certain circumstances. In the context of deciding to unseal large portions of eleven dockets associated with the 1998 investigation by an independent counsel into the relationship of President Bill Clinton and Monica Lewinski, Chief Judge Howell noted that "a district court retains an inherent authority to unseal and disclose grand jury material not otherwise falling within the enumerated exceptions to Rule 6(e)" as part of a "court's supervisory authority over grand juries."[75]

Though courts have not done much to spell out a precise test for when grand jury materials can and should be released, there are several common law factors that courts have identified as relevant to any

[70] *United States v. John Doe, Inc. I*, 481 U.S. 102, 116 (1987); *see Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959) (same). In fact, prior to the adoption of the Federal Rules, the Supreme Court had already held that the release of sealed grand jury materials "rests in the sound discretion of the court" and is "wholly proper where the ends of justice require it." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-34 (1940).

[71] *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261, 1268 (11th Cir. 1984); *see In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219, 1228 (D.D.C. 1974) (finding "no justification for a suggestion that this codification of a 'traditional practice' should act, or have been intended to act, to render meaningless an historically proper function of the grand jury by enjoining courts from any disclosure of reports in any circumstance"). Notably, the Rules themselves say that "when there is no controlling law . . . [a] judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district." Fed. R. Crim. P. 57(b).

[72] *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d at 1269.

[73] *Carlson v. United States*, 837 F.3d 753, 766 (7th Cir. 2016); *see In re Special Feb., 1975 Grand Jury*, 662 F.2d 1232, 1236 (7th Cir. 1981) ("We may not always be bound by a strict and literal interpretation of Rule 6(e) in the situation where there is some extraordinary and compelling need for disclosure in the interest of justice, and little traditional need for secrecy remains.").

[74] *In re Craig*, 131 F.3d 99, 103 (2d Cir. 1997).

[75] *In re Unseal Dockets Relating to Indep. Counsel's 1998 Investigation of President Clinton*, 2018 WL 1801173, at *1-*2, *6 (D.D.C. Apr. 16, 2018).

decision to release a grand jury report. For instance, the Fifth Circuit has made clear that "there is persuasive authority and considerable historical data to support a holding that federal grand juries have authority to issue reports which do not indict for crime, in addition to their authority to indict."[76] To decide when this can happen, the court listed as relevant factors "whether the report describes general community conditions or whether it refers to identifiable individuals; whether the individuals are mentioned in public or private capacities; the public interest in the contents of the report balanced against the harm to the individuals named; the availability and efficacy of remedies; whether the conduct described is indictable."[77] The Second Circuit has enumerated other possible factors: "(i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury proceedings and that of their families; (vii) the extent to which the desired material—either permissibly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question."[78]

Furthermore, the provision of federal law governing special grand juries may offer courts some additional guidance. Special grand juries are different than ordinary grand juries: courts are required to impanel them once every eighteen months in large judicial districts to "inquire into offenses against the criminal laws of the United States alleged to have been committed within that district."[79] Federal law specifically provides that a special grand jury may submit to the court a report concerning specified subjects which the court may release publicly if the report "is based upon facts revealed in the course of an investigation," "is supported by the preponderance of the evidence," and "is not critical of an identified person."[80] Though limited to special grand juries, these provisions could provide additional guidance to a district court judge in deciding whether to allow a regular grand jury report to become public.[81]

In short, though modern federal grand juries exercise far less independence than traditional grand juries, only part of this change is due to the adoption of the Federal Rules. Instead, this change is largely the result of the increasing complexity of federal law and the ability of prosecutors to control what the grand jury sees and does. The only impediments to an independent grand jury investigation are practical: modern grand juries typically do not have the resources and expertise to conduct their own investigations. Likewise, where the interests of justice are served and a district court judge approves, there is no legal prohibition on a grand jury releasing a report detailing its findings. Though rarely

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[76] *In re Grand Jury Proceedings*, 479 F.2d 458, 460 (5th Cir. 1973).

[77] *Id.* at n.2.

[78] *In re Craig*, 131 F.3d at 106.

[79] 18 U.S.C. §§ 3331(a), 3332(a).

[80] *Id.* § 3333(b).

[81] Though at least two district courts have relied on this provision governing special grand juries to suggest that an ordinary grand jury has no power to issue a report, *see United States v. Ceccerelli*, 350 F. Supp. 475, 479 (W.D. Pa. 1972) (stating, without citation, that "[t]he Special Grand Jury . . . can issue reports while a regular Grand Jury cannot"); *In re Grand Jury Proceedings*, 813 F. Supp. 1451, 1463 (D. Colo. 1992) (same, citing to *Ceccerelli*), that argument is belied by the legislative history of the statute creating special grand juries. Congressman Poff, a sponsor of the special grand jury bill, explained that although "the authority to issue reports relevant to organized crime investigations has been specifically conferred upon the special grand juries created by this title," "[t]he committee does not thereby intend to restrict or in any way interfere with the right of regular Federal grand juries to issue reports as recognized by judicial custom and tradition." 116 Cong. Rec. 35291 (1970).

exercised, the modern grand jury continues to retain this traditional common law power, and as the next section describes, sometimes uses it.

III. Recent Grand Jury Reports

As described above, the modern grand jury rarely independently investigates criminal activity or issues findings in the form of a report. There are, however, at least two examples after the enactment of the Federal Rules of Criminal Procedure in which grand juries have been permitted to release reports detailing their investigations, despite the requirements of grand jury secrecy.

First, the grand jury investigating the Watergate scandal wrote a report and issued a recommendation that the report be submitted to the Committee on the Judiciary of the House of Representatives for its consideration as part of impeachment proceedings against President Nixon, and the district court approved this request. Although in that case the grand jury was working in conjunction with a special prosecutor, the presence of the special prosecutor does not appear to have played any role in the court's analysis. Instead, the Court concluded that "grand jury prerogatives extend to the presentation of documents that disclose evidence the jury has gathered but which do not indict anyone."[82] The court noted that "grand juries have historically published reports on a wide variety of subjects,"[83] and also pointed to other courts which had permitted grand juries to issue reports.[84] Moreover, addressing Rule 6(e) secrecy requirements, the court noted that because the grand jury had ended its work, "[t]here [was] no need to protect against flight on anyone's part, to prevent tampering with or restraints on witnesses or jurors, to protect grand jury deliberations, [or] to safeguard unaccused or innocent persons with secrecy."[85]

Speaking more broadly, the court emphasized that it was "deal[ing] in a matter of the most critical moment to the Nation, an impeachment investigation involving the President," and that "[i]t would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on all the pertinent information."[86] For that reason, the court suggested that "[t]hese considerations might well justify *even a public disclosure* of the Report," but in any event held that there was "ample basis" for disclosing the report to the House Committee investigating the President.[87] The D.C. Circuit, sitting en banc, noted that it was "in general agreement with" the district court judge's handling of the "question of the grand jury's power to report," and did not believe the district court

[82] *In re Report and Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. at 1222.

[83] *Id.*

[84] *Id.* at 1223 (grand jury powers "include the power to make presentments, sometimes called reports, calling attention to certain actions of public officials, whether or not they amounted to a crime" (quoting *In re Presentment of Special Grand Jury Impaneled Jan., 1969*, 315 F. Supp. 662 (D. Md. 1970))); *id.* at 1224 ("the grand jury had the authority to make the report" (quoting *Application of Johnson et al.*, 484 F.2d 791, 797 (7th Cir. 1973))).

[85] *Id.* at 1229.

[86] *Id.* at 1230.

[87] *Id.* (emphasis added).

abused its discretion.[88] In short, the Watergate case is an important example of a district court judge approving the dissemination of a grand jury report to a House Committee.

A second example illustrates how a grand jury—in this case, a special grand jury—can take initiative and craft a report on its own, but also serves as a cautionary tale of the limits of what a grand jury can do without a district court judge's approval. In the early 1990s, a special grand jury spent over two years hearing evidence of environmental crimes involving hazardous wastes at the Rocky Flats Nuclear Weapons Plant outside Denver. Although the Justice Department negotiated a plea agreement with the company that ran the plant and did not indict any individuals, the grand jurors believed this settlement was too lenient.[89] The grand jury ended up writing its own informal report detailing what it viewed as the environmental crimes that had been committed at the plant over the course of decades and its disagreement with the prosecutor's plea deal and submitted that report to the district court judge.[90]

At first, the district court judge refused to release the report and sealed it.[91] In response, some of the grand jurors started talking to reporters at the Denver-area weekly *Westword* about the case, likely violating the rules of secrecy governing grand jury proceedings. The *Westword* ran an extensive cover story on the Rocky Flats grand jury and published excerpts of the sealed grand jury report, presumably leaked by grand jurors.[92] For these secrecy violations, the grand jurors were investigated by the FBI, though no charges were brought.[93]

Various news organizations ended up filing a motion to release the grand jury's report in full, but the district court, applying the standard discussed above, issued an order refusing the request.[94] Importantly, however, the court noted that "it was possible for the special grand jury to draft an acceptable report, a report which the Court could, in good conscience, release to public view."[95] In the end, the district court judge "authorized the release of an edited version of the grand jury report along with the government's response to it,"[96] recognizing that there were "some portions of the report that may heighten awareness of the activities at Rocky Flats and address certain of the community's safety, health, and environmental concerns."[97] The Rocky Flats case, therefore, is an important example of a grand jury taking initiative and writing its own report, but also illustrates that a grand jury cannot make a report public without the support of a district court judge. To do so would violate grand jury secrecy requirements—requirements that serve important purposes—and could lead a court to hold grand jurors in contempt.[98]

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[88] *Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974) (en banc).

[89] Beall, *supra* note 63, at 625.

[90] Barry Siegel, *Showdown at Rocky Flats: The Justice Department Had Negotiated a Rocky Flats Settlement, but the Grand Jury Could Not Keep Quiet About What Happened There*, L.A. Times (Aug. 15, 1993), https://tinyurl.com/yawrate9.

[91] *Id.*

[92] *Id.*

[93] Beall, *supra* note 63, at 626.

[94] See *In re Grand Jury Proceedings*, 813 F. Supp. at 1454.

[95] *Id.* at 1459.

[96] Beall, *supra* note 63, at 625-26.

[97] *See In re Grand Jury Proceedings*, 813 F. Supp. at 1455.

[98] *See* Fed. R. Crim. P. 6(e)(7).

IV. Implications for the Mueller Grand Jury

The foregoing history raises questions about what the federal grand jury working with Mueller's team could do if he were fired and his team disbanded.[99] Three points are clear. First, as already noted, the President and his political appointees cannot fire a grand jury. Only Chief Judge Beryl A. Howell of the U.S. District Court for the District Court of Columbia, who impaneled the grand jury, has the power to discharge the grand jury. And President Trump cannot fire Chief Judge Howell—an Article III judge—or order her to do anything.

Second, the grand jury could not issue any additional indictments because the Federal Rules require the signature of a prosecutor. To be sure, if President Trump fires Mueller, another prosecutor, such as the U.S. Attorney for the District of Columbia, could sign indictments issued by the grand jury. But President Trump could just as easily order that prosecutor to refuse to sign indictments or fire that person and install someone who would agree not to sign any indictments from the grand jury and who would be willing to dismiss any indictments his predecessor might have signed. In short, the Trump Administration has the power to prevent indictments from issuing.[100]

Third, nothing in the Federal Rules strips grand juries of their common law authority to investigate and write reports. As the Supreme Court has said, traditionally the grand jury "may determine alone the course of its inquiry,"[101] and the Federal Rules did not change that.

With respect to continued investigation, the primary hurdle would likely be logistical: "[T]he Federal Rules of Criminal Procedure . . . provide no clear avenue for the exercise of traditional grand jury powers," and grand juries do not have "their own investigative staff and resources."[102] As another commentator has noted, grand jurors "have no staff, no physical facility other than the room in which they periodically meet, no expertise in interviewing witnesses or collecting and analyzing data, no legal authority to hire such expertise, and no budget to pay for any of these things."[103] Thus, the modern grand jury typically must rely on prosecutors to conduct any serious investigation of crimes.

While practical limitations may make it impossible for the grand jury to engage in additional investigation, the Mueller grand jury may already be aware of sufficient information to enable it to write a report without any additional investigation, given the evidence the grand jury has already heard and the indictments the grand jury has already issued. If the grand jury were to decide to prepare a report, it would then be up to the district court to determine whether to release that report publicly, either in

[99] In all likelihood, if Mueller is fired, his team will be fired or disbanded too, and there would be no new special counsel to assist the grand jury. That is not necessarily the case, however. After President Richard Nixon fired the first special prosecutor in the Watergate case, he appointed another special prosecutor—Leon Jaworski—who continued the investigation for another year before Nixon's resignation. *See generally* Patrick Cox, *Cox: It's Time for Another Leon Jaworski*, Hous. Chron. (May 20, 2017), https://www.houstonchronicle.com/opinion/outlook/article/Cox-It-s-time-for-another-Leon-Jaworski-11161500.php.

[100] One commentator has suggested that Chief Judge Howell could appoint a new special counsel, while acknowledging that this arrangement raises questions about the district court's authority, as well as separation-of-powers concerns. *See* David Ignatius, *How the Courts—Not Congress—Could Protect Mueller's Investigation*, Wash. Post (Apr. 3, 2018), https://tinyurl.com/y8gbs8uu.

[101] *Calandra*, 414 U.S. at 343.

[102] Roots, *supra* note 31, at 829.

[103] Frank Bowman, *No, a Zombie Grand Jury Won't Save the Russia Probe*, Politico (Feb. 15, 2018), https://www.politico.com/magazine/story/2018/02/15/trump-grand-jury-fire-mueller-217002.

total or in part, or to provide it to a specific body like a congressional committee. As described above, numerous courts have held that the Federal Rules maintain the district court's traditional discretion to release grand jury materials in special cases when it serves the interests of justice. Following these cases, Chief Judge Howell could look to whether the grand jury's report is based on its investigation, is supported by a preponderance of the evidence, and whether the benefit to the public of releasing a report outweighs any harm to any individual. The fact that any report would presumably be released toward the end of the grand jury's investigation, and the fact that the report would concern a matter of national importance involving the President, would counsel in favor of release.

To be sure, the court would have to consider countervailing concerns with releasing any report, like fairness to individuals mentioned in the report and national security interests if any of the information is sensitive or classified. Moreover, there may be a stronger case for disclosure if the grand jury wished only a particular audience to receive the report. For instance, Chief Judge Howell, like the district court in the Watergate case, could decide to disclose a grand jury report to congressional committees investigating Trump-Russia connections. Even the disclosure on a limited basis of such a report could be significant, particularly if the grand jurors have been exposed to information over the last several months that lead them to believe that crimes have been committed by individuals whom Mueller is investigating.

In short, if Mueller is fired, what happens with this investigation will largely be up to the grand jurors and to Chief Judge Howell: if Chief Judge Howell decides not to discharge the grand jury, the grand jurors can decide whether to put together a report regarding what they have learned, and Chief Judge Howell enjoys the discretion to determine whether to disclose that report publicly or to a limited audience.

Conclusion

The modern grand jury has largely become a tool of prosecutors. But that was not always the case. Traditionally, grand juries completed their own investigations, released reports detailing their findings, and even bucked the will of prosecutors. While the Federal Rules of Criminal Procedure limited the authority of federal grand juries in some respects, they did not make grand juries completely toothless. Should President Trump attempt to derail the Justice Department's investigation of his campaign's collusion with Russia, the grand jury impaneled last summer would continue to exist until and unless Chief Judge Howell discharges it. And nothing in the Federal Rules deprives grand juries of their common law powers to investigate and report findings to a district court judge, who would have the discretion to release the report to Congress or the public. In short, what the grand jury does in the face of such a crisis will largely depend on the initiative the jurors choose to take and the support that Chief Judge Howell affords them. While it is impossible to predict what exactly would happen in the aftermath of any firing of Mueller, one thing is certain: firing Mueller does not necessarily mean the President would be successful in ending the Russia investigation and burying the evidence that might implicate him or his associates.