

**[J-56A-J & L-2018] [MO: Todd]  
IN THE SUPREME COURT OF PENNSYLVANIA  
WESTERN DISTRICT**

**SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.**

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| IN RE: FORTIETH STATEWIDE | : Nos. 75, 77-82, 86-87, 89 WM 2018 |
| INVESTIGATING GRAND JURY  | :                                   |
|                           | : ARGUED: September 26, 2018        |
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**CONCURRING OPINION**

**JUSTICE BAER**

**DECIDED: DECEMBER 3, 2018**

I join the Majority Opinion in full in concluding, reluctantly, that the parties failed to present any currently available remedy to cure the due process violations identified in this Court's decision of July 27, 2018, other than the previously ordered redaction of the grand jury report. *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560 (Pa. 2018). Additionally, I concur in principle with many of the sentiments expressed by Justice Dougherty in his responsive opinion. I write separately to address two points.

First, like my colleague in concurrence, I agree that this Court should provide guidance to the Commonwealth regarding how it may comport with due process in conducting future investigating grand juries where an individual's right to reputation is implicated, pending any legislative action to address the constitutional deficiencies in the Investigating Grand Jury Act, 42 Pa.C.S. §§ 4541-4553, highlighted by this Court's July 27<sup>th</sup> decision. *Id.* Moreover, while I understand the benefits of presenting a potential framework for how due process may be effectuated, I emphasize the concurrence's

observation that the recommendations “are not etched in stone” and “should not be interpreted as the only method of affording the necessary protections.” Concurring Op. at 2 (Dougherty, J.). My fear is that any rigid framework could be manipulated to delay the publication of grand jury reports until the passage of the statutory maximum term of a grand jury, concluding in the unsatisfactory result seen in the instant case.

While I do not endorse specific procedures, I generally caution the Commonwealth that, if it intends to criticize but not indict an individual in a grand jury report to an extent that threatens the individual’s right to reputation, it should provide reasonable notice of any potential accusations and a meaningful opportunity to respond thereto. In my view, detailed procedural requirements are better left to the legislative branch or addressed by a supervising judge on a case-by-case basis.

Second, I acknowledge the Majority’s observation that the question of any future grand jury investigation of these Petitioners is outside the scope of the current case. Majority Op. at 18, n.16. Nevertheless, based on my current understanding of the various constitutional rights at issue and estoppel doctrines generally, I see no impediment to a new investigation of these Petitioners, or potentially other individuals, by a future grand jury, so long as the necessary due process is provided by the Commonwealth. I acknowledge, of course, that future advocacy to the contrary may alter my position.