Defense Counsel Options Widen As No-Bill Rate Increases

By **Henry Hockeimer and Brad Gershel** (April 3, 2026)

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For decades, former New York Court of Appeals Chief Judge Sol Wachtler's famous quip that a prosecutor could persuade a grand jury to "indict a ham sandwich" has been treated as an immutable law of federal criminal practice.[1]

It symbolized the government's near-total control over the charging process and appeared to reduce a core Fifth Amendment protection — that no "person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" — to a mere procedural formality. Yet a recent and unprecedented wave of federal grand jury no-bills in high-profile, politically sensitive cases suggests that a profound structural shift may be underway.

Grand juries across the country are suddenly, and repeatedly, saying no. From refusing to indict demonstrators accused of clashing with federal law enforcement at immigration facilities, to rejecting legally strained theories against high-level political figures — most recently evidenced by the collapse of cases against Democratic lawmakers and New York Attorney General Letitia James — citizens impaneled on grand juries are reasserting their role as a critical check on state power.

In some cases, the grand jury is becoming an active and potentially decisive stage of the adversarial process. For defense practitioners, this development should prompt a careful reassessment of preindictment strategy.

The Statistical Backdrop

To appreciate the significance of these recent developments, one must first understand how extraordinarily rare no-bills have historically been.

According to the U.S. Department of Justice's Bureau of Justice Statistics, federal prosecutors' dominance over the grand jury process has long been nearly absolute. In fiscal year 2013, federal grand juries declined to indict in just five out of 196,969 criminal matters concluded — a rate of roughly 0.003%.[2] The numbers remained similarly lopsided in subsequent years: 14 no-bills out of 170,161 matters in 2014 (0.008%), 19 out of 163,005 in 2015 (0.012%), and six out of 155,615 in 2016 (0.004%).[3]

At first glance, these numbers appear to confirm the ham-sandwich theory of the federal charging process. But the statistics have always been misleading.

The overwhelming indictment rate was never simply the product of juror passivity. Rather, it reflected the internal filtering mechanisms embedded within the DOJ.

Cases typically pass through multiple layers of review before ever reaching a grand jury. A criminal referral from investigators is evaluated by line prosecutors, vetted by supervisory attorneys, and — when politically sensitive matters or public officials are involved — often

reviewed by specialized units such as the DOJ's Public Integrity Section.

Federal prosecutors historically subject potential cases to multiple layers of internal screening before they are ever presented to a grand jury. Investigative referrals typically pass through line prosecutors and supervisory review, and the DOJ's internal policies impose additional safeguards in sensitive matters.

For example, when an investigation involves public officials, political campaigns or election-related conduct, Section 9-85.000 of the Justice Manual requires consultation with — and often approval from — the Criminal Division's Public Integrity Section before prosecutors may take overt investigative steps or seek an indictment.

More broadly, the Principles of Federal Prosecution set a baseline evidentiary threshold for any charging decision. Under Section 9-27.220 of the Justice Manual, prosecutors are instructed to proceed only when the admissible evidence will likely be sufficient to obtain and sustain a conviction. Cases that fall short of that standard are ordinarily filtered out within the DOJ and never reach a grand jury at all.

Bureau of Justice Statistics data from fiscal years 2020 through 2023 confirm this dynamic. During that period, U.S. attorney's offices declined to prosecute approximately 17% to 26% of criminal referrals.[4] In other words, the vast majority of weak or uncertain cases are filtered out internally long before a grand jury ever sees them.

The result is a classic example of statistical survivor bias. The more-than 99% indictment rate reflects the universe of cases prosecutors themselves have already determined are sufficiently strong to charge and, under DOJ policy, to convict.

But recent developments suggest that this filtering process may be weakening — at least in certain categories of cases.

A Cluster of Recent No-Bills

Over the past year, federal grand juries in multiple jurisdictions have declined to return indictments in matters that attracted national attention.

The first cracks in the government's traditional dominance surfaced in protest-related cases, where the DOJ adopted an unusually aggressive charging posture. In the Northern District of Illinois, a grand jury declined to indict two protesters, Ray Collins and Jocelyn Robledo, accused of assaulting federal agents outside a U.S. Immigration and Customs Enforcement facility after video evidence showed the protesters were shoved against a wall before an agent sustained a minor thumb injury.[5]

Similar resistance emerged in the U.S. District Court for the District of Columbia, where jurors refused to indict a former DOJ employee, Sean Charles Dunn, alleged to have thrown a sandwich at a federal officer during a demonstration.[6] Following the no-bill, the government bypassed the grand jury process entirely and charged this individual with a misdemeanor by information in U.S. v. Dunn. In November 2025, a jury acquitted him of the misdemeanor charge.[7]

What began as skepticism in protest cases appeared to quickly expand into politically sensitive investigations. Late last year, the DOJ suffered a rare public rebuke in its pursuit of charging former FBI Director James Comey.

After a Trump-appointed U.S. attorney, Erik Siebert, reportedly concluded that the evidence did not warrant an indictment and was subsequently let go, a newly installed prosecutor, Lindsey Halligan, took over the case. However, when the new prosecutor presented the matter, a grand jury in the U.S. District Court for the Eastern District of Virginia returned a no-bill on a third count, declining to indict Comey on a false statements theory.[8]

The trend continued into 2026. In January, a grand jury in the District of Columbia refused to return a true bill against Sen. Mark Kelly, D-Ariz., and five other Democratic lawmakers, rejecting a theory that attempted to criminalize conduct shown in a released video — urging military service members not to follow illegal orders — that was arguably protected by the speech or debate clause of the U.S. Constitution.[9]

Perhaps most striking was the DOJ's attempt to reindict Letitia James after the Eastern District of Virginia dismissed U.S. v. James in late November.

After an initial grand jury declined to return charges, prosecutors reportedly sought a second presentation before a different grand jury. The second panel likewise refused to indict.[10]

Despite these setbacks, the DOJ's aggressive charging posture shows little sign of abating. Recent reporting indicates that federal prosecutors have threatened to pursue criminal charges against Federal Reserve Chair Jerome Powell in connection with alleged false or misleading testimony to Congress concerning the cost and scope of renovations to the Federal Reserve's Washington, D.C., headquarters.[11]

Strategic Implications for Defense Counsel

For defense lawyers, the implications of these developments extend beyond the specific cases involved.

Historically, in the typical course of federal investigations, once it became clear that prosecutors intended to present a case to the grand jury, the remaining preindictment period was often treated as little more than the runway to indictment. By that stage, the government's investigation was largely complete. Defense counsel might still request a meeting with prosecutors to outline legal or factual deficiencies and urge them not to pursue charges — but with the government having already invested substantial time and resources in the investigation, few practitioners generally expected those efforts to materially influence the charging decision.

That assumption may now deserve reconsideration. Grand jury proceedings remain secret, and defense counsel is barred from the room — but practitioners are not without recourse. Internal DOJ policies offer meaningful tools to shape what prosecutors ultimately present, and engaging them early builds a record that can lay the groundwork for any future challenge to the integrity of the proceedings.

One of the most important policies is Section 9-11.233 of the Justice Manual, which requires prosecutors who are "personally aware of substantial evidence that directly negates the guilt of a subject" to present that evidence to the grand jury before seeking an indictment.

Historically, defense attorneys have been cautious about previewing their defenses. There has always been a legitimate concern that providing information to prosecutors could inadvertently strengthen the government's case.

But strategically presenting evidence to prosecutors — and creating a clear written record of that presentation — can force the government to confront weaknesses in its case before it ever reaches the grand jury.

If prosecutors ignore that evidence and proceed to seek an indictment, the defense may later have a basis to argue — whether through a pretrial motion to dismiss the indictment under Federal Rule of Criminal Procedure 12(b) or a motion for disclosure of grand jury materials under Rule 6(e)(3)(E) — that the government violated its obligations.

While violations of the Justice Manual do not automatically create enforceable rights, courts have recognized that misconduct before a grand jury may justify dismissal where the defendant can demonstrate prejudice or a fundamental impairment of the grand jury's independence.[12]

Defense counsel should therefore act early. Identify exculpatory evidence, present it to the government in writing and request confirmation that it will be placed before the grand jury. That record serves a dual purpose — it pressures prosecutors to confront the weaknesses in their case before indictment, and it preserves a foundation for any subsequent challenge to the integrity of the proceedings.

Another strategic consideration involves narrative control. Grand juries hear only the government's version of events. When prosecutors advance legally novel or politically charged theories, the absence of competing context can make those theories appear more compelling than they actually are. Effective preindictment advocacy can force prosecutors to grapple with alternative explanations before presenting the case to jurors.

Finally, the recent no-bills raise questions about what happens after an indictment is returned. If prosecutors increasingly present aggressive or untested theories to grand juries, courts may face more motions challenging the adequacy of the proceedings, as well as motions seeking discovery of prosecutors' interactions with the grand jury.

Under Rule 6(e), grand jury proceedings are generally secret. But courts may authorize disclosure of grand jury materials "preliminarily to or in connection with a judicial proceeding." Defendants may therefore seek access to transcripts where they can demonstrate a particularized need — such as evidence suggesting that prosecutors failed to present known exculpatory evidence or improperly re-presented rejected charges to multiple grand juries.

Such challenges have historically been difficult to win. Courts are understandably reluctant to pierce grand jury secrecy. But if prosecutors increasingly bypass traditional internal screening mechanisms and rely on grand juries to test novel theories, judges may become more receptive to examining how those cases reached the indictment stage.

Conclusion

A handful of no-bills does not restructure federal criminal practice. But the pattern is notable precisely because they are rare — and because they appear concentrated in cases where the government pushed legally untested or politically driven theories past the DOJ's traditional internal filters. Whether that pattern holds will depend largely on how aggressively the current administration continues to charge.

In the meantime, defense practitioners who anticipate an impending indictment in politically

charged or legally novel cases would be well advised to treat that window as a meaningful strategic opportunity rather than a fait accompli.

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