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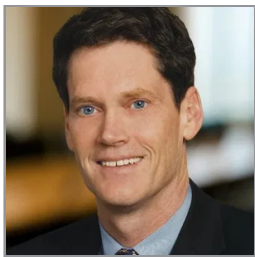
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Is the Justice Department Killing the Federal Grand Jury?



By *Michael K. Loucks* June 9, 2020

Comment

The U.S. Constitution prohibits the Department of Justice, absent consent of the defendant, from bringing criminal charges against any person or entity without approval of a grand jury composed of American citizens. When the pandemic erupted in earnest in March and states began implementing stay at home orders or guidance, the federal courts, which supervise federal grand juries, suspended virtually all non-emergency sessions. As the country begins to emerge from home confinement, the courts will begin to loosen restrictions on the sitting of grand juries. Will they fully recover, and what does that mean?

The Supreme Court has called the grand jury a “kind of buffer or referee between the Government and the people” and asserted that an “independent and informed grand jury” is a “necessity to society.” The Department of Justice Manual provides that the grand jury “is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal prosecutions.” The rules permit the prosecutor to seek an indictment based solely upon hearsay evidence, so long as the grand jury knows that the evidence is indeed hearsay to the witness presenting it. Criticism of the grand jury as a barrier to unfounded prosecutions has included the statement by New York Judge Sol Wachtler: “If a district attorney wanted, a grand jury would indict a ham sandwich.”

The grand jury is an effective investigative tool. It acts in secret, which allows witnesses to recount events far from the glare of publicity and pressure that accompanies it. Individuals under investigation may not know who is testifying and accordingly may not bring improper pressure to bear. Witnesses who refuse to provide evidence can be compelled to testify, and even immunized upon assertion of the Fifth Amendment to decline to answer questions. Subpoenas may be issued to collect documents from third parties, including those reluctant to help in the investigation of criminal conduct. And, as the Department of Justice itself recognizes, it can act as a protection for defendants from meritless charges.

Two things are clear: Only a grand jury can return an indictment, and only a grand jury that is given the opportunity to evaluate the government’s core evidence can act as a bulwark against unfounded prosecutions. While prosecutors can seek an indictment with only the presentation of hearsay evidence, following such a practice in all matters and for all evidence not only eviscerates the efficacy of the grand jury as an investigative tool (it is hearing only evidence already collected), such a practice effectively eliminates the grand jury’s efficacy as a bulwark.

Until 2014, the DOJ reported the number of “proceedings before grand jury” in the aggregate for all United States Attorney’s offices. The number of grand jury proceedings rose fairly steadily from 23,925 in 1990 to a peak of 47,253 in 2010. After reporting consecutive annual drops to 41,324 in 2013, DOJ eliminated, without explanation, further reports of this data from the annual report.

Nevertheless, the DOJ has continued to report the number of hours that the individual United States attorneys’ offices spend in the grand jury. The reported grand jury hours present a stark picture of a diminishing number of grand jury investigations and protections for citizens. The chart below reflects, at five year intervals from 1985 and for each year from 2006, the grand jury hours reported by the Department of Justice, the total criminal cases filed, and the grand jury hours per criminal case (the total for years 2005-7 have been corrected using an average for District of Columbia across 2003 through 2009 given apparent reporting errors for the middle three years for that federal court). The hours per case overstate the actual hours spent on each matter in which an indictment is returned as there will be in each year matters that are investigated and for which no indictment is returned.

Year	Grand Jury Hours	Criminal Cases Filed	Grand Jury Hours per Case
1985	62,184	29,689	2.1
1990	72,140	36,042	2.0
1995	69,579	36,878	1.9
2000	54,745	52,887	1.0
2005	48,570	60,062	0.8
2006	44,652	58,702	0.8
2007	44,977	59,228	0.8
2008	53,979	63,042	0.9
2009	45,392	67,864	0.7
2010	39,433	68,591	0.6
2011	36,705	68,926	0.5
2012	34,938	63,118	0.6
2013	34,861	61,529	0.6
2014	31,049	56,218	0.6
2015	29,019	54,928	0.5
2016	27,332	53,908	0.5
2017	27,007	53,899	0.5
2018	28,004	64,222	0.4

The drop in number of hours is even more startling for certain United States attorneys. In 2008, the Chicago United States attorney spent 2,718 hours before the grand jury; by 2011 that number had dwindled to 360 and would drop further to just 133 in 2018. The United States attorney in Boston spent 2,889 hours before the grand jury in 2008; in 2011, those hours had dropped to 1,281 and would further dwindle to 566 in 2018. The United States attorney in Los Angeles spent 1,353 hours before the grand jury in 2008; in 2018, these hours had dropped to 495.

One might consider these numbers to simply be erroneous reports, the drops are so prodigious. Corroboration exists. The federal courts have reported total grand jury hours and criminal proceedings filed by indictment since 2012; the courts' data reflects 36-42 minutes per indictment during the period 2012-2018. While slightly higher than the 24-36 minutes reported by the department, both reports are in the same small ballpark.

The department's data reflect poorly on the use of the grand jury as either an investigative tool or a bulwark against unfounded prosecutions. Where the grand jury spent on average of two hours collecting and evaluating evidence in a criminal case between 1985 and 1995, by 2000, that time had been cut in half, to just 60 minutes. The grand jury time remained relatively unchanged through 2009, when the grand jury time per case stood at 54 minutes. The time per case then resumed its slide; by 2011, grand juries were spending just 30 minutes per criminal case indicted. After rising marginally for three years to 36 minutes, the time per case has again dropped, to just 24 minutes in 2018.

In short, in a generation, the grand jury time per case has dropped from 126 minutes to just 24. Factoring in the time necessary for introducing a matter to the grand jury, swearing in witnesses, requesting the return of an indictment, deliberating, and appearing before a judge to return the indictment, grand jury time spent hearing actual witness testimony is hardly likely to be even 10 minutes per indictment returned. Assuredly, the pandemic has not changed this trend; while most federal court orders closing court houses do not explicitly shutter all grand jury proceedings, the major United States attorneys' offices have announced few if any indictments since early March. In the near term, citizens called upon to serve in grand juries may be reluctant to do so in the shadow cast by the coronavirus and the potential for it to reemerge. Federal prosecutors, already using the grand jury less than they were 20 years ago, may themselves be reluctant to use them. With the reopening of grand juries by the federal courts this summer, can we expect a return to a further dwindling of their use by federal prosecutors?

The vanishing grand jury over the past 35 years is consistent with the DOJ's dramatic reduction in all prosecutions since 2011. If the DOJ believes as its manual states, the department must also be concerned that the grand jury, as presently used, has lost much of its efficacy as a barrier to unfounded prosecutions.

Conclusion

Beginning in 2011, United States attorneys and the Department of Justice have substantially reduced all criminal prosecutions; with limited exceptions, that across the board reduction continued into 2018. This drop was coupled with a reduction in the use of the grand jury as an investigative tool. In those seven years of declining prosecutions, the time spent by federal prosecutors per case in actual grand jury investigation dropped from 60 minutes to less than 25 minutes per case. The courts have in the past refused to look behind the curtain at the extent and nature of a prosecution's presentation to the grand jury, including refusing to require presentment to the grand jury of exculpatory evidence. At some point, though, there may be a tipping point, and a court will conclude that the government's presentation to the grand jury in seeking criminal charges is so spare as to not satisfy the Fifth Amendment's requirement of a "presentment or indictment of a grand jury." With just 24 minutes per indictment, we may be at that tipping point.

This post comes to us from Michael K. Loucks, a partner at the law firm of Skadden, Arps, Slate, Meagher & Flom LLP. A version first appeared in Law360.

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