S. HRG. 110–683

# EXAMINING FEDERAL DECLINATIONS TO PROSECUTE CRIMES IN INDIAN COUNTRY

## HEARING

BEFORE THE

## COMMITTEE ON INDIAN AFFAIRS
## UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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# EXAMINING FEDERAL DECLINATIONS TO PROSECUTE CRIMES IN INDIAN COUNTRY

**THURSDAY, SEPTEMBER 18, 2008**

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
*Washington, DC.*

The Committee met, pursuant to notice, at 9:30 a.m. in room 628, Dirksen Senate Office Building, Hon. Byron L. Dorgan, Chairman of the Committee, presiding.

## OPENING STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. I will call the hearing to order.

This is a hearing of the Indian Affairs Committee. My colleague, Senator Murkowski, will be along and other members as well, but I wish to start on time. With the consent of the Vice Chair, I will begin.

The Committee will examine what are called Federal declinations, that is, declining to prosecute crimes in Indian Country. This is the ninth hearing on the issue focusing on tribal law enforcement. This hearing will reveal, I think, as we have revealed in others, that the law enforcement issues on Indian reservations are very serious issues, and that current situations on some of our reservations are threatening public safety of American Indians who live there.

At the core of this problem, in my judgment, is the system of justice that applies to American Indians and to American Indian lands. The system, I think, is now a proven failure, and the question is what do we do about it. The system limits local tribal control, and forces reliance on the Federal Government to provide the public safety. That system is broken.

Many Indian reservations are hundreds of miles from the U.S. Attorneys offices and the Federal courthouses. Unfortunately, some offices have taken an out of sight/out of mind attitude with regard to our obligation in Indian Country. That attitude is not department-wide. There are a good many U.S. Attorneys, and some in the Department of Justice, who have dedicated their careers to serving the public safety needs of tribal communities and other parts of America as well. But their efforts, in some cases, are too often ignored.

The mind set was made evident in recent years at hearings that were held before this Committee and also the Senate Judiciary Committee, with the dismissal of several U.S. Attorneys who made

a clear commitment to fighting crime in Indian Country. The U.S. Attorney from Michigan stated that people within the Justice Department simply don't recognize the Department's obligation to tribes. She claimed that she received little support for her efforts in Indian Country, and stated, "People thought it was too much of my time and it was too small of a population." Another sitting U.S. Attorney is quoted as saying, "I know the performance of my office will be compared to other U.S. Attorneys. My gun cases have to compete. My white collar crime cases have to compete. One criteria that is never on that list is Indian Country cases."

Testifying before the House Judiciary Committee on May 23 last year, Monica Goodling, the Justice Department's White House Liaison, confirmed that the then-U.S. Attorney in Minnesota would have been dismissed had he not previously resigned. She cited his "preoccupation with Indian affairs issues" as the reason.

We have had previous testimony from Mr. Heffelfinger, who served as U.S. Attorney both in the first Bush presidency and in the second Bush presidency, that "something is fundamentally broken within the Department of Justice that goes to the core value of delivering services in all 93 Federal judicial districts."

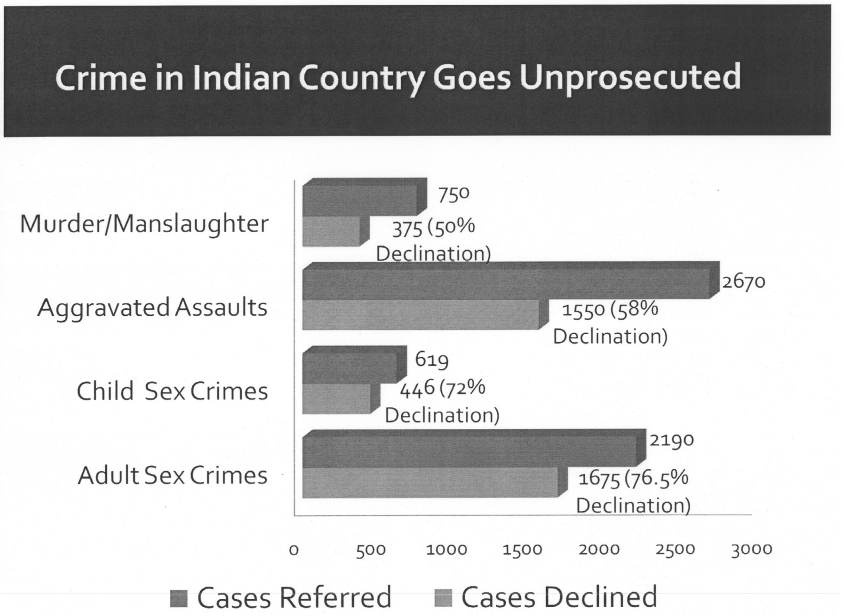
Tribal communities rely on Federal prosecutions to deter crime and provide a sense of community justice. Ignoring the obligation undermines any sense of trust in that legal system. Combating crime on Indian reservations has to be made a top policy priority and it has to come from the top down.

Another failure with the system is the lack of resources. Less than 3,000 Bureau of Indian Affairs and tribal police patrol more than 56 million acres in Indian lands. As of 1998, only 102 FBI agents served Indian Country. To address that shortfall, Congress appropriated funds for an additional 57 FBI agents to serve Indian Country. Despite the additional funding, the FBI's current numbers show an increase of only 12 FBI agents serving Indian Country. So something isn't adding up.

The Department of Justice has been requested to share declination material with us and has declined to do that. I called Attorney General Mukasey this week and had a long conversation with him, and indicated to him why it is important that we have that information shared with this Committee and with the Congress. He is now reviewing the information and we will be talking again.

I do want to show you what I believe I have charts here—I want to show you what we know, and pathetically it only comes from information from Syracuse University.

[The information referred to follows:]




It comes from Syracuse University, which has done FOIA requests of the Justice Department. I don't have any idea whether this represents accurate information. Again, this has been published in the press and it comes from Syracuse University information. It shows that with respect to murder and manslaughter, there is a 50 percent declination rate—we don't have the foggiest idea what that means, but it is serious—aggravated assaults, 58 percent; adult sex crimes, 76 percent declination rate.

So the question is, why would we have declination rates of 50 percent on murder and manslaughter, 76 percent on adult sex crimes, including rape? I don't know the answer to that, but I intend to find the answer to that. I have asked General Mukasey to share information with us. He and U.S. Attorneys have told us, well, the problem is if we provide information, there are so many reasons that someone else would have to interpret it, or it might be misinterpreted. Well, we will see. Importantly in my judgment, withholding that information is not going to allow us to get where we need to get with respect to an understanding of what is happening and what needs to be done to fix it.

In July of this year, I introduced S. 3320, the Tribal Law and Order Act of 2008, with the support of 12 Senators, including a number of members of this Committee: Senators Murkowski, Domenici, Johnson, Tester, Smith, and Cantwell. This bill would move Indian Country up on the priority list and would establish a system of accountability and transparency that requires data collection, while at the same time protecting the privacy of the victims and suspects. This bill alone will not solve the crisis. Congress needs to strengthen tribal justice systems and deal with adequate funding. We also need leadership from the Administration, from Justice. I want to say again, this Committee is not going to cease

our intent to get information by which we can make decisions about what is happening. It is not acceptable to me that the Justice Department has said, we decline to give you information. We intend to get the information.

Declination rates, a term that is kind of an unusual term, describes circumstances in which prosecutions are declined, many perhaps for very legitimate purposes. But when we have testimony before the Congress saying had someone not resigned, they would have been fired because they were spending too much time on Indian issues, or we have information in front of the Congress by U.S. Attorneys that describe to us people thought too much of my time was spent on Indian Country—that is a sitting U.S. Attorney. When we have that information, it seems to me, and at the same time we understand there is a violent crime rate that is excessive on reservations. Mr. Ragsdale, who is in charge of assigning resources, has pathetically too few resources to assign to all of the areas in this Country where we have responsibilities to provide law enforcement, so he moves people around here and there.

When we see all of that, we have a responsibility. People are hurt. People are victims of crime. People are killed because the system isn't working. It is not acceptable to me to have the Justice Department say, we will not provide information that is requested on declinations.

So we will have this hearing and then proceed again. I will have another discussion with the Attorney General.

Let me now call on my Vice Chairman, Senator Murkowski.

**STATEMENT OF HON. LISA MURKOWSKI,**
**U.S. SENATOR FROM ALASKA**

Senator MURKOWSKI. Thank you, Mr. Chairman, and good morning. I do appreciate the fact that we are taking up this morning in the Committee the issue of what is going on with these declination rates and the accountability from a broader perspective, the accountability in administering justice in Indian Country.

We recognize that when the Indian Law Enforcement Reform Act of 1990 was passed by the Congress that there was an attempt to address the issue of accountability, but we continue to hear from Indian Country. We recognize that the implementation, the congressional intent, has been frustrated over many years.

Now, I do understand that the Department of Justice has concerns about both the accuracy of the declination rates that have been published in certain reports, and about disclosing the declination reports to tribal prosecutors and law enforcement. But Mr. Chairman, the Department of Justice has testified that it opposes the concept of mandatory submission of those reports as required in our bill, yet the Department, they haven't offered anything. They haven't offered any sufficient alternatives to improve that accountability and reduce the serious crimes that we know are occurring throughout Indian Country.

When we hear about incidents of serious felony crimes in so many parts of Indian Country—the sexual assaults, the homicides, the drug manufacturing and the distribution, and about the impact of all of this on our Native communities—we have to acknowledge the status quo is simply not acceptable.

Now, I do recognize that victims and confidential information need to be protected, that the integrity of investigations and prosecutions need to be preserved, but this matter does not, this is not to suggest that we just close our eyes to what needs to be done within the system in terms of accountability.

We recognize that this matter doesn't lend itself to quick and easy solutions, but I do expect that we would hear some positive solutions from the Department of Justice.

Mr. Chairman, I look forward to the comments of our witnesses today, and again I appreciate your leadership on this issue.

The CHAIRMAN. Senator Murkowski, thank you very much.

Let me just observe again. I talked to Attorney General Mukasey this week. We are going to talk again. My hope is that we will receive cooperation to get information about declinations. If not, I will suggest that we issue subpoenas from the full Committee. We will discuss it. My hope is that we don't even have to go there, but it is not acceptable that a department that collects data and information on declining prosecutions says, yes, we collect the data; no we will not share them with those of you who need them. That is not something that will stand, in my judgment, with this Committee.

Senator Tester?

**STATEMENT OF HON. JON TESTER,**
**U.S. SENATOR FROM MONTANA**

Senator TESTER. Thank you, Mr. Chairman. Thank you for your leadership. Thank you for your comments just now. I am sorry I am late.

Thank you, Ranking Member Murkowski for your comments also because I think they are spot-on from what I heard.

I apologize for being late, but I will just say that being in Indian Country, it is not like the folks sitting at this table. The folks sitting at this table haven't been in Indian Country and see the problems they have. The truth is, if we are going to help self-sufficiency in our Native American lands, safety has to be a big consideration.

Let's put ourselves in the same position. Let's ask ourselves what we would do if there were crimes that weren't being prosecuted. Let's ask ourselves what we would do if our kids were living in a place that was unsafe. Let's ask ourselves what we would do as far as conducting business in a place that wasn't safe. Would we be able to do that? Let's ask just ultimately about quality of life. Could we even enjoy life?

The truth is that we need to address the problem. We need to get it done and we ought not be hiding information. We ought not be untruthful and putting forth the information we need to be able to make the decisions. Because, you know, if it is a lack of law enforcement resources, if that is the problem, we can address it. If it is inadequate public detention facilities, we can address it. If it is under-staffing or overworked officials, then we can address it. If it is confusing jurisdictional problems, we can address it.

But the truth is that unless we have the information, we can't. And the other truth is that this is too important to say, oh, it has always been that way so we are just going to leave it that way. That is not acceptable.

With that, I want to thank the witnesses for coming today. I look forward to your testimony, and I appreciate your coming before the Committee to talk about this issue.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Tester, thank you very much.

We have two panels today. One is Drew Wrigley, the U.S. Attorney from North Dakota; also Mr. Patrick Ragsdale, the Director of the Office of Justice Services at the BIA. And we have a second panel of four witnesses.

I am going to begin with Mr. Drew Wrigley. The Justice Department has asked Drew Wrigley to appear. It is a coincidence that he is from North Dakota and the Chairman of the Committee is from North Dakota, I suspect. But Drew Wrigley is someone I have known for a long while and is a good person and has served well as U.S. Attorney. We very much appreciate him being here to provide the Justice Department views, although I suspect it would be more comfortable were he here providing views that I particularly thought were constructive on behalf of the Attorney General. I hope those views will change over time.

But Mr. Wrigley, thank you for traveling to Washington to be with us today. We appreciate it. Why don't you proceed?

## STATEMENT OF HON. DREW H. WRIGLEY, U.S. ATTORNEY, DISTRICT OF NORTH DAKOTA, U.S. DEPARTMENT OF JUSTICE

Mr. WRIGLEY. Thank you, Mr. Chairman, Madam Chairman and members of the Committee. I do appreciate the opportunity to be here today. We, of course, are here to discuss declination reports.

The Department of Justice and United States Attorneys take very seriously, of course, our responsibility as the key prosecutors in Indian Country. We recognize the seriousness of the crime problems on some of our reservations as well. We are committed to working to improve public safety on tribal reservations, but we believe that public reporting on declinations is not the best method to achieving that aim.

The discussion of declinations has been distilled down to two essential points. The first is the report of the declination of an individual case to tribal law enforcement. The second is the issue of declination statistics generally.

The Department agrees that Indian Country crime data is important. However, a U.S. Attorney's Office declination rate does not provide any useful information about whether additional resources are needed to train local investigators, to hire more prosecutors, to direct resources somewhere else along the path of any case from investigation to prosecution.

The only way to determine why cases are declined and correspondingly how additional resources could best be used would be to examine cases individually, case by case going through that file. Was there a lack of evidence? Was there a problem with witnesses? Were there resources lacking somehow or was there a jurisdictional issue? Those are just a few of the many options.

Providing detailed information in this regard is highly problematic in that it might undermine an investigation that does eventually lead to a chargeable case. It happens all the time in Indian

Country, and may endanger witnesses along the way and others in the community as well.

In most instances, the communication between Federal and tribal law enforcement occurs well before a declination is ever issued in any case. And that exchange of information that occurs between Assistant U.S. Attorneys and federal or tribal law enforcement often effectively renders a declination report a mere formality in the end anyway.

The Department continues to work to ensure appropriate communication to our tribal liaisons, as well as other departmental resources such as the Officer of Violence Against Women, the Office of Tribal Justice, and then individual Assistant U.S. Attorneys assigned to prosecute tribal Indian Country cases.

We do not believe that a statute requiring uniform formalized exchange of case information is advisable. Such a top-down mandate creates potentially discoverable material which could jeopardize a subsequent criminal case, could endanger the public safety and the privacy of victims, the privacy of witnesses and the Indian Country communities themselves.

Other provisions of law often preclude U.S. Attorneys' offices and investigative agencies from providing the declination reports or any of the various types of protected information such as grand jury materials. Again, it is not uncommon for us to be working on investigation and for a declination to occur, and then sometime later a case to be resurrected because of emergence of a new witness, new evidence that comes along, or new technology.

Moving on to the overall declination statistics that Senator Dorgan was referencing moments ago, because of the sometimes profound differences between our districts, individual United States Attorneys select different approaches to managing our offices. Case tracking is one management area in which there is a wide array of approaches.

While all cases that are eventually charged by the grand jury, they are all tracked, of course, but there is a lot more flexibility when it comes to tracking cases pre-indictment—how we track the flow of information in our offices. Some U.S. Attorneys find it useful to know the total volume of matters that pass through their offices, regardless of whether they will ever become a Federal prosecution. While this option has the advantage of allowing U.S. Attorneys to follow the volume of the work in the office, it does nothing to assess the Federal capacity for work in that district.

This is particularly true in districts that encompass Indian Country, where many criminal acts do not constitute Federal offenses. We get many, many referrals on cases that do not in fact constitute a Federal offense. That is because of a statutory definition of some kind, or maybe there was a territorial issue of some kind. Anyway, this approach can result in an artificially high declination rate created by including cases that could never have been prosecuted federally.

Other U.S. Attorneys choose to focus their tracking efforts only on cases which are charged in Federal court. Still others might track the cases that include anything that is formally presented to the office by Federal law enforcement or another entity.

While either of those approaches have the advantage of allowing the U.S. Attorney to focus his or her attention on serious matters that are likely to go to trial someday, they present a more limited picture of the overall work of the office.

U.S. Attorneys using either of these last two approaches will record a much lower declination rate than those that open files for any referral that is made to the office. However, as you might guess, any statistical disparity between those two approaches would often be illusory when it comes to the issue of declinations.

The Department doesn't believe that one of these management approaches is inherently better than the other. Each district is unique. It is clear, however, that these different management choices do result in very different rates of declinations, even though cases with similar facts are eventually resolved in the very same manner.

If all U.S. Attorneys were required to manage case tracking the same way, any declination statistics would still not provide an accurate picture of the extend of our work in this regard because crimes in Indian Country are often tracked by the substantive offense, rather than the venue being in Indian Country. That means that many prosecutable crimes that occur in Indian Country don't even turn up on Indian Country statistics, again skewing the statistics looking at declination rates.

As a result of the considerations I have listed today, the Department does not believe publication of declination statistics will provide an accurate or helpful tool for assessing the work of an individual U.S. Attorney's office or the Department. Indeed, such publication would simply create fodder for false comparisons that would inevitably prove corrosive.

In conclusion, I just want to say again it is the Department's position that these statistics, while useful for internal management purposes, do not provide a sound basis upon which to make resource determinations.

Mr. Chairman and Madam Vice Chair and members of the Committee, this does conclude my statement. I would be happy to answer any questions to the extent that I am able to today, and to get back to the Committee with anything that I can't answer for you.

[The prepared statement of Mr. Wrigley follows:]

PREPARED STATEMENT OF HON. DREW H. WRIGLEY, U.S. ATTORNEY, DISTRICT OF NORTH DAKOTA, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman, Madame Vice-Chair and members of the Committee:

My name is Drew Wrigley, and I am the United States Attorney for North Dakota.

We are here today to discuss declination reports. This is a discussion that the Department, this Committee, and the public have been actively engaged in for a number of months. The Department and the U.S. Attorneys take very seriously their responsibility as key prosecutors in Indian Country and recognizes the seriousness of the crime problems on some reservations. We are committed to working to improve safety on tribal reservations, but do believe that public reporting on declinations is not the best method to achieve this aim.

The discussion of declinations has been distilled down to two distinct issues. The first issue is the reporting of the declination of an individual case by federal law enforcement to tribal law enforcement. Here the concern is the appropriate and timely communication of information within the law enforcement community. The

second is the issue of declination statistics. This is a broad general accounting of which cases are prosecuted federally and which are not.

The Department understands your desire to better understand how decisions to prosecute or decline cases are made by those on the ground in Indian Country. Further, we agree that better data on crime in Indian Country will help law enforcement agencies combat crime and help inform the decisions on where to direct additional resources to have the greatest impact. Rates pertaining to the number of cases that a U.S. Attorney's Office declines do not provide any useful information about whether additional resources are needed to train local investigators, hire additional prosecutors, or take other action along the path from investigation to prosecution. Unfortunately, the only way to determine why cases are declined—and correspondingly how additional resources would be best used—would be to examine cases individually to determine if there was a lack of evidence, witnesses, resources or jurisdiction. But please keep in mind that providing detailed information as to why an investigation was either declined or terminated is highly problematic because the information could be rendered discoverable in any subsequent prosecution. Such information might well compromise the safety and privacy of victims and witnesses, and also provide a damaging roadmap to any weaknesses in the case.

Let me tell you about a case handled by the office of my colleague, Marty Jackley, in the District of South Dakota. In the case in question, the U.S. Attorney's Office sent a letter declining to prosecute a matter based on "weak or insufficient admissible evidence and a potential witness problem." Eventually, there was sufficient evidence to charge the offender for similar sexual conduct against another victim. That case went to trial. During the trial, the victim from the declined matter testified as a prosecution witness. The judge allowed the defense to introduce the declination letter into evidence. In his closing argument, the defense attorney used the fact that the previous matter involving the prosecution witness was investigated and ultimately declined to suggest that the witness's testimony was not credible.

While we believe that declination information needs to be handled appropriately so as not to jeopardize a future case, the Department agrees that there is a need for close coordination with tribal prosecutors to ensure that criminals are brought to justice. However, given everyone's desire to ensure wrong-doers are brought to justice, we need to ensure that's done in a way that doesn't jeopardize future prosecutions, or compromise victim and witness safety and privacy. Note that in cases in which a tribal court has jurisdiction, tribal prosecutors never have to wait for a declination from a U.S. Attorney's Office before launching their own investigation or prosecution. The U.S. and tribal governments are separate sovereigns, each with their own independent right to bring a prosecution. Each U.S. Attorney's Office with Indian country jurisdiction has at least one tribal liaison to facilitate this coordination. In most instances this communication between federal and tribal law enforcement should—and does—occur well before a declination occurs. For example, many districts use multi-disciplinary teams in the review of child abuse allegations in Indian country. These teams involve law enforcement agents, health professionals, social services representative and prosecutors. The teams work matters from the time an allegation is received until, where appropriate, a defendant is prosecuted. In districts where such teams are in place, the constant exchange of information that occurs in team meetings effectively renders a declination report a formality. The Department is exploring the use of this team concept in other settings, such as Sexual Assault Response Teams which address sexual assault allegations. Where a formal team is not practical, we believe that better communication between tribal and federal prosecutors will ensure that cases do not fall through the cracks. The Department is working to ensure appropriate communication through our tribal liaisons as well as other Departmental resources, such as the Office on Violence Against Women and the Office of Tribal Justice.

Conversely, we do not believe that a statute requiring formalized exchange of case information is advisable. First, removing discretion and requiring U.S. Attorneys' Offices and other investigative agencies to prepare detailed written reports that contain information about why investigations were either declined or terminated, runs the danger of compromising victims and witnesses, and creates potentially discoverable material which could jeopardize subsequent criminal case by highlighting weaknesses. Second, other provisions of law often preclude USAOs and investigative agencies from providing declination reports or any of the various types of protected information. For example, law enforcement officers and prosecutors can be subject to criminal liability for improper disclosure of information, where a declination is based on the existence of an on-going investigation that requires the law enforcement agency to protect the investigation, such as with grand jury proceedings. Because of the statutory restrictions on the use of protected information, the usefulness of declination reports and declination rates would be severely limited. More-

over, the very production of a declination report under this circumstance could lead to the inadvertent disclosure of protected information. Thus, the USAOs must have discretion in what information may be provided to tribal justice officials. In addition, declination reports can get into the wrong hands and pose the danger of jeopardizing investigations, as well as the safety and privacy of witnesses and victims, and the integrity of related investigations. This would particularly be a concern for districts with small tribal populations, in which even reports that have personally identifying information redacted could still be easily linked to victims.

Moving on to overall declination statistics. As you are certainly aware, each tribe in North Dakota has unique qualities that distinguish it from every other tribe in North Dakota. Similarly, U.S. Attorneys located in districts across the United States recognize the various law enforcement realities which exist in different areas of the country. The presence of tribes in a district adds to the unique circumstances that an individual U.S. Attorney's Office faces. It is that unique set of circumstances that renders declination comparisons meaningless or misleading.

As a starting point, because of the sometimes profound differences between their districts, individual U.S. Attorneys select different approaches to manage their offices. Case tracking is one management area in which they differ from one another. While all cases that are charged are tracked, there is more flexibility in tracking cases pre-indictment. As a result, individual U.S. Attorneys use different models, based on the needs of their individual districts.

Some U.S. Attorneys find it useful to know the total volume of matters that pass through their offices. This entails coding and tracking every case presented to the office, regardless of whether that case was likely eligible for Federal prosecution. While this option has the advantage of allowing the U.S. Attorney to follow the volume of work his or her office is processing, it doesn't provide an accurate picture of the federal case capacity for that district. This is particularly true in districts that encompass Indian country, where many criminal acts do not constitute federal offenses because of statutory definitions or limited territorial jurisdiction. That approach can result in an artificially high declination rate created by including cases that could never have been prosecuted federally.

Other U.S. Attorneys choose to focus their tracking efforts only on those cases which are charged in Federal court, or are formally presented to prosecutors by a Federal law enforcement agency. These approaches have the advantage of allowing the U.S. Attorney to focus his or her attention on serious matters likely to result in a trial. On the other hand, these options present a more limited picture of the overall work of the office. U.S. Attorneys using either of these case tracking options will record a much lower declination rate than those that open files for any referral made to their office. However, as you might guess, any statistical disparity recorded by offices following the two approaches could be wholly illusory.

The Department doesn't believe that one of these management approaches is inherently better than the other. We recognize that each U.S. Attorney's district is unique, so effective management requires flexibility. It is clear, however, that these different management choices will result in very different rates of declinations. This is true even though cases with similar facts are eventually resolved in similar manners. To reiterate, differences in declination rates between districts may represent differences in case tracking though no meaningful difference exists in the way cases are handled.

In addition, even if all U.S. Attorneys were required to manage case tracking in the same manner, Indian country declination statistics by district would still not provide an accurate picture of our work in this area. Crimes in Indian country are often tracked by the substantive offenses (such as drugs, child exploitation, or violent crime), which is the general practice of the United States Attorneys' Offices, rather than by venue on Indian country. This means that many crimes that occur in Indian country, and that are likely to proceed to prosecution, may not be included in Indian country statistics. Because these categories of cases are not included in Indian country data, any declination statistics would be misleading.

Accordingly, the Department does not believe publication of district specific declination statistics will provide an accurate or helpful tool for assessing the work of an individual U.S. Attorney's Office. Indeed such publication would simply create fodder for false comparisons that would inevitably prove corrosive. The Department wants to assure you and your colleagues that the availability of USAO resources is not the primary basis for a decision to decline a case arising in Indian country. That is certainly true of North Dakota, where a lack of United States Attorney's office resources is never the basis for declinations in violent crime cases or any other serious offenses.

Finally, as I have noted repeatedly each tribe is different, and as a result each U.S. Attorney's district is also fundamentally different. This truism carries over to

the type of crime and the environment in which the crime occurred. Generally speaking, violent crime may be much more difficult to investigate and prosecute than other types of offenses, such as white collar crime or drug conspiracies. When investigating a white collar crime, the law enforcement officer often has the ability to pace the investigation. As investigations progress, it is usually possible to seek additional documentary evidence or depose additional witnesses. With a violent crime, an investigator is often limited to evidence (as well as witnesses) that remain at the crime scene. This is particularly problematic in Indian country, where the crime may have occurred in an area hours away from a police station. It is not uncommon for these crimes to occur outside, where the elements may quickly degrade or destroy evidence. Add in uncooperative or unavailable witnesses, and investigators sometimes don't have the necessary factual record to present a case to prosecutors. Again, it is the Department's position that these statistics do not provide a meaningful tool to assess investigative and prosecutorial efforts in Indian country.

**Conclusion**

Mr. Chairman, Madame Vice Chair, this concludes my statement. It has been my honor to appear before this Committee today, and I will do my best to answer any questions the Committee may have at this time.

The CHAIRMAN. Mr. Wrigley, thank you very much.

Mr. WRIGLEY. Thank you.

The CHAIRMAN. Next, we will hear from Mr. Patrick Ragsdale, Director, Office of Justice Services of the Bureau of Indian Affairs.

Mr. Ragsdale?

## STATEMENT OF W. PATRICK RAGSDALE, DIRECTOR, OFFICE OF JUSTICE SERVICES, BUREAU OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Mr. RAGSDALE. Good morning, Mr. Chairman, Madam Vice Chairman, and Senator Tester.

You have my full statement, which I would ask the Committee to put in the record, and I will just try to highlight the points that we try to make in my personal testimony.

Let me take a moment and give the Committee a quick update on some significant operations that we have ongoing in Indian Country. The Operation Dakota Peacekeeper in North and South Dakota is still ongoing. We have supplemented our regular police force with about 20 additional officers from throughout Indian Country, as well as from various tribal jurisdictions that have allowed us to take their officers that have special Federal commissions to supplement our workforce—the Cherokee Nation, the Comanche Nation, the Chickasaw Nation, the Poarch Creek Band of the Creeks, and maybe one or two other officers.

Our force is also now being supplemented with National Park Service rangers, and we will probably have another team, a group from our sister agencies within the Department to assist us in the operations at both Pine Ridge and Standing Rock that entails about 50 officers on detail to both of those reservations.

I am happy to report this morning, you probably have heard about the shooting of one of our police officers, Sergeant Louis Troy Poitra. He has been discharged from the hospital and is expected to fully recover from the wound that he received at an early morning call on September 10. We are very proud of Sergeant Poitra. He is one of our best, and we are proud of all the officers that we have serving Indian Country throughout America.

The Committee had an interest in a number of issues which I will just try to highlight from my testimony. I think it is always

important to cite where our authority comes from in enforcing laws in Indian Country throughout the United States. At one of my recent visits to Pine Ridge, I met with one of the traditional Sioux leaders and he reminded me of our treaty obligations under the Treaty of 1865. So after I talked with him that morning, I dug up the Treaty of 1865 with all the Sioux Nations.

Article I provides for peace and friendship with the United States, which is common to most of our treaties, but Article I specifically talks about the responsibilities of the United States of America to deliver bad people to appropriate authorities, whether they have committed a Federal offense or committed an offense against the tribe. So that is where our basic authorities are rooted, as well as in other Federal laws.

With regards to who is responsible for patrolling, policing, and investigating crimes in Indian Country, the primary responsibility for policing is vested historically with the Bureau of Indian Affairs. So we provide either through a direct policing operation or through tribal contracts for the basic policing and initial investigation of crimes throughout Indian Country.

We also have a Criminal Investigative Division within the Bureau of Indian Affairs. That is spoken about in the Indian Law Enforcement Reform Act of 1990. Those services are supplemented with the Federal Bureau of Investigations, sometimes the DEA and ATF, depending on the types of crimes that are involved. So we have the responsibility to provide for basic policing in Indian Country, the Bureau of Indian Affairs does.

We have spoken about the training, which was another issue that I understand that the Committee was interested in. I will just say succinctly that it is my belief that we provide some of the best training in law enforcement in the Country in terms of providing police with the complete range of training, with specialization and focus on domestic crimes, sex crimes, crimes against children, and homicides and the like.

We also provide supplemental training by sending criminal investigators to the criminal investigative course at Glencoe, Georgia. We send senior tribal police officials and BIA officials to the FBI's National Academy at Quantico, Virginia, which is one of the premier law enforcement agencies in the world.

In my written testimony, we provide you with a synopsis of a hypothetical incident on one of our reservations and try to walk through the process, which I will not go into in my testimony. But typically, this is the way we address major crime investigations in Indian Country, whether it is directed from a tribal police department or a BIA police direct operation.

Last, or next to last, let me talk a little bit about our collaboration with U.S. Attorneys, Federal and tribal investigators, and victims. In the best set of circumstances, this collaboration between the law enforcement partners is constant and ongoing depending on the nature of the case. It has been my experience when I was in a tribal police department, that my discussions were always open and direct with both of the U.S. Attorneys that represented my jurisdiction in Indian Country, the Northern District and Eastern District of Oklahoma. I have never found the U.S. Attorneys that I have dealt with, either in my former capacity as a tribal po-

lice officer or in my current capacity, to be less than diligent and champion the rights of victims and go after those people that have violated Federal law.

A lot is involved, depending on the particular circumstances of a case. You know, a case may stay open for a year or years, depending upon the complexity of the case. A whole bunch of factors go into the development of a criminal investigation that we submit to the U.S. Attorney, which I will defer to Mr. Wrigley to answer specific questions about. They are sometimes very complex. I have never found that the U.S. Attorneys that I have dealt with, and my folks that run investigations now, that is a lower priority for them.

The Indian Country U.S. Attorneys I believe are very diligent and thoughtful. Mr. Wrigley called me about 30 days ago because he was concerned that they were not getting very many referrals from one particular reservation. So we had a conference where we involved a couple of his offices and with their Assistant U.S. Attorney. So if the perception is that the Indian Country U.S. Attorney have a second layer or a low priority for Indian cases, that has not been my personal experience.

As we have talked about before, there are a number of pillars that support a public safety system throughout America. Number one, you have to have an effective police department to maintain the peace, which is our primary role in the administration of justice. You have to have a court system that works, whether it is the local tribal court system or the Federal system. And you also have to have strong community support from the Government that you are dealing with.

In the instance of Standing Rock, one of the great strengths in our operation there is the tribal government has been totally supportive of developing and maintaining a better justice system for that particular jurisdiction.

The prosecutor's role is next to last to the court's determination. A court case is the final process of administering justice, so we rely very heavily on the prosecutors, both tribal and Federal, to get our work done.

With regards to the declination issue, I just returned from a Phoenix meeting with the U.S. Attorneys in Indian Country. We had some discussion about the numbers that were being talked about in terms of declinations. I can tell you that when I was a tribal police chief, I referred every allegation of a crime against a child that was reported to my office to the U.S. Attorney.

Now, sorting those out, if that is the basis—and a U.S. Attorney would decline those that were in another jurisdiction. Many of those allegations and incidents were in State jurisdictions and for whatever reason, we would clear those in an investigation. So if that is the basis of the statistic of declination, I think that is not the real view of what our work entails and the U.S. Attorney's decision-making process is.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Ragsdale follows:]

PREPARED STATEMENT OF W. PATRICK RAGSDALE, DIRECTOR, OFFICE OF JUSTICE SERVICES, BUREAU OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Mr. Chairman and Members of the Committee, I am pleased to provide testimony for the Department of the Interior. My testimony will focus on the aspects of declination reports that are issued by the United States Attorneys DPC from the perspective of the Bureau of Indian Affairs (BIA) in its law enforcement capacity.

The Bureau of Indian Affairs (BIA) has a service population of about 1.6 million American Indians and Alaska Natives belonging to 562 federally recognized tribes. The BIA supports 191 law enforcement programs with 42 BIA-operated programs and 149 tribally operated programs. Approximately 78 percent of the total BIA Office of Justice Services' (OJS) programs are under contract to Tribes as authorized under Public Law 93-638, as amended, or compacted to Tribes as authorized under Title IV of the Indian Self Determination and Education Assistance Act, as amended.

The Indian Law Enforcement Reform Act of 1990 (25 U.S.C. 2801 et seq.) and the regulations contained in Title 25 of the Federal Code of Regulations provide the statutory and regulatory authority for the BIA. Under these authorities, the BIA provides basic police and corrections services while the Department of Justice (DOJ), including the Federal Bureau of Investigations (FBI), the Drug Enforcement Administration (DEA), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), also investigate crimes and prosecute offenders in Indian country.

Police, Patrolling and Criminal Investigation Responsibilities

The BIA's responsibility for providing basic day-to-day policing and patrolling of Indian country is provided for in 25 U.S.C. 2802. Tribes have jurisdiction for tribal criminal offenses as defined by the respective Tribe's tribal law. Violations of Federal criminal law within Indian country are the responsibility of the BIA and the FBI. In addition, ATF and DEA are often involved in investigations of weapons and drug offenses and the Environmental Protection Agency's Criminal Investigation Division investigates environmental criminal activity in Indian country. Tribal and state law enforcement agencies assist and have primary roles under existing special law enforcement commissions that are authorized by the Indian Law Enforcement Reform Act

(25 U.S.C. 2801 et seq.). Often these tribal, Federal, and state law enforcement agencies work together on task forces to address crime that impacts their jurisdictions and residents. The BIA encourages a cooperative law enforcement practice between and among tribal, state and other Federal agencies wherever possible.

Criminal Jurisdiction in Indian Country

While jurisdictional issues arise during investigations, for every crime in Indian Country, there is a court with jurisdiction to try the case. Criminal jurisdiction in "Indian Country," 18 U.S.C. 1151, is allocated among Federal, state and tribal courts. Most Federal criminal law for Indian country is set forth in 18 U.S.C. 1151-1170. Jurisdiction over particular cases in Indian country depends, in general, upon three factors: (1) the nature of the offense, (2) whether any jurisdiction has been conferred on the State, and (3) whether the perpetrator or victim is an Indian.

The following scenarios provide an example of the complexities arising from the three factors related to defining criminal jurisdiction for law enforcement in Indian Country when PL 280, which confers State jurisdiction in certain circumstances, does not apply.

**Scenario One**

A non-Indian commits an assault on another non-Indian on trust property. Criminal jurisdiction lies exclusively with State jurisdiction.

**Scenario Two**

A non-Indian sexually assaults an Indian on trust property. Criminal jurisdiction lies exclusively under Federal Jurisdiction pursuant to 18 U.S.C. 1152.

**Scenario Three**

An Indian commits an armed robbery against a non-Indian on trust property. Criminal jurisdiction lies in Federal, Tribal, or both jurisdictions.

BIA and Tribal Police Officers Receiving and Answering Calls

Depending on the local jurisdiction's circumstances, calls for routine or urgent assistance are received from several sources, such as, walk-ins, telephone calls, dispatch or 911 services, if available at the BIA or Tribal Police offices. In certain circumstances dispatch calls may come in from state or other Federal agencies. Subject to applicable jurisdiction and available resources, responses by local law enforcement is the same or similar to any local police department in America.

In the event a criminal complaint is reported, subject to the applicable jurisdiction, the complaint may be referred to and investigated by the United States Attorneys Office. Criminal complaints of violations of Federal, Tribal and sometimes state laws are investigated by Tribal and Federal law enforcement agencies. Depending on the nature of the complaint, Tribal and BIA Police

Officers usually are the first to respond. The scenario that follows is an example of how a major case is investigated.

*"A brief synopsis on the anatomy of a fictional Federal investigation in Indian Country that would be conducted by the Bureau of Indian Affairs (BIA), Office of Justice Services (OJS)."*

A tribal police officer patrolling the Pine Ridge Indian Reservation received a call for service to a disturbance at Wounded Knee housing. Upon arrival, the officer observed a victim lying in the street who had apparently been beaten unconscious by unknown subjects. First, the officer needed to ensure that proper medical attention was obtained. Other officers arrived on location, the scene was secured, and the tribal police initiated a preliminary investigation. When information suggested the victim had been beaten unconscious with a blunt object, the BIA Criminal Investigations Unit (CIU) was notified and special agents responded to the scene.

Depending on local protocol, the FBI may have been notified. Upon arrival, BIA special agents would collect physical evidence, photographic evidence, and witness statements. Within 24 hours, a Notice of Allegation (NOA) would be sent to the BIA District Special Agent in Charge, the United States Attorney's Office and to the local resident office of the FBI. The NOA is an administrative tool used to initiate a Federal investigation. At this point of the preliminary investigation, the BIA special agents would be updating the Assistant United States Attorney (AUSA) assigned to the Indian country unit. Once a suspect has been identified and all of the elements of a crime have been met, a report of investigation (ROI) is submitted to the US Attorney for review. The ROI would consist of the following information:

Table of contents
Notice of Allegation
Case Summary
Details of the Case
Defendant History
Additional Information, such as: photographs, diagrams, transcriptions, medical reports, etc.
Victim/Witness Form(s)
Witness Briefs
Police Incident Reports, and, Other Agency Reports

If the AUSA determines federal prosecution is warranted the case, the case would be heard by a Grand Jury. Once the Grand Jury returns an indictment, an arrest warrant or summons would be issued for the suspect and served by BIA special agents. At this point in the investigation, the suspect would have been brought before a Federal magistrate to enter a plea to the charge. The magistrate would set conditions of release, if any, and a court date would be set. If the AUSA determines federal prosecution is not warranted, then the case may be referred for possible prosecution in the tribal or state court if such jurisdiction exists in either forum.

BIA Collaboration with US Attorney, Federal or Tribal Investigators, and Victims

Under the best circumstances, the collaboration and constant communication among law enforcement officials and the AUSAs does exist. Throughout the investigation witnesses are

questioned and the interviews and forensic information are reviewed and analyzed. There is and should continue to be an ongoing dialogue, assessments, and investigation strategy between law enforcement and Federal prosecutors. In Federal cases, victims are often eligible for services from the victim/witnesses offices of the FBI and U.S. Attorneys during the investigation and prosecution phases. The final determination to prosecute, plea, decline, or defer to local prosecution is the decision of the AUSA.

Mr. Chairman and members of the Committee, I thank you for providing the Department of Interior's Bureau of Indian Affairs the opportunity to comment on the aspects that surround declination reports issued by the Unites States Attorneys from the DOJ in perspective of law enforcement provided by the BIA and Tribal Police in Indian Country. We will continue to work closely with the Committee and your staff, tribal leaders, and our Federal partners. The Bureau of Indian Affairs will be happy to answer any further questions you may have.

The CHAIRMAN. Mr. Ragsdale, thank you very much.

The point is, you don't know and we don't know what those declination numbers mean. That is the problem.

Mr. Wrigley, I indicated when I started that we have some evidence, and this is not to tarnish all U.S. Attorneys because we have a lot of great U.S. Attorneys across the country, but when Monica Goodling comes to testify before the Congress and she says that one U.S. Attorney would have been fired had he not resigned because of a preoccupation with Indian Affairs issues. Another sitting U.S. Attorney says one criteria that is never on my list as a U.S. Attorney to the Justice Department is Indian Country cases. Another U.S. Attorney, who has since retired, said she received little support from Justice; people thought it was too much of my time being spent on too small a population.

So that is the reason we are concerned. We know there is a string of evidence here that at least in some cases a U.S. Attorney's office was not encouraged to, and perhaps in some cases discouraged, to pursue those kinds of cases. But because we know almost nothing about this, I went to the Syracuse University website and pulled down what they have. They are the only ones that have any information because we have not been allowed to get the information from Justice. Justice has said we collect it, but we won't give it to you.

So Syracuse University filed a FOIA, and so I went to North Dakota. For example, on page one, the first six cases, all aggravated sexual assault or sexual abuse or sexual contact, perhaps rape, perhaps sexual assault against a child or a woman. And this one, two, three, four, five, six—they all say declined. They all say weak or insufficient admissible evidence—all of them, just the first six cases. I don't have the foggiest idea what that means. Does it mean, for example, that the BIA, who investigated the report of a crime—serious crime, sexual assault is a serious crime—that the BIA didn't do the job to put the information together so that you could prosecute? Maybe that is the case. I am not talking about you now. I am just talking about whatever U.S. Attorney's office.

Maybe that is the case. Maybe it is the case that they put together the case and it was considered a lower priority. Maybe that is the case. I don't have the foggiest idea. The only information we have is to go to a university website and pull down information that Justice has in its possession, but will not share with us.

You have aid today, and I think General Mukasey said to me, well, we are worried that someone would disclose information. We are not asking for information about victims, about names. We are not asking for information about circumstances that would prejudice a case. That is not what we are asking for. What we are trying to do is understand what on earth is happening.

So again, I guess the question is, if we are not asking for anything that would undermine an investigation or harm witnesses, as you have implied in your testimony, why would the Department not want to not only provide us the information, but provide a substantial amount of explanation of the information so that we all understand the same thing?

Mr. WRIGLEY. Thank you, Senator. I would first point out that it has not been my experience at all that the Department is not supportive of our Indian Country efforts.

The CHAIRMAN. I understand that.

Mr. WRIGLEY. In fact, in my seven-years quite separate from that, we have had a great deal of support. In our district, as you know, in any given year 25 percent of our caseload comes from Indian Country cases.

The last issue that you talked about though, Senator, when you mention that the information that you do not want, it is the information that you do not want that is the basis of a declination. By that, I mean every case, and I mentioned it in my testimony and in my written testimony as well, every case where here is a declination might have a very, very different reason. I know the public perception because I end up talking to people who read those same articles. I know the public perception would be, well, it must be indifference or lack of resources that would lead to those declinations. As I have mentioned here today, there are a variety of reasons that lead to those declinations.

The Department, like most government entities, puts out a lot of information, but the information that we are reluctant to put out—speaking very generally and trodding gentle ground, of course, speaking on behalf of a large organization—but we recognize this would be misleading. Well, people say why do you have the information, then, if it could be misleading? Well, it is useful to use as an internal management mechanism. It is useful for us to know because I am familiar with the individual cases that get declined. I am familiar with the rationale that they got declined for a lack of evidence, or was there an investigative problem, as you point out, or was it just a false allegation of some kind.

The CHAIRMAN. Why would it mislead us to try to understand what the purpose of the declinations were? What if Mr. Ragsdale's investigators investigating six people who alleged sexual assault has been committed against them, what if Mr. Ragsdale's investigators are insufficiently trained and have presented six successive cases of sexual assault to your office or to another office, and they simply can't be prosecuted because they just weren't good? Perhaps the assault happened, but the investigation was flawed and didn't give you the information with which to prosecute. Shouldn't Mr. Ragsdale know that? Shouldn't we know that? Because what that would suggest is substantial law enforcement additional training is

needed, perhaps additional personnel. Wouldn't that be information that would be useful not just to you, but also to us?

Mr. WRIGLEY. Well, Senator, the reasons that you spell out, if we were to provide that level of detail, we would get into the information oftentimes stuff that we are not allowed to provide by law; information that we cannot provide out of privacy concerns for individuals on the reservations or witnesses; concerns about public safety of witnesses or the alleged victim in a particular case. And that would be the only meaningful information to assess why the declination took place.

So the catch–22 is, the only information that we could provide to you would be that there was a declination, and then that would come up as a declination statistic. But when you ask for the additional—I am sorry, Senator.

The CHAIRMAN. Well, that is not quite the case. Let me ask it in a different way. Have you, for example, in your district and perhaps all other districts, you have six cases of alleged sexual assault. Have you evaluated and catalogued for your own use what has occurred her that persuaded you not to prosecute? If so, was that valuable to you? If so, would it be valuable to us as decision-makers about resources?

Mr. WRIGLEY. That is the last question that I would go to. The issue of resources is never a basis for a declination of a case in North Dakota, but violent Indian crime cases, we never decline any cases for resources. I can tell you that statistic because it is zero. We never decline cases in North Dakota in Indian Country because of resources.

The CHAIRMAN. But the first question was have you evaluated the broad inventory of declinations to evaluate what you can learn from those declinations? And have you shared that with, for example, the BIA? You obviously will not share it with us at this point under the order of General Mukasey, but have you done that kind of evaluation? And have most U.S. Attorneys done it?

Mr. WRIGLEY. Well, Senator, I can speak for myself on that issue. The issue of declinations is something that happens week-in and week-out, because as you know we have hundreds of case referrals every year. Hundreds of cases come in, and any case that comes in, and my office is not so big—I have 17 Assistant U.S. Attorneys, 13 of whom are working on Indian Country cases. So in one form or another, they are working on criminal matters.

And so I am in real-time discussing matters as they go forward, so I would hear if there is an investigative problem, and from time to time, you know, we may take issue with an individual investigator on a particular case, and most often that is something where we say we need additional information. Most agents will then turn around and go and work on the additional information for you.

If it becomes systemic with one entity or another, whether it is—and I don't want to mention any because it sounds like I am slandering them. I am not. If it is a particular agency where I feel now I need to go above that agent, and I talk to their supervisor or I go up to the SAC level beyond that—those discussions take place. And understanding that, and I would like to point out, I think we are conscientious to the point where we are deeply concerned if ever we had an emerging trend that they are just not investigating

crime, they are showing indifference towards Indian Country or anything along those lines, they wouldn't last a week, much less a month or something else.

Our obligation is strong. My experience in the seven years that I have been there as U.S. Attorney has been that that commitment is very wide in the Department among the U.S. Attorneys.

The CHAIRMAN. Except that you have heard my description of what we have had testified to here in the Congress from Monica Goodling, from the previous U.S. Attorney in Minnesota, and elsewhere about that commitment. So I mean, I understand your point about your experience, but there is plenty of reason, it seems to me, publicly to question what happened. This isn't under Mr. Mukasey's stewardship. He has not been there a very long period of time. I had that discussion with him the other day. My hope is that we will have some cooperation from him.

I am going to make one other quick observation to Mr. Ragsdale. Mr. Ragsdale, you and I have talked about this. You have indicated you are understaffed. We know that. I mean, we appreciate that you have put some people in Standing Rock Reservation, where they have five times the rate of violence of the national rate of violence. My understanding is on the Spirit Lake Reservation, it is about seven times the rate of violence compared to national rates of violence and violent crime.

You are dramatically understaffed in order to do what the Congress has promised by treaty and by trust to do. You can come here forever. We appreciate very much your work and your testimony, but ultimately we have to find the additional resources and the training necessary to make this system work.

I am going to call on my colleagues, and then I will have another round.

Senator Murkowski?

Senator MURKOWSKI. Thank you, Mr. Chairman.

Mr. Wrigley, I guess I am still not clear. You have the information regarding the declinations. You say that you use it for internal management and that you are able to learn from that. But I will express the same concerns that the Chairman has, that if in fact there is something in another agency, whether it is BIA or wherever, that information needs to be conveyed that there is an inadequacy or a lack of accountability or lack of training or what have you. Internal management within your department is fine, but if there isn't some way to then help another agency because of the information that you have, what good is the collection of the information that you are gathering?

Mr. WRIGLEY. Thank you, Senator. Again, I don't think that I was very clear in my answer. The information is useful to us because of course we are charged with the responsibility of having that information. The information flows into us. We have the security clearances. We have the case management responsibilities as to the facts and the allegations contained in the individual case file.

Senator MURKOWSKI. They are only as good as what you may have received in the collection of information from law enforcement from the BIA. Correct?

Mr. WRIGLEY. That is correct. As you point out, if we had an issue that developed on a particular case or in a number of cases or they are trending, we had an issue, a problem with the investigative work of BIA or anyone else, we would certainly be addressing it head-on with that individual investigator.

Senator MURKOWSKI. How would you convey that to the agency?

Mr. WRIGLEY. Mr. Ragsdale wants to answer this, too, but if I just could respond, Senator. You have to understand, my individual Assistant U.S. Attorneys are very conscientiously working on individual case allegations that come in. In working with an agent, if they feel that there has been substandard work of some kind or something has been overlooked in their investigation, they convey that back to the agent and the work gets completed.

Senator MURKOWSKI. But that is the particular investigation that they are looking at and working with another agent at BIA. What if you have—everybody has their work order in front of them. You might not know what is happening two cubicles down, and you may have a trend here that you all are aware of, but that the agency itself, that information is not communicated. Is there a way to communicate that, that we have a problem here?

Mr. WRIGLEY. As for resources within the Department, there is a way. I mean, there is a process by which——

Senator MURKOWSKI. Not the resources, the information that you have, the information that you have learned that could be used to help, whether it is with training or just accountability procedures. Is there some way to convey that?

Mr. WRIGLEY. Well, sure, within the Department, as I say——

Senator MURKOWSKI. Within the Department is fine, but we are not talking about—if you guys were the ones that were handling it exclusively, then that is fine. But you are not. You have other agencies, as we know, and this is part of our problem here. How do you talk between the agencies?

Mr. WRIGLEY. Well, we talk in terms of trends in cases. And we talk about individual cases, and we talk about if there are resource needs. As Mr. Ragsdale pointed out, if there is an issue where I feel that we have not gotten referrals from one reservation for a time that I am starting to question that and wonder about it, that is communicated and we try to get to the bottom of it, and we do. I mean, we address those problems.

It is done in real time and it is done consistently and in an ongoing fashion. My point about the declinations is again the information, the only way to explain an individual declination or even the statistic overall, you have to break it down by case. And if you break it down by case, you get down to the information that we are sometimes not by law allowed to share, and sometimes it is unwise to share because it would violate the essence of an ongoing investigation. That is common. And also, it might violate the privacy interests. There is a lot of medical information contained in that information, especially involving sexual assault cases. So it goes into that.

The reason behind the individual declination, which is the only way to give meaning to a declination, that information is what is problematic in sharing outside of the law enforcement circle.

Senator MURKOWSKI. Two things that I want to ask, and my time is up, but I need the answers to these two questions. On the second panel there is a gentleman who I guess is proposing that in our legislation, the Tribal Law and Order Act, that the information be considered confidential. If it was strictly confidential with penalties imposed by law, is this going to help?

The second question that I would like the answer to, you stated in your opening remarks that these statistics, these declination statistics are not helpful; that they are not accurate and publication of them would not be particularly helpful. I am assuming that you recognize, though, that we are not able to prosecute as many of the cases that come from Indian Country that we would like; that there are issues there. We can dispute whether or not it is a 58 percent declination rate or whether it is a 63 percent, but I am assuming you would agree that we need to do better.

The question then is, if you don't think that publication of the declination reports is going to be helpful, if you say that we can't get around the confidentiality, what do you propose as a positive solution to this Committee and to the Congress as to how we do a better job? Unless you say that we are doing a fine job and we don't need to improve, what is the solution?

Mr. WRIGLEY. Well, with due respect, Senator, Senator Dorgan pointed out it might be uncomfortable to come in sometimes and testify as a U.S. Attorney. I understand I am not going to be telling anybody whether they are doing a good job. I understand the importance of this hearing.

I do want to point out, though, I want to go back to a point that you made about me accepting that there are more cases than we can prosecute and more than we can do. I will say again to the Committee, and I have gone back with my individual Assistant U.S. Attorneys to confirm this at the ground level in my office, we do not decline cases because of a lack of resources in North Dakota on Indian Country matters. We don't. We don't have thresholds.

Senator MURKOWSKI. What can you do to improve?

Mr. WRIGLEY. Okay. What can we do to improve the statistics? Or what can we do to improve the reporting to the Senate?

Senator MURKOWSKI. What can you do to improve the situation so that the people that are the victims of a sexual assault, domestic violence and all kinds of heinous acts know that those that have violated them will be prosecuted to the full extent of the law?

Mr. WRIGLEY. Senator, I am actually glad to get that question because I can tell you again, tying back into what I just said, in North Dakota, I do not aspire to drop that declination rate because our declination rate does not contain any percent of cases that are declined for resources. It is declinations based on no jurisdiction——

Senator MURKOWSKI. We are not talking about resources. If you haven't been able to prosecute this because, you know, whether it was a chain of custody problem or whether it was lack of training—we don't know what it is. You just keep saying that you don't decline because of lack of resources, but there are clearly other reasons that you would decline to take the case.

Mr. WRIGLEY. The vast majority, and I am talking the vast majority is because there is a lack of jurisdiction or because there was

no Federal crime. I know that we share the understanding and respect for the idea that we are duty bound not to present cases to the grand jury or proceed on cases where we don't have jurisdiction or we don't think we have an evidentiary hope of getting there. We don't think there is a Federal crime.

And so when the vast majority of declinations are based on those reasons, there would be nothing to improve. The issue that you raise, though, is a good one. It is something that we work on all the time on an individual case. If there is, as you mentioned, a chain of custody matter, I mentioned to someone the other day. I was a State prosecutor. I was away from my State for about six years. I was in the Philadelphia DA's office. I had a different experience there in a lot of regards from being in North Dakota. I don't recall a single case in my seven years as U.S. Attorney where there was substantial evidence suppressed under the Fourth Amendment—extremely professional law enforcement; not a single case that I can remember substantial evidence being thrown out of court under the Fourth Amendment.

I think that addresses the issue that you raise. It is not to say that issues don't come up in cases, and when they do, my assistants deal with them very directly with the law enforcement agencies that they are dealing with. There would be no way to catalogue, and we don't catalogue in a year, and I think this addresses your question as well, the number of times someone has said that they were upset with an investigation that was done by a particular agency or another. But I hear about it when there are substantial problems with an individual investigator of some kind, or if people feel, you know, fill in the blanks—agency X is not living up to their obligation. I hear about that.

The CHAIRMAN. We want to move on.

Senator Tester?

Senator TESTER. Thank you, Mr. Chairman.

First of all, you have a difficult job. We all recognize that and appreciate the job you do. I just want to step back for just a second. Do you think that there is a problem with the number of cases in your jurisdiction that are declined to be worked on?

Mr. WRIGLEY. Again, Senator, the reasons for the declinations——

Senator TESTER. Or just your perspective? I mean, you don't have to justify it, but if you don't think there is a problem, no; if you think there is a problem, yes.

Mr. WRIGLEY. It is an issue, and I see these public reports, you know, I get concerned about, too. I want to kind of ferret out what, if any, impact that is having in my particular jurisdiction. So concerned, yes, of course. I look at those numbers and I need to make sure that we are doing the job that we need to be doing here. I have made those inquiries.

Senator TESTER. And from your previous answers to Senator Murkowski's questions, you seem to indicate that most of those reasons for declination were due to jurisdiction. Is that correct?

Mr. WRIGLEY. Jurisdiction and lack of evidence, the most common being someone brings an assault case in and we don't have jurisdiction over it unless it is an assault resulting in serious bodily

injury. If there is no serious bodily injury, that is far and away the vast majority of those kinds of declinations I am discussing.

Senator TESTER. Okay. How about on-reservation versus off-reservation? You said that you had worked in a previous job before—I assume that wasn't in Indian Country.

Mr. WRIGLEY. No, it was in Philadelphia, the DA's office.

Senator TESTER. Right. So I mean, that is a whole different world. But I mean, did you see the same kind of problems there as far as cases that were not pursued?

Mr. WRIGLEY. Well, to the first part of your question, I have said often that the prosecution of Indian Country crime is very similar to the prosecution of crime in some of our more dangerous urban centers.

Senator TESTER. Okay. All right. How about from a standpoint of what is pursued and what isn't? Is that very similar, too?

Mr. WRIGLEY. Well, again, my experience prosecuting crimes in Indian Country and having people working on my behalf doing that is that the law enforcement has been very professional in North Dakota at the Federal, State and local levels. They work together quite well, so it is a different experience in that regard.

Senator TESTER. Okay, so I guess what I am trying to figure out is, is it comparable to what is happening off the reservation to what is happening on the reservation as far as crimes and how they are pursued and how many of them are turned away because of lack of evidence or jurisdictional problems?

Mr. WRIGLEY. Again comparing Philadelphia and Indian Country? Or just our other——

Senator TESTER. Any way you want to go—just off-reservation, on-reservation. You worked in Philly, but if you can compare it to Fargo, that is fine.

Mr. WRIGLEY. Let's compare it to our other cases in North Dakota, because it raises another issue. The vast majority of our violent crime that we prosecute federally in North Dakota is off of the reservation and is Indian Country and it is reactive work. So you have the problems of evidence-gathering. You have the issues that come up with witnesses in every violent crime case, whether working in an urban center or somewhere else.

Compared to a lot of the other cases that we do in North Dakota where they are proactive investigations in a white collar case, proactive investigations in a drug trafficking organization of some kind, so you have different evidentiary issues because you are building into the investigation, as opposed to reacting to it, and maybe the elements are playing some role. I talked about that in my written testimony a bit. So there are those differences.

Senator TESTER. Okay. I guess what I kind of envisioned coming into this hearing and kind of where we started at are kind of two different places. I envisioned coming into this hearing to try to figure out ways that we could offer some help in the legislative branch of things to the judicial branch to be able to make you as effective as possible. Then the conversation got around to we couldn't get the information and so we don't know how to compare apples with apples. We don't know how to help you. We don't know if it is a jurisdictional issue or if it is an issue with police collection of data or what the heck it is.

What would you do if you were in my shoes? How would you find out the information that you need? I don't think we would be having this hearing if there wasn't at least a perceived problem. I think there is a problem. What would you do? I mean, how do we help? How do we offer a level of accountability to folks in Indian Country that come up to me and say, my daughter was raped and nothing was done about it?

Mr. WRIGLEY. Well, Senator, I think one of the first gauges that has to be viewed is what is the commitment of individual U.S. Attorneys to Indian Country prosecution? What is the commitment of the Department? I am here to say that the commitment is quite strong. I have been there seven years, and I won't go through all of that because I know that——

Senator TESTER. I think you do a great job. How do we get the information to help figure out what the problem is so we can solve it?

Mr. WRIGLEY. As I said, when the commitment is strong there, I guess I have to look back on my years of experience again here and say I do not have an issue with resources. When we have had questions of resources, I have to say I think that the Congress has been supportive of that because issues—let's say it is Internet luring of crimes or child pornography—those issues surface as well.

Where that need develops, it does get communicated by the Department. I think the Congress has been very receptive. I am going to get in trouble when I get back and say, well, they forgot to give us $8 for that, but—you know what I am saying.

Senator TESTER. I am not saying it is resources. It may not be your resources. It may be Patrick Ragsdale's resources. How do we fix the problem if we don't have the information? And how do we get the information? It just seems to me—I am not an attorney—but it seems to me if we wanted to fix this problem, we could fix this problem, if it is a problem, but we can't tell if it is a problem because we can't get the information to determine if it is a problem.

Mr. WRIGLEY. Senator, as I have said, I think, and you know, I am sitting here being forthright with you about my issues. If the issue is resources, as I say, when people read those statistics or when they come to me after some member of my family or someone else has read those stories, they want to know what is wrong. Is it indifference, or do you guys just don't have enough people to prosecute the cases, which is a rational inquiry. My response is, we are very interested and we have the resources to prosecute every case, including all the additional cases that came off this BIA action down in Standing Rock this year. We were able to handle those cases and the surge of cases coming from there.

So again, that goes to the issue of what is—when you say there is a problem. Again, there is no problem when a significant number of the declinations are based on jurisdictional issues. That is not a problem. That is a truism. It is not a problem to say we couldn't prosecute the case because we didn't have evidence that there was serious bodily injury.

Now, the smidgen of cases that might come in there—I am talking just about North Dakota—that might come in there where I say, you know, the real problem is we didn't have sufficient train-

ing for the investigators that responded to the scene that day from the tribe, or from BIA, or from the FBI or whomever. When that problem arises, whenever it does, in real time U.S. Attorneys and Assistant U.S. Attorneys before us when they have the case, they address those issues with the FBI and with that agency. They address it for that case. They address it for the others. They are very conscientious about the individual cases that they are working on.

That is why, you know, I go to Indian Country as well. We go out to visit and I hear from folks who will say, you know, the same kind of things you mentioned, Senator, about, well, "why didn't this case get pursued?" And just as often, "why did this case get pursued?" "I heard that that person recanted." You know, we hear it both ways and the reality is we deal with individual cases. I don't know of a meaningful way, Senator, to deal with these things. They are so factually dependent. They are dependent upon who was the investigator. They are dependent upon who responded to that scene. And they are so dependent upon the facts of a particular case, you can't often extrapolate much out of that.

I can guarantee the Senate that if in North Dakota—and I trust my colleagues to be doing the same—if there evolved a trend where we were seeing indifference by investigators or lack of training by investigators, we are professional and we are conscientious about it, and our assistants are as well. The Department is committed to Indian Country prosecutions. And when they do develop in places or for individual investigators, they are addressed head-on. I don't know how to discuss this in the abstract.

The CHAIRMAN. Mr. Wrigley, if I might just ask, one of the sitting U.S. Attorneys was quoted in a recent report saying, I know the performance of my office will be compared to other U.S. Attorneys' offices. My gun cases have to compete. My white collar cases have to compete. One criteria that has never been on that list is Indian Country cases.

Is that your experience?

Mr. WRIGLEY. That is not my experience because it is such an overall part of our office's work.

The CHAIRMAN. Are you done?

Senator TESTER. No, ultimately there is not a problem, there is not a problem that I have seen since I have been that can't be solved if people work together and branches of government work together. I can tell you, if it is a jurisdictional issue, then we need to figure out what that issue is and I am sure it is different in every reservation there is, but we need to figure out ways we can overcome the jurisdictional issue. If it is an issue about gathering evidence, then we need to figure out how to do it.

I can tell you that the violent crimes I hear about where I live, and I live about 40 miles, 35 miles from a reservation, the violent crimes in our area that I hear about most often happen on that reservation. And that is one of the reasons why we don't have economic development on reservations like we should have; that is one of the reasons why businesses don't move up there; that is one of the reasons why the schools don't do as well; that is one of the reasons why our kids come out and the unemployment rate is higher.

I mean, the list goes on and on and on. Unless we figure out a way to find out how we are going to solve the problems, whatever

those problems might be, then it is never going to get any better. And quite honestly, that is unacceptable to me. It has got to get better.

Quite frankly, I want Native Americans to be able to determine their own destiny and be self-sufficient. I don't want to have the Federal Government have to cut them a check because I don't think they want it to begin with. That is all. That is where the frustration is for me. If we can't get the Department to at least come together to figure out a way we can share information to fix the problem, the problem will never be fixed. That is all.

And if there is no problem, then how come when I read the paper it appears to be a problem to me. I mean, there is something going on here that I think we need to figure out a solution for. We are not going to do it without your help.

The CHAIRMAN. Senator Tester, thank you very much.

Let me just make a point. I did when I started and I want to do it again. I know there are wonderful U.S. Attorneys' offices out there with a lot of people working very hard to do exactly the right thing. And we appreciate them. But to sit on this side of the desk and, for example, here is a story about a woman named Leslie Iron Road—this happened in South Dakota—20 years old, violently raped. It was not investigated or ever prosecuted. She indicated, her relatives indicated that while in the hospital before she died, she indicated specific names of the people that, of the gang of people that brutally raped her. And then they talked to one of the BIA investigators and he said—and again, this is a published piece, a long-published piece in June of this year—he said, you know, we knew when it came to prosecution, we all knew they only take the ones with a confession, so we are forced to triage our cases—this is from one of Patrick Ragsdale's people.

You know, I don't know where the truth lies in all of this. I know you can parse statements here and there and everywhere. All I know is this, in the U.S. Attorney's manual, there is a whole long list of reasons for declining cases, a long list: no Federal offense; lack of criminal intent; no known suspect; suspect was either a fugitive or serving a sentence or deceased or deported; weak or insufficient evidence; no rape kit; no confession—a whole series of things that represent reasons for declination.

But when I look at this data that Syracuse put out, on this list, reasons of weak or insufficient or inadmissible evidence. I mean, that is for most of it. And it raises the question, was the crime not committed? Or if the crime was committed, was the investigation flawed? Somehow, in some way, we need to be a part of evaluating—not in any way ever to prejudice a prosecution, to get the name of the victim, to get information that should be confidential—that is, and I know you have raised that and so did Attorney General Mukasey, but that is not the issue. That is well beside the point because no one is asking for that information.

But I think, Mr. Wrigley, you make a good appearance on behalf of the Attorney General. You have worked long and hard for seven years. I think you have been a really good U.S. Attorney in North Dakota. I appreciate your work, and I don't suggest that in our jurisdiction you turn down cases just for the sake of turning them down.

I do suggest this, however. We have violent crime rates in North Dakota and around the Country that are multiples of the national average. Those violent crime rates on Indian reservations demonstrate something very serious is wrong—five times at Standing Rock; seven times at Spirit Lake. Something is desperately wrong, and we need to find a way to fix it.

Part of that continuum is the investigation side. Part of that continuum is the prosecution side. Part of it is tribal courts. Part of it is detention. It is all of those things together.

All we are trying to do today is try to begin to understand on that piece that represents prosecution and declination rates that we have virtually no knowledge of at all, despite the fact that data is collected and then withheld from us.

So I appreciate your testimony. I appreciate, Mr. Ragsdale, your being here today. Senator Murkowski and I will have a conversation with the Attorney General. He wanted to go back and review this information and the reason that we had requested it. I hope that our discussion with the Attorney General will resolve the matter. If not, this Committee will take further action.

Mr. RAGSDALE. Could I?

The CHAIRMAN. Yes, Mr. Ragsdale?

Mr. RAGSDALE. Let me just say briefly that I don't have any points to gain from the DOJ, but I think the core issue with policing and prosecution in Indian Country is having an effective police department that can provide for basic peacekeeping, and to vigorously go after those people that violate the law. The problem is not with the prosecutor's unwillingness to take our cases. The problem is keeping up with the cases.

In the State of Montana, on one of your reservations, Senator, you have two FBI—we used to have, I don't know if they are still there—two FBI agents full-time on probably one of the most violent reservations in the Country. They had a caseload the last time I checked of about 50, and that is including we have our CID criminal investigators in that same office.

Now, if you have that kind of caseload to do due diligence on serious crimes, that is part of the problem. The U.S. Attorney cannot prosecute a case that just isn't there, that you have incomplete information, or you have in the scenario that we laid out—the person that was assaulted with a blunt instrument—if you find out in the investigation that there were witnesses there, but they were all drunk or under the influence or uncooperative, you can write the best investigative report in the world and refer it to the U.S. Attorney and they are not going to be able to make a case out of it. The core issue is providing effective policing up front on the reservation, and effective investigations with a caseload that professional investigators can handle.

Now, if one of my agents told a victim or a witness that the U.S. Attorney didn't take anything except for a signed confession, that is just simply not true, and that was an unprofessional thing for that agent to say. So I will look into that.

The CHAIRMAN. Senator Murkowski?

Senator MURKOWSKI. Thank you, Mr. Chairman.

I just wanted to do a quick follow-up. I probably didn't give you an opportunity, Mr. Wrigley, to answer my question about why

can't we just make the information confidential. I guess I pose this, we recognize that here in Congress, we have the authority to exercise the oversight over the executive. We deal in classified information all the time. We deal in top secret information all the time.

I guess I am just not certain why the Department of Justice would be hesitant, would be afraid to share the declination information with us, subject to whatever appropriate discharge restrictions might be in order, so that we can more effectively carry out the oversight responsibilities that we have.

You didn't answer that question about whether or not we could provide for that level of confidentiality so we can have the information that I think it is quite clear that we need.

Mr. WRIGLEY. Thank you, Senator, for giving me that opportunity again, because I have it written down here with a box next to it and it is not checked, so that means I didn't get to it, and I apologize.

The reason would be, what you point out is getting the information to you confidentially or otherwise, and again from my testimony, and just experience looking at these matters, my chief concern in looking at those is that it will be misleading to you to give you the information without providing real-time, here-is-the-case files. That is the reality of it, because every one of those declinations is going to involve a measure of the professional judgment of the assistant in dealing with the specifics of that particular case. You know, if told to do so, of course the Department could put into nice categories, here is the declination for this, this and this. And by the way, those statistics are misleading when you don't know the individual case. That is the very real concern.

The CHAIRMAN. But you have made that case over and over today. You would be surprised at how often people come to the Congress to say, you probably won't understand this information so it won't be valuable to you. You know what? I think it would be useful for that information to be available to policymakers. And frankly, I think the continuum here—Mr. Ragsdale, you and I share one common piece of information. The six cases of sexual assault—likely rape and sexual assault—all dismissed for weak or insufficient admissible evidence. The one thing that you and I share is we don't have the foggiest idea what connects these six. Is it because you have investigators out there that don't know what they are doing? Or is it because you had a bunch of folks at a party that were drunk and they were witnesses that were unreliable, as you said? The thing is, you don't know and I don't know. None of us know. So you have six declinations here with no information at all for either of us.

And with respect to the FBI, we appropriated money for FBI agents. Somehow, they didn't get out to Indian Country despite that fact that is why we appropriated the money. So there is a whole continuum of issues that we need to deal with. It is not as if there isn't knowledge by us from U.S. Attorneys, Mr. Wrigley, that there are problems in some areas. And I don't ascribe that to you, but it is not as if there is not direct testimony before the Congress that those problems exist.

So we will continue to pursue this information. You know, I think Senator Tester said it as well, and Senator Murkowski, our

interest is not in trying to skewer anybody. But the fact is, if you are not living in a circumstance where you believe that you and your family are safe because there is a violent crime wave going on in your area, that is real trouble. This Congress and this government has a responsibility to address it because of treaty and trust responsibilities.

Mr. Ragsdale, you are dramatically understaffed and you know it. You said at the last hearing something most people wouldn't say because some people have come to say that I didn't get enough money in my budget, and the next morning they were fired. You are still here. I am pleased.

[Laughter.]

Mr. RAGSDALE. I am just stubborn, sir.

The CHAIRMAN. And a bit surprised. But we have a lot of things to do, to work on together. We want U.S. Attorneys' offices to succeed. We want BIA law enforcement to succeed. Senator Tester said the U.S. Attorneys' offices, those are tough jobs and you do very important work for this Country. I don't want this hearing to tarnish the reputation of all U.S. Attorneys. That is not the case. But we want all U.S. Attorneys and their offices to make sure that they are all addressing the issue of violent crime on Indian reservations in a serious way. I believe testimony suggests that has not always been the case, and we will except your service, Mr. Wrigley.

So let me thank you for being here on the part of the Attorney General. You are a strong advocate admonishing us why we shouldn't see the information, but I think ultimately we will. I think it will help us. It will help you. It will help Mr. Ragsdale and help us write a piece of legislation that will really begin to address a serious crime problem on the reservations.

You have traveled some distance to be here. We thank you, Mr. Wrigley.

Mr. WRIGLEY. It is a pleasure. Thank you, Senator.

The CHAIRMAN. And Mr. Ragsdale, thank you again.

Mr. RAGSDALE. Thank you, Mr. Chairman.

The CHAIRMAN. We have a second panel, and if the two of you can stay for any amount of time, we would appreciate that, just to listen to the second panel: Mr. Thomas Heffelfinger, a partner of Best and Flanagan at Minneapolis, Minnesota, former U.S. Attorney; Mr. Brent Leonhard, Deputy Attorney General, Confederated Tribes of Umatilla Indian Reservation in Oregon; Ms. Janelle Doughty, Director of the Department of Justice, Southern Ute Indian Tribe in Colorado; and the Honorable Thomas Weissmuller, Board Member and Tribal Representative of the National Criminal Justice Association, and Chief Justice of the Mashantucket Pequot Tribal Nation.

I appreciate very much the four of you coming. We will include all of your statements in the record. We would ask only that you summarize your statement. Your entire statement will be made a part of the permanent record.

Mr. Heffelfinger, why don't you proceed.

**STATEMENT OF THOMAS B. HEFFELFINGER, PARTNER, BEST AND FLANAGAN, LLP**

Mr. HEFFELFINGER. Thank you, Senator Dorgan, Vice Chair Murkowski, Senator Tester, thank you very much. I appreciate the honor and opportunity to appear before you again. My name is Tom Heffelfinger, I am with the Minneapolis law form of Best and Flanagan, where among other things, I represent tribal communities.

As Senator Dorgan implied in the prior panel, I served as United States Attorney in the District of Minnesota twice, most recently from 2001 through 2006, and during that period, I was Chair of the Native American Issues Subcommittee.

Probably relevant to the discussion here today is that in my background I also spent six years as an assistant Hennepin County Attorney in Minneapolis, where I prosecuted street crimes and spent about nine months on the charging desk, where all I did is every day come in and review cases, charge them or decline them. And I am happy to share my declination experience. I also spent seven years as an Assistant U.S. Attorney.

I am going to lead off by saying I do, in all due respect to Mr. Wrigley, who is a great friend and a great U.S. Attorney, I disagree with the position of the Department of Justice and I am testifying here today in support of the declination report provision of the 2008 Act. I want to commend this Committee, quite frankly, for the Tribal Law and Order Act of 2008, and for your commitment to pursuing the issues in there. There are many, any provisions of that Act, which will enhance public safety in Indian Country.

Ultimately, I don't understand the Department's position on the declination reports. The experience of State and local prosecutors across the Nation, and this was my experience, is that declination reports are a common part of doing business. They are shared with probably the elected district attorney and they are shared with the referring police department. By doing that, the information that led to the declination is shared with people who are in a position to make change in order to avoid having those reasons that led to declination interfere with the ability to prosecute future crimes.

Also, members of the Committee, in all due respect to the Committee's need for the statistics, I understand that, and I understand it is important for your oversight and for your identification of resources. I believe that the value of declination reports to the communities in which those crimes are committed and the law enforcement agencies that refer those crimes to the United States Attorneys offices outweighs the benefit that this Committee will gain from them. Because without that information, and I will give you a very specific case example at the end of my testimony, without that information how is the community to effect change in order to enhance the safety of their own people, which in my experience, is what every tribal community places as its top priority?

Despite my general agreement with the declination report provisions in Section 102, I do have several different suggestions. Having testified before this Committee three times as a Department of Justice representative, I actually welcome today the freedom to be able to make suggestions. I need to say up front, these are my sug-

gestions, they do not reflect, obviously, the Department, nor do they reflect the positions of the tribal clients whom I represent.

First, however, the current law as you have drafted it places the burden on law enforcement agencies to report to Congress, and I believe to the tribes, when the law enforcement agencies decide not to pursue an investigation. I believe that a law enforcement agency investigating a case in Indian Country ought not to be able to decline an investigation without consulting with an Assistant U.S. Attorney on that case. In other words, it ought not be a decision made at the desk of an investigating agent, period.

There are two reasons for that. First of all, I am a strong believer that a second set of eyes and a legal analysis from an Assistant U.S. Attorney is valuable when it comes to make the decision of whether or not to investigate that case at all. Quite frankly, if one looks at the role of the FBI, they generally will not decline a white collar case without at least consulting with an Assistant U.S. Attorney before they will make that declination to investigate.

The second benefit of requiring that all decisions to not investigate go through U.S. Attorneys offices is that then the data and the declination data will be included in the data that is reported by the United States Attorneys office. As Senator Murkowski properly identified, there are a ton of agencies out there who have jurisdiction in Indian Country, and all of them have the ability to decline. By requiring that that declination data go through the U.S. Attorneys office, for all the positive reasons the declination report can provide, it will be unified.

The second suggestion, confidentiality is a legitimate concern. And I think that the Act needs to be amended to reflect that. But frankly, Section 102(d), which is the confidentiality provision, isn't strong enough, it isn't clear enough, and it could be tightened up. There are three areas of confidentiality concern that I see, most of which were mentioned by Mr. Wrigley. The first is protecting the identity of victims, clearly, and of offenders where no prosecution has been undertaken. Those people have the right to have their confidentiality preserved.

Number two, it is improtant to recognize that sometimes investigations in Indian Country are ongoing. We are seeing that increasingly as the FBI established Safe Trails task forces and gang and drug investigations are undertaken. Those cases sometimes are presented to the U.S. Attorneys office piece-meal, and if you decline one, the U.S. Attorney ought not be in a position of disclosing the existence of an ongoing investigation. It is a simple fix, but it is a fix that I think needs to be taken.

Third, it wasn't mentioned here, but it is a concern of mine, having been a U.S. Attorney responsible for protecting the United States Governmetn against claims of liability. Declination reports ought not be used as evidence upon which a claim of legal liability can be asserted against a Federal agent or a Federal prosecutor or anybody like that. Again, simple fix. That section could provide that, these reports may not be used, or the information contained therein may not be used to establish a claim of liability.

The third suggestion I make, and this is something of a fundamental change from what you have suggested. I suggest that the distribution of declination reports be limited to the tribal liaisons

in each U.S. Attorneys office and to either the Office of Tribal Justice or the Office of Indian Country Crime, if it is fact established. What I am suggesting here is that the reports not be routed direcly to the tribes. However, I say that recognizing that this Committee in the proposed 2008 Act has sigificantly enhanced and clarified the role of the tribal liaisons, including in there a requirement that the tribal liaisons coordinate and communicate dirctly with tribal law enforcement officals, including tribal prosecutors, and that the performance of those tribal liaisons be evaluated based on their success in doing that kind of communication.

The most effective way for a case to be prosecuted at the tribal level when there is confirmed jurisdiction, or even at the State level where there may be State jursidictino, is to put the tribal liaison in a position to effectively communicate that information to the tribal prosecutor and tribal law enforcmeent official and the like. Similarly, that will enahce the ability to protect confidentiality.

Finally, by putting the data through either OTJ or the new Office of Indian Country Crime, there is a second route for providing that information to tribal governments.

The CHAIRMAN. Mr. Heffelfinger, I must ask you to summarize.

Mr. HEFFELFINGER. Thank you.

I will not repeat what has already been said. I do obviously have strong feelings about the competence and credibility of the Assistant U.S. Attorneys and the agents who work in Indian Country. As I stated in the testimony, I am concerned that, as Senator Dorgan cited with the report, that more often than not these cases get declined for weak or insufficient evidence. One has to go behind that. In my written testimony, I cite some reasons for that.

But let me address one which I think is relevant. I would agree with Mr. Wrigley, there is not a United States Attorney's office in the Nation, including North Dakota and Minnesota, that would ever decline an Indian Country crime simply because that office or the U.S. or the FBI or BIA or whomever lacks the resources to do the investigation.

However, it is my experience that the lack of resources does lead to weak and insufficient evidence. It is in the inability to recover evidence from the work that was not done between the time of the crime and the time of the referral. And frequently, that work isn't attributable to the law enforcement officer, but rather to the support resources that are not available in Indian Country. Let me give you examples: child advocacy centers, domestic violence shelters, crime laboratories, safe and sane trained nurses capable of doing sexual assault testing.

Let me make a suggestion to you in that regard. I think that in the 2008 Act you have taken a great step forward in providing for State and local cooperation at the law enforcement level. I strongly support that, which I believe is in chapter 202. I would suggest, however, that 202 be amended to provide for grants for organizations that provide services that are not directly law enforcement, but provide services upon which law enforcement officers rely.

I am thinking now of sexual advocacy centers. I will finish with how this can work and how it does work. In Northern Minnesota, we faced this problem back in 2004 and 2005 with child abuse cases and the inability to find a child abuse advocacy center who

could evaluate these children. We took our declination data and took it to the tribal council directly. The Red Lake Tribal Council agreed with us that we needed to establish something like this that would serve for the benefit of Red Lake and White Earth and Leech Lake, as well as the non-Indian communities around it. And because of that, we were able to develop an advocacy center that now provides those services.

Thank you very much, Senators. I will stand for questions.

[The prepared statement of Mr. Heffelfinger follows:]

PREPARED STATEMENT OF THOMAS B. HEFFELFINGER, PARTNER, BEST AND FLANAGAN, LLP

Mr. Chairman and Members of the Committee, my name is Thomas B. Heffelfinger and I am a partner with the Minneapolis law firm of Best & Flanagan LLP where, among other things, I represent tribal communities. From 2001 to March 2006, I was the United States Attorney for the District of Minnesota and also the Chair of the Department's Native American Issues Subcommittee ("NAIS"). In that capacity, I had the honor of testifying before this Committee three times, twice on issues related to criminal jurisdiction in Indian Country. I also have had the opportunity to testify once before this Committee as a private citizen regarding the same issue.

I appear before the Committee today to comment upon Section 102 of Senate File 3320 (the Tribal Law and Order Act of 2008), which addresses the topic of declination reports from federal law enforcement officers and United States Attorneys' Offices. Although my experience as a federal prosecutor and as a representative of tribal governments provides the experiential basis for my testimony, I am appearing today as a private citizen and not as a representative of either the Department of Justice or a tribal government.

I commend the Committee for the proposals contained in the Tribal Law and Order Act of 2008. There are many provisions of the proposed legislation which will significantly enhance public safety in Indian Country, both in the short term and in the long term. I support the provisions contained in Section 102 to require declination reports from federal law enforcement and from the offices of the United States Attorneys. The experience of state and local prosecutors has shown that declination reports can assist law enforcement, prosecutors and governmental officials in properly training their employees, identifying resources necessary to investigate alleged criminal misconduct and refining their procedures for investigating and prosecuting crimes. There is no reason why federal law enforcement officials and prosecutors considering prosecution of crimes in Indian Country should not issue declination reports and realize the benefits of such reports.

Despite my general agreement with the need for declination reports, I suggest changes to Section 102 in order to address not only the concerns of federal prosecutors and law enforcement officers, but also to enhance the effectiveness of such declination reports. First, I suggest that any decision by a federal law enforcement agency not to pursue an investigation in Indian Country shall only be made following consultation with an appropriate Assistant United States Attorney. This would give the law enforcement officer the benefit of the legal analysis of the merits of an investigation. This consultation would also result in such decisions not to investigate being included in declination reports which would be submitted by United States Attorneys' Offices.

Second, because declination reports would contain the names of victims and/or suspects in matters that will not be prosecuted, steps must be undertaken to protect the privacy of those individuals. Similarly, declination reports may contain information regarding the performance of law enforcement officers during an investigation which could be used against those officers as a basis for establishing or supporting a claim for civil liability. Therefore, I suggest that Section 102 be amended to require that all such reports be considered confidential. Similarly, all such reports and the information contained therein should not be admissible in any action to establish civil liability against any federal official.

Third, I suggest that the distribution of declination reports be limited to the tribal liaison in each United States Attorney's Office and to the Office of Tribal Justice or the new Office of Indian Country Crime. This distribution will allow the tribal liaison to effectively communicate to the tribal government the reason for a declination. It will also protect the privacy of those involved. The best method for coordinating with tribal prosecutors in cases in which the tribe has concurrent jurisdiction is to rely upon the tribal liaison to personally refer matters which have been declined for federal prosecution to the tribal prosecutor, as anticipated in Section 103 of the Tribal Law and Order Act of 2008. Providing the information to the Office of Tribal Justice or the Office of Indian Country Crime will allow Main Justice to anonymously collect statistics on declinations and the reasons for such declinations. Such statistics can be shared with tribes on a tribe-by-tribe basis and would also be available to Congress.

Although I support the requirement for declination reports, I must caution that such reports are not a panacea for the public safety needs of Indian Country. I am concerned that the requirement for declination reports could create the incorrect implication that declinations in United States Attorneys' Offices are due to a lack of commitment and effort by federal law enforcement and prosecutors working in Indian Country. In reality, federal agents and prosecutors who address crimes in Indian Country are among the most dedicated and hard-working prosecutors and agents in the federal law enforcement system. These men and women work under difficult conditions with extremely large case loads and deal with some of the most emotionally-charged cases that federal prosecutors and agents can face. It is my experience, based upon approximately 13 years as a federal prosecutor, that cases are not declined because the agents and the Assistant United States Attorneys lack commitment to justice in Indian Country.

Declination reports themselves generally do not address the question of why the case was declined for prosecution. Most frequently, cases are declined for prosecution at the state, federal and local level because there is insufficient evidence to establish a violation of law beyond a reasonable doubt. The reason why there is insufficient evidence to prosecute an offense in Indian Country is complicated and may not be reflected in declination reports. At least the following reasons may exist for a declination:

(1) There may simply be insufficient direct and/or circumstantial evidence to establish a violation beyond a reasonable doubt;

(2) The insufficient evidence may arise from jurisdictional barriers. Whenever a crime occurs in Indian Country, resolving the jurisdictional issues may require an initial jurisdictional investigation and may result in a case not being prosecutable under federal law. Whenever a violent crime occurs in Indian Country, in order to determine prosecution, prosecutors are forced to make a determination concerning who has jurisdiction by answering four questions: (1) whether the offense occurred within "Indian Country;" (2) whether the suspect is an Indian or a non-Indian; (3) whether the victim is an Indian or a non-Indian; and (4) what the nature of the offense is. Depending on the answers to these questions, an offense may end up being prosecuted in tribal court, federal court, state court or not at all;

(3) Delay is, unfortunately, a frequent factor in Indian Country investigations and prosecutions. This delay may be attributable to jurisdictional considerations, lack of resources, remote location or difficulties in obtaining witnesses or witness cooperation. In any event, delay can make a case incapable of being prosecuted due to loss of evidence, loss of witnesses or deteriorating memories of those witnesses, all of which translate into insufficient evidence;

(4) Prosecutions may be declined due to inadequate skills or violations of policies or legal standards by law enforcement or support services agents, such as medical personnel. These failures are most often

attributable to a lack of effective training. The net effect of such lack of training is inadequate or inadmissible evidence to pursue prosecution; and

(5) Lack of resources can lead directly to declination of cases. This lack of resources relates not only to the lack of police resources, but also to support services, such as crime laboratories, nurses trained to conduct sexual assault examinations and Child Abuse Centers. This lack of resources, both law enforcement officers and support personnel, is well known in Indian Country and contributes directly to the declination of prosecutors. I strongly urge Congress to consider new and innovative ways to efficiently provide these resources in Indian Country. For example, much of rural America suffers from a lack of law enforcement resources similar to that being experienced in Indian Country. Cooperative law enforcement services, such as Child Advocacy Centers, drug task forces and crime labs, which are established and funded to provide services both in tribal communities and in the surrounding non-tribal counties, can effectively enhance law enforcement in both Indian Country and non-Indian Country. Current cooperative efforts, such as the FBI's Safe Trails Task Forces and the Family Advocacy Center of Northern Minnesota, have proven the effectiveness of this strategy.

Declination reports can enhance the sharing of information between federal law enforcement, tribal communities and Congress. As such, they are a valuable part of a multi-faceted approach to improving public safety in Indian Country. Such reports will not, however, reduce the need to focus on the basic reasons for why prosecutions in Indian Country are declined.

The CHAIRMAN. Mr. Heffelfinger, thank you very much.

Next, we will hear from Mr. Brent Leonhard, the Deputy Attorney General of the Confederated Tribes of the Umatilla Indian Reservation in Oregon.

Mr. Leonhard?

**STATEMENT OF M. BRENT LEONHARD, DEPUTY ATTORNEY GENERAL, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION**

Mr. LEONHARD. Thank you, Chairman Dorgan, Vice Chairman Murkowski, members of the Committee. I want to thank you for allowing me to testify this morning.

This is a very important bill. The 2008 Law and Order Act is probably one of the most important Indian Country crime bills in the last 30 or 40 years, primarily because it gets at systemic fixes to a completely broken system.

I appreciate that, and I also want to thank Senator Smith from Oregon for cosponsoring the bill. This is a bill that needs and deserves broad bipartisan support as it is written.

There are two areas I want to touch on in my oral testimony. The first is the need to amend the bill to expand tribal sentencing jurisdiction actually up to five years, and I will explain that; and the second is Federal declinations.

As it stands, the bill expands tribal sentencing jurisdiction from one to three years, which is a great thing. It is a wonderful thing. I like that idea. The reason for it was because the typical Federal prosecution is an aggravated assault. The average sentence for that is 34 months. So there is a gap between one year and three years. To fill that gap, the bill gives tribal courts the ability to sentence up to three years. It fills that gap. That is great.

However, it overlooks one thing. When you have a defendant who is put into the Bureau of Prisons system, the Bureau of Prisons is going to credit them good time, and sometimes that can be quite substantial. So instead of three years, you have actually got that gap opening up. It hasn't been closed. And I think more importantly, it is important to look at how States treat their felonies. I have drafted a report with the help of Cisco Minthorn which I think is in the Senate record, which looks at how all 50 States deal with their felonies.

One thing that is pointed out there is of the States that define felonies, 64 percent of them define their lowest-level felony as having a maximum sentence of five years. So a State's lowest-level felony is five years. You have tribes that are dealing with murder, intentional homicide, rape, child molestation—extremely serious offenses. Tribes ought to be afforded the respect to be able to treat their most serious offenses the way States treat their least serious felonies, and that would close the gap.

Moving on to declinations. We all know that the declination rates are exceedingly high. We don't all know why that is, and I think there is probably a lot of finger-pointing and a lot of disagreement. I have my personal opinions which don't jibe with what you have heard today. But this bill is critically important, section 102, to deal with that issue by requiring the reporting of declinations. It does so in two ways, or for two reasons. It seeks to, one, obtain accurate information for declination rates and the reasons for them.

That is critical. If you have a system that is broken, you can't fix it without knowing why it is broke. We have to have that data, and I am disturbed to hear that DOJ won't provide you with the data it already has.

And two, the most important aspect of this is it requires coordination between the Federal prosecutor and the tribal prosecutor. It requires the Federal prosecutor to in a timely way coordinate and communicate with the tribal prosecutor so a declined case can be brought forward in tribal court before a statute of limitations runs, and to make sure that the tribal prosecutor has all the information they need to take the case forward in tribal court. Without it, cases fall through the cracks.

To illustrate this, there is an excellent series of articles in 2007 by the Denver Post, one part of which illustrates an incident on the Crow Nation reservation. The Crow Nation prosecutor had a case involving the sexual molestation of a six-year-old girl. The Feds declined to prosecute. So the tribe tried to pick up that ball and run with it in tribal court to do something, but by the time it got to tribal court, the statute of limitations had run. The case was dismissed. Nothing happened. We have to fix that problem, and this bill helps fix that problem.

Now, DOJ has previously in written testimony and today explained that they have concerns that somehow the reporting requirements in section 102 will become either public or subject to discovery disclosure in the future if they in some unusual circumstances decide to take up the case after they declined it. I think that is highly unlikely, and I detail that in my written testimony.

I think the most valid argument they would have is somehow the provision that says that Federal law enforcement is to share written reports with tribal law enforcement, giving the reason for refusing to investigate or terminating an investigation, and somehow by sharing that information it loses its designation as work product. I find that highly doubtful, given the nature of Federal Indian law and criminal jurisdiction of Federal Indian jurisdiction.

However, if that is the case and they can give cogent reasons and legal analysis and case law to suggest that is the case, I think there is an easy fix. And that is to say that these reports remain work product of the Department of Justice when they are disclosed to tribal law enforcement. Tribal law enforcement is the prosecutor. Maybe the chief of police, key law enforcement—there are people probably already involved in an investigation. It is not going anywhere else. So I think we can fix that problem easily if there is indeed a problem.

The CHAIRMAN. Mr. Leonhard, I have to ask you to summarize as well.

Mr. LEONHARD. I just want to say again thank you for the opportunity, and I look forward to answering any questions you have.

[The prepared statement of Mr. Leonhard follows:]

PREPARED STATEMENT OF M. BRENT LEONHARD, DEPUTY ATTORNEY GENERAL, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

Chairman Dorgan, Vice-Chairman Murkowski, and Members of the Committee:

My name is M. Brent Leonhard. I and the Confederated Tribes for the Umatilla Indian Reservation appreciate the opportunity to testify before the Committee regarding the 2008 Tribal Law and Order Act, and more specifically, federal declinations to prosecute crimes in Indian Country.

The first section of my testimony pertains directly to federal declinations to prosecute crimes in Indian Country. As has been repeatedly pointed out before this Committee, the rate at which federal prosecutions are declined in Indian Country is appallingly high. There may be many reasons for such high rates of declinations ranging from inadequate evidence to limited resources, from lack of jurisdiction to a lack of confidence in the ability to obtain a conviction at trial, and anything in between. Regardless the rates are inordinately high, and in light of this fact it is important to do the two things that relevant portions of this bill seek to accomplish. First, the bill seeks to obtain accurate data on declination rates and the reasons for those declinations. And second, the bill seeks to ensure there is timely coordination and reasonable communication with tribal prosecutors to make certain they have sufficient details to proceed with the case in tribal court. While the Department of Justice has indicated that it is committed to improving Indian Country crime data, it has previously expressed concerns about the purported publication and disclosure of declination reports under the bill. My testimony on this issue addresses those concerns.

The second part of my testimony pertains to section 103 of the bill and its bolstering of the use of Special Assistant United States Attorneys (SAUSA) within Indian Country. While the head of the prosecution unit for the White Mountain Apache Tribe I was an SAUSA in Arizona. Unfortunately, my participation in that program was underutilized at the time. However, the program itself offers a significant opportunity for United States Attorney offices to leverage limited resources, increase federal prosecutions of Indian Country crime, and improve tribal-federal relations. All of which is desperately needed.

Finally, I want to encourage the Committee to amend the bill to expand tribal sentencing jurisdiction from 3 years to 5. As outlined in the last section of my testimony, the majority of states that define felonies in terms of maximum sentences define their lowest level felonies as carrying a maximum sentence of 5 years. It seems only fair that Tribes ought to at least have the same sentencing authority as states with respect to the state's lowest level felonies.

**I. Declination Reports**

The United States Department of Justice has expressed concerns about provisions of the 2008 Tribal Law and Order Act that pertain to declination reports. Those concerns turned on publicizing declination reports and creating potentially discoverable material outlining weaknesses in subsequent criminal cases. Presumably, these concerns specifically pertain to section 102 of the bill as presently drafted, as that is the section of the bill governing the declination of reports. The concerns previously expressed by the Department of Justice should be sufficiently dealt with by the language of the bill as presently drafted.

Section 102 of the bill essentially requires federal law enforcement officials, when declining to investigate a crime or upon terminating an investigation, to submit a report describing each reason why the case was not opened or an investigation was declined or terminated. This report is to go to two places. First, it goes to the appropriate tribal justice official so that they have a full understanding of the reasons for the termination or declination. Second, the report goes to the Office of Indian Country Crime, which will be a component of the Department of Justice itself. A "tribal justice official" is a defined term under the bill and means "a tribal prosecutor, a tribal law enforcement officer, or any other person responsible for investigating or prosecuting an alleged criminal offense in tribal court." In short, initial disclosure outside of the Department of Justice itself is only made to those tribal officials who are intimately involved in the criminal investigation. And in those situations where the tribal prosecutor is an SAUSA or the tribal law enforcement officer has authority to conduct federal investigations, the disclosure still technically remains within the Department of Justice or at least within a federal law enforcement agency.

In those circumstances where the appropriate tribal justice official is not effectively an arm of the Department or Federal Government in a given criminal investigation, the information still is not subject to general public disclosure unless the tribal justice officials themselves make such a disclosure. The Freedom of Information Act (FOIA), at 5 U.S.C. 552(b)(7)(A), specifically exempts records or information compiled for law enforcement purposes to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings. With the specific FOIA exemption, and limited disclosure

to critical tribal law enforcement officials, the concern that such reports could be subject to public disclosure is unwarranted.

Section 102 of the bill also requires United States Attorneys, when declining to prosecute a case or otherwise terminating a federal prosecution, to do two things. First, they are to coordinate and communicate with the appropriate tribal justice official with enough advanced notice to prevent the running of a tribal statute of limitations and provide them with reasonable details about the case to allow the tribal prosecutor to pursue the case in tribal court. Second, they must submit relevant information regarding a declination, including among other things the reason for the declination, to the Office of Indian Country Crime.

With regard to the requirement that they coordinate and communicate with appropriate tribal justice officials in a timely manner on declined federal cases, it should go without saying that this requirement is critical. Every state and the Federal Government have a criminal statute of limitations. Tribes may, or may not. Even those that don't may look to state or federal laws for guidance in determining if a limitation period applies and what that period might be. Typical state statutes limit the time in which misdemeanor crimes can be prosecuted to one or two years. In Washington State it is two years for a gross misdemeanor (punishable by up to one year) and one year for misdemeanors (punishable by up to six months). Given that tribal courts are limited to sentencing an individual to one year in jail this can have serious consequences for very serious offenses. As reported in a 2007 Denver Post article, a prosecutor for the Crow tribe had a case dismissed for violation of a statue of limitations in a case alleging the sexual assault of a six year old girl that was eventually declined by federal prosecutors (http://www.denverpost.com/ci—7429560). Delays can have serious consequences. Furthermore, information obtained during the federal investigation of any case needs to be shared with tribal prosecutors to ensure they have all of the facts and evidence necessary to take a case forward, not to mention the need to ensure a defendant's discovery rights are being protected as the case proceeds through tribal court. Consequently, even if such a requirement may in some tenuous way potentially jeopardize a few federal cases that are initially decline but later pursued, absence of such a requirement will seriously undermine the ability for tribes to bring cases in tribal court.

Furthermore, there isn't a requirement in the bill that this coordination or communication be in writing, let alone subject to public disclosure or publication. There is no reason to assume such coordination with tribal prosecutors would result in the creation of federally discoverable material that will somehow undermine the investigation that would not otherwise be discoverable. I am not aware of any requirement that a federal prosecutor must provide discovery to a potential federal defendant absent a pending federal case. If and when the matter is pursued in tribal court, certainly the defendant will have a right to all discoverable material, but that requirement isn't unique to any provision of the proposed bill—it is a matter of criminal procedure and due process requirements. Furthermore, there is no reason to assume that any work product from the Department of Justice would be subject to disclosure even after a case is filed in tribal court, as work product generally is not subject to disclosure.

The second thing United States Attorneys are to do under section 102 is to submit relevant information regarding a declination, including among other things the reason for the declination, to the Office of Indian Country Crime. Again, the Office of Indian Country Crime will be an office within the Department of Justice and sharing information within the department does not give rise to any unique problems concerning publicizing sensitive information.

In addition to the requirements imposed on federal law enforcement and United States Attorneys, section 102 of the bill requires that the Director of the Office of Indian Affairs establish and maintain a compilation of the information discussed above. This compilation is to be made available to Congress. However, release of information to Congress does not constitute a waiver of any exemption under FOIA. *Kanter v. Internal Revenue Service,* N.D.I11.1977, 433 F.Supp. 812; 5 U.S.C. 552(d). Furthermore, a compilation report as contemplated under the bill (which, presumably, will be made public) will not contain information of such a detailed nature as to be capable of undermining the investigation or prosecution of a specific case. And such a report, in and of itself, certainly would not make other more specific information about a particular case suddenly discoverable.

It may be that the Department of Justice fears that after having created a report detailing the reasons for declining to prosecute a case or terminating the prosecution of a case, they may subsequently decide to pursue prosecution after all. In that instance, they may be concerned that the previously created report which has only been shared internally and, potentially, with tribal law enforcement officials has become discoverable. This line of reasoning would presume the report would have lost

its status as work product because of the disclosure to "outside" law enforcement. I'm not sure such a concern is warranted. Certainly, given the nature of federal Indian law and the necessary interaction between tribal and federal law enforcement in prosecuting crimes in Indian Country it is reasonable to assume communications between the two remain work product for both. In fact, the connection between the two is so intimate, given the present nature of federal criminal Indian law, that tribal law enforcement officers often have certification to exercise federal investigatory powers and tribal prosecutors are often designated as Special Assistant United States Attorneys. If, however, that assumption is erroneous, there appears to be no reason why the bill could not be amended to specifically declare that such reports are to be considered the work product of the Department of Justice and tribal law enforcement. Furthermore, the likelihood that the Department of Justice is going to pursue the prosecution of a case after having specifically declined to prosecute it, or after having terminated the prosecution of the case, as opposed to issuing a request to conduct further investigation pursuant to United States Attorney Criminal Resource Manual 9–27.200, is likely very low. On the other hand, the need to coordinate and communicate with tribal law enforcement officials on the reasons for declinations is critically important.

**II. Special Assistant United States Attorneys**

In an effort to expand the capacity of United States Attorney Offices, section 103 of the bill specifically amends 28 U.S.C. 543(a) to include the appointment of qualified tribal prosecutors and other qualified attorneys to assist in prosecuting federal offenses committed in Indian Country. The bill goes on to encourage the use of SAUSAs in Indian Country to enhance the prosecution of what might other wise be considered minor federal crimes. United States Attorney resources are limited. Consequently, they often have to pick and choose between cases they want to prosecute in federal court. The United States Attorney manual gives prosecutors wide discretion in determining whether to proceed with the prosecution of a case, as it should. However, discretion does not turn solely on the likelihood of conviction at trial. Exercise of discretion also turns on whether a substantial federal interest would be served. In making that determination federal prosecutors are to refer to federal law enforcement priorities, the nature and seriousness of the offense, the deterrent effect of prosecution, culpability, criminal history, and willingness to cooperate in other prosecutions (USAM 9–27.230). There is little doubt in my mind that this means a lot of federal crimes go un-prosecuted in Indian Country and often even serious crimes will be set aside to pursue other serious matters that have a greater likelihood of conviction.

Using qualified tribal prosecutors or other attorneys to pursue viable cases in federal court that might otherwise have been set aside to pursue other, more serious, cases can close this resource gap. SAUSAs in Indian Country are not paid out of United States Attorney resources, have direct ties to the community where cases arise, and routinely deal with the law enforcement officials who will be handling the investigation of the crimes. Unfortunately, it is a program that is significantly underutilized in Indian Country.

My own experience as an SAUSA left me without having prosecuted a single case in federal court. But that doesn't have to be the case. Many tribal prosecutors are highly qualified trial lawyers. With appropriate encouragement and training they can be effective federal prosecutors on cases that would otherwise be set aside. Furthermore, training could involve second chairing a few cases with AUSAs which would certainly enhance the relationship between tribal and federal law enforcement. In addition, AUSAs could second chair a few of the SAUSA's initial cases. While this may require some additional devotion of resources upfront, the payoff could be significant in that United States Attorney offices would essentially be getting free prosecutors to handle cases that otherwise would not have been pursued. Furthermore, tribes would gain by having their prosecutors receive free training and experience in prosecuting crimes in multiple jurisdictions.

**III. Expanding Tribal Court Sentencing Jurisdiction to 5 Years**

Finally, I want to address the need to make at least one more amendment to the bill as presently drafted. The Tribal Law and Order Act of 2008 is a significant step forward in curbing crime in Indian Country. Among its provisions is the expansion of tribal sentencing authority from a maximum of 1 year to a maximum of 3 years. While this is laudable, it may be more appropriate to permit tribes to sentence individuals who commit serious crimes to a maximum of 5 years, and I encourage the Committee to consider amending the bill to expand sentencing authority from 3 to 5 years.

The 3 year timeframe was initially selected based on the 2002 report of the Committee to the U.S. Sentencing Commission, which showed that the most common federally prosecuted crime was assault, and that the most common sentence was 34 months. However, it may be more relevant to look at how states define their lowest level felonies to determine what tribal sentencing authority ought to be. Furthermore, the 3 year time frame fails to take into account that prisoners are often given good time, such that the actual sentence served may be significantly less than that imposed.

Most states define felonies by statute, just as this bill will do for Indian Country. Rather than basing tribal sentencing authority on a given federal sentence, it might be more appropriate to look at how states define their lowest level felonies as a guide to determine an appropriate expansion of tribal sentencing authority. Furthermore, it stands to reason and fairness that a tribe ought to at least have the same sentencing authority as a state does with respect to the state's lowest level felonies. This is particularly true given that a tribe's use of such enhanced sentencing authority will typically be for very serious crimes that have not been prosecuted through the federal system. Examples include rape, attempted homicide, serious child abuse, and aggravated assault. While it is unlikely that a state would include such crimes within their lowest level felonies given the serious nature of the offenses we are talking about, tribes ought to at least be able to sentence someone committing these crimes up to the maximum allowed by a typical state's *lowest* level felony.

As it turns out, according to a memo previously submitted into the Senate record by myself and Cisco Minthorn, of the states that define felonies, the majority define their lowest level felony as having a maximum sentence of 5 years. And most states that define low level felonies as less than 5 years categorize aggravated assault (presumably, the typical crime to be covered by expanded jurisdiction) as falling within a felony class that has at least a 5 year maximum sentence. 11 states were left out of the calculation because they don't define a felony and an equivalency was not found. Of the remaining 39 States we have found that 25 states define their lowest level felony as carrying a maximum sentence of 5 years in jail or more (18 of these define the lowest level felony at 5 years.) 4 states define the lowest level felony as 4 years, 3 States as 3 years, and 7 as 2 years or less. However, 6 of the 7 that have low level felonies defined as 2 years or less actually treat aggravated assaults (the typical type of offense to be covered by expanded jurisdiction) as 5 years or more. So, it might be more accurate to say, in regard to offenses of concern in Indian Country and the need to expand jurisdiction, at least 31 of 39 states define their lowest level felony as 5 years or more.

Consequently, 64 percent define a low level felony as 5 years or more, and if we include relevant felony crimes for Indian Country, it is more like 79 percent. In addition, of the 11 states that do not define felonies, 9 sentence aggravated assaults to more than 5 years. As for the other 2 states, 1 sentences aggravated assault up to 4 years and the other uses a complex sentencing grid for all offenses. Therefore, in regard to offenses of concern in Indian Country, 46 of the 50 states, or 92 percent, allow for a sentence of 5 years or more.

In conclusion I want to extend my gratitude and appreciation to Senator Gordon Smith, this Committee, and all those who support this very important bill. It has many significant provisions and seeks not only increased resources to combat crime in Indian Country, but most notably, systemic changes that are necessary to help fix a clearly broken system. It is easily one of the most important federal Indian Country crime bills in the last 30 years, and accordingly warrants the broad bi-partisan support it has received. Thank you for your efforts.

The CHAIRMAN. We thank you for being here.

Ms. Janelle Doughty, the Director of the Department of Justice, Southern Ute Indian Tribe in Colorado.

Ms. Doughty, thank you for being here. If you would pull that very close to you, we would appreciate that.

## STATEMENT OF JANELLE F. DOUGHTY, DIRECTOR, DEPARTMENT OF JUSTICE AND REGULATORY, SOUTHERN UTE INDIAN TRIBE

Ms. DOUGHTY. Thank you and good morning. Chairman Dorgan, Committee members, thank you for the opportunity to testify today. My name is Janelle Doughty. I am an enrolled member of

the Southern Ute Indian Tribe, and serve as the Director for the Department of Justice and Regulatory for the tribe.

The Southern Ute Indian Tribe has 1,500 enrolled members and consists of approximately 681,000 acres of land in Colorado. I supervise the tribe's Police Department, Wildlife Rangers, as well as the Southern Ute Detention Center. I also oversee the tribal prosecutor, the public defender, the Division of Gaming, Regulation and Licensing, and Environment Affairs. I am also leading the tribe's development of a new juvenile detention center. I previously served as the tribe's Crime Victims Advocate and as its Executive Officer. I have a master's degree in social work from the University of Denver and I am a graduate of the State of New Mexico Police Academy.

The topic of this hearing is declinations. I understand this term to mean decisions by United States Attorneys not to prosecute certain criminal cases arising within Indian Country. I have read published reports that some U.S. Attorneys in other States than Colorado are declining criminal prosecutions that is disproportionate to that in similar situations off-reservation.

The Southern Ute Tribe hosted a meeting of the Native American Issues Subcommittee of the U.S. Attorney General's Advisory Committee last October in Ignacio, Colorado, and our Tribal Council met with approximately 15 U.S. Attorneys from around the United States. Colorado's United States Attorney Troy Eid invited Professor Kevin Washburn of Harvard Law School to talk about declination rates during a public portion of that meeting. It was refreshing to see the issue openly discussed by the Justice Department. So I am very familiar with the public debate over this issue, as well as what really happens in practice.

We have a model relationship with the U.S. Attorney's office in Colorado. This is a direct result of the current U.S. Attorney Troy Eid. My department has partnered with Mr. Eid and his office to strengthen criminal justice on the Southern Ute Reservation, and is achieving real results. Before Mr. Eid took office, I could not have told you the U.S. Attorney was because I have never met him. Mr. Eid meets regularly with the Tribal Council, doesn't decline cases without discussing them with me and my department, and has even revisited cases that his predecessors declined.

In one such case, Mr. Eid's office obtained a conviction in a statutory rape case involving a 13-year-old victim. This was a case that the previous U.S. Attorney had declined without any explanation. The Tribal Council asked Mr. Eid to revisit the case. I have established a cooperative relationship geared toward training and information-sharing that allows my officers actual face-time with those responsible for prosecuting our cases. On many occasions, Assistant U.S. Attorneys have actually conducted training opportunities in areas such as building a Federal case, preparation for courtroom testimony, and pertinent issues of jurisdiction. It is my belief that actual personal interaction is irreplaceable in developing strong working relationships.

With isolation from the prosecutorial system, we drastically limit common understanding. By putting investigators and prosecutors in the same room, we have been able to reach a high level of cooperation and understanding, which translates into cases being de-

veloped in an appropriate format for prosecution. This is the way things are supposed to work, but often didn't until Colorado finally had a U.S. Attorney who understands that his role is that of a local district attorney on our reservation.

I also persuaded Mr. Eid to develop a pilot program to train and federally deputize tribal, State and local law enforcement officers on the Southern Ute Reservation so they can obtain or renew their Special Law Enforcement Commission cards without traveling for a week to the BIA Police Academy.

On the Southern Ute Reservation, we can see the positive results. Last May 24, the tribe's Chief Criminal Investigator, Chris Naranjo, responded to a domestic violence crime scene on the reservation. Because he was federally deputized, Chris could arrest the non-Indian suspect who allegedly victimized one of our tribal members in that case, which is now being prosecuted by the U.S. Attorney's office.

Mr. Eid has written about the need for Congress to overrule the U.S. Supreme Court's decision in *Oliphant v. Suquamish Tribe* so that qualifying tribes can choose to assert criminal jurisdiction over non-Indians. This was not an easy or popular stance for him to take in the Justice Department or with some in Congress, but I am glad that there is at least one U.S. Attorney who understands his trust responsibility. As a Tribal Justice Department Director, I strongly support a repeal of Oliphant as a common sense way to strengthen public safety on our reservation.

Our tribal courts protect criminal defendants' rights. We should be permitted to take the next step further. It is wrong for Indian people living on Indian reservations to be totally at the mercy of chief Federal prosecutors far from our reservations. It is absolutely deplorable for Indian people to be denied equal access to justice. We need to have a meaningful voice in their selection. It is also totally unacceptable that the nearest U.S. District Court Judge in Colorado is 350 miles away from the Southern Ute Reservation and even farther from our sister tribe to the west, the Ute Mountain Ute Tribe.

I and other law enforcement agency managers, along with local municipal, tribal, and county government representatives have been pushing for a Federal courthouse and judgeship in our area. Trying cases that meet the elements of the Major Crimes Act 350 miles from the jurisdiction in which they occur stands as a roadblock to justice and must be resolved.

Federal juries in Colorado rarely include a single American Indian, yet they decide purely local crimes, and we have never had a Federal grand jury in Western Colorado in my lifetime.

It is time for Congress and the Department of Justice to chart a path that, over time, will end the Federal Government's dominant role in Indian Country criminal justice for those tribes that are willing and able to do this for themselves. Case declination, inadequate resources for criminal investigations, the lack of Federal judicial access, these are all symptoms of a justice system that was designed more than a century ago by the Federal Government to keep Indian people down, instead of permitting us to take responsibility for our own destiny.

Thank you.

[The prepared statement of Ms. Doughty follows:]

PREPARED STATEMENT OF JANELLE F. DOUGHTY, DIRECTOR, DEPARTMENT OF JUSTICE AND REGULATORY, SOUTHERN UTE INDIAN TRIBE

Chairman Dorgan, Committee members, thank you for the opportunity to testify today. I have a written statement and ask that it be submitted in its entirety for the record of these proceedings.

My name is Janelle Doughty. I am an enrolled member of the Southern Ute Indian Tribe and serve as the Director of the Department of Justice and Regulatory for the Tribe. The Southern Ute Indian Tribe has 1,500 enrolled members and consists of approximately 681,000 total acres in Colorado. My responsibilities as Director include managing 97 total employees. The Bureau of Indian Affairs has delegated the primary justice and regulatory functions of my Department to our Tribal government through so-called "638" contracts. I supervise the Tribe's Police Department and Wildlife Rangers, as well as the Southern Ute Detention Center. I also oversee the Tribal prosecutor and public defender; the Division of Gaming; Regulation and Licensing; and Environment Affairs, including the regulation of stationary air pollution sources, water quality and environmental controls. I am also leading the Tribe's development of a new Juvenile Detention Center. I previously served as the Tribe's Crime Victims' Advocate and as its Executive Officer. I have a Master's Degree in Social Work from the University of Denver and am a graduate of the State of New Mexico Police Academy.

The topic of this hearing is "declinations." I understand this term to mean decisions by United States Attorneys not to prosecute certain criminal cases arising within Indian Country. I've read published reports that some United States Attorneys in states other than Colorado are declining criminal prosecutions at a rate that is disproportionate to that in similarly situated areas off-reservation. These reports include the newspaper series entitled "Lawless Lands," written by investigative reporter Michael Riley and published by The Denver Post last November. Mr. Riley's work recently received the national Silver Gavel Award from the American Bar Association for excellence in legal reporting, and he interviewed me and members of my staff during his investigation. The Southern Ute Tribe also hosted a meeting of the Native American Issues Subcommittee of the U.S. Attorney General's Advisory Committee last October in Ignacio, Colorado, and our Tribal Council met with approximately 15 U.S. Attorneys from around the United States. Colorado's United States Attorney, Troy Eid, invited Professor Kevin Washburn of Harvard Law School to talk about declination rates during a public portion of that meeting, and it was refreshing to see the issue openly discussed by the Justice Department. So I am very familiar with the public debate over this issue—as well as what really happens in practice.

We have a model relationship with the United States Attorney's Office in Colorado. This is a direct result of the current United States Attorney, Troy Eid. My Department has partnered with Mr. Eid and his office to strengthen criminal justice on the Southern Ute Reservation, and is achieving real results. Before Mr. Eid took office, I could not have told you who the U.S. Attorney was because I have never met him. Mr. Eid meets regularly with the Tribal Council, doesn't decline cases without discussing them with me and my Department, and has even revisited cases that his predecessor declined. In one such case, Mr. Eid's office obtained a conviction in a statutory rape case involving a 13-year-old victim. This was a case that the previous U. S. Attorney had declined without any explanation. The Tribal Council asked Mr. Eid to revisit the case. He met with the victim's mother at my request, took the case, and Assistant U.S. Attorney Jim Candelaria—who does a terrific job for the Tribe—obtained a conviction.

I have established a cooperative relationship geared toward training and information sharing that allows my officers actual face time with those responsible for prosecuting our cases. On many occasions Assistant United States Attorneys have actually conducted training opportunities in areas such as: building a federal case, preparation for court room testimony, and pertinent issues of jurisdiction. It is my belief that actual personal interaction is irreplaceable in developing strong working relationships. With isolation from the prosecutorial system we drastically limit common understanding. By putting investigators and prosecutors in the same room we have been able to reach a high level of cooperation and understanding which translates into cases being developed in an appropriate format for prosecution.

This is the way things are supposed to work but often didn't until Colorado finally had a U.S. Attorney who understands that his role is that of a local District Attorney on our Reservation.

I also persuaded Mr. Eid to develop a pilot program to train and federally deputized tribal, state, and local law enforcement officers on the Southern Ute Reservation so they can obtain or renew their Special Law Enforcement Commission cards without traveling for a week to the BIA Indian Police Academy. This program has worked so well that all our Tribal officers, and many of those off-reservation from state and local government, have been trained by Mr. Eid, his Criminal Division Chief, Jim Allison, and others from the U.S. Attorney's Office. Mr. Eid has taken this training to other states, including New Mexico and South Dakota, and will again provide it free of charge at the National Congress of American Indians' national convention next month. On the Southern Ute Reservation, we can see the positive results. Last May 24th, the Tribe's Chief Criminal Investigator, Chris Naranjo, responded to a domestic violence crime scene on the Reservation. Because he was federally deputized, Chris could arrest the non-Indian suspect who had allegedly victimized one of our Tribal members in that case, which is now being prosecuted by the U.S. Attorney's Office.

Mr. Eid has written about the need for Congress to overrule the U.S. Supreme Court's decision in *Oliphant v. Suquamish Tribe* so that qualifying tribes can choose to assert criminal jurisdiction over non-Indians. This was not an easy or popular stance for him to take in the Justice Department or with some in Congress, but I'm glad there is at least one U.S. Attorney who understands his trust responsibility. As a Tribal Justice Department Director, I strongly support a repeal of Oliphant as a common-sense way to strengthen public safety on our reservation. This should include the ability of Tribal Courts to punish non-Indians for contempt when they refuse to comply with valid court orders in civil cases. The Federal Government already contracts with Southern Ute's detention center to hold Immigration and Customs Enforcement and U.S. Marshals Service detainees. Our tribal courts protect criminal defendants' rights. We should be permitted to take the next step without further delay.

Finally we have a great relationship with the Colorado U.S. Attorney's Office right now, but we all wonder what will happen when Mr. Eid leaves. I remember when some previous U.S. Attorneys ignored our Tribe, and when one former Assistant U.S. Attorney treated our people rudely and unprofessionally. It is wrong for Indian people living on reservations to be totally at the mercy of chief federal prosecutors far from our reservations. It is absolutely deplorable for Indian people to be denied equal access to the justice system. We need to have a meaningful voice in their selection and move away from the Federal Government's dominance in criminal law enforcement in Indian Country which traces its roots to the Bad Old Days of Indian Wars and the military occupation of tribal lands. It is also totally unacceptable that the nearest U.S. District Court Judge in Colorado is 350 miles away from the Southern Ute Indian Reservation, and even farther from our sister tribe to the west, the Ute Mountain Ute Reservation. I and other law enforcement agency managers along with local municipal, tribal, and county government representatives have been pushing for a federal court house and judgeship in our area. Trying cases that meet the elements of the Major Crimes Act 350 miles from the jurisdiction in which they occur stands as a road block to justice and must be resolved. Federal juries in Colorado rarely include a single American Indian, yet they decide purely local crimes. And we have never had a federal grand jury in Western Colorado in my lifetime.

It's time for Congress and the Justice Department to chart a path that—over time—will end the Federal Government's dominant role in Indian Country criminal justice for those Tribes that are willing and able to do for themselves. Case declinations, inadequate resources for criminal investigations, the lack of federal judicial access—these are all symptoms of a justice system that was designed more than a century ago by the Federal Government to keep Indian people down instead of permitting us to take responsibility for our own destiny.

Thank you.

The CHAIRMAN. Ms. Doughty, thank you very much.

Next, and finally, we will hear from the Honorable Thomas Weissmuller. He is a Board Member and Tribal Representative of the National Criminal Justice Association and Chief Justice of the Mashantucket Pequot Tribal Nation.

Mr. Weissmuller, you may proceed.

**STATEMENT OF HON. THOMAS W. WEISSMULLER, CHIEF JUSTICE, MASHANTUCKET PEQUOT TRIBAL NATION; BOARD MEMBER AND TRIBAL REPRESENTATIVE, NATIONAL CRIMINAL JUSTICE ASSOCIATION**

Mr. WEISSMULLER. Mr. Chairman and members of the Committee, thank you for holding this hearing to address this very important issue to tribal communities. I appreciate the opportunity to share with you some of my experiences in Indian Country from approximately 12 years of working with various tribes.

I have served as a trial judge on the Tulalip and Swimomish Indian Reservations, and I am currently the Chief Judge at Mashantucket. As we speak, a man is held at Tulalip under a $50,000 cash bond for allegedly raping a five-year-old child. The matter was forwarded to Federal authorities, but there has been no word as to whether the matter will be presented in Federal court. Tulalip continues to hold the man in jail pending the trial before the tribal court. At Tulalip, the penalty for raping a child is one year in jail and a $5,000 fine.

Tulalip authorities must prepare for the complex case and the child must endure the traumatic pretrial process, which will include psychological evaluations, forensic interviews, and of course cross-examination. The child may endure this once again in Federal court. All the while, the alleged perpetrator remains in jail at tribal expense. He has waived his right to a speedy trial to see if there can be a determination on the Federal matter.

The current case at Tulalip is but one example of how tribal courts work to overcome the possible declination and the institutional delays associated with the Federal process. The worst example in my experience involves the prosecution of a Native American man for the sexual assault or rape of a young child. I presided over the jury trial. The Federal authorities did not prosecute. They did not formally decline. As the statute of limitations was about to run, the matter was filed before me.

The case involved a young native girl and a man in his 20s. The man befriended the girl and her friend and added alcohol to their soda. Concerned relatives eventually found the girl behind a closed bedroom door. As they opened the door, the man known to them was pulling himself off the girl. They testified that his pants were down and that the woman was exposed from her ankles to her neck. She was unconscious. The more graphic details of what happened are in my submission, along with the investigation and the testimony.

At the trial, the eyewitnesses recounted what they had seen. The victim testified to the events she could recall. The factual record was supported by DNA and blood evidence. The jury rendered a verdict to convict in approximately 45 minutes. To this day, I wonder why the Federal authorities did not prosecute, after seeing what one jury had done with the evidence. Unknown to that jury, but known to the Federal authorities, the defendant had even confessed.

In what can only be described as an indictment of the system, the defendant was released from jail after serving only nine months, pursuant to a Federal order intended to alleviate prison overcrowding. We managed to correct that.

Every tribal judge deals with this on some level. You hold sway over the Federal component in this equation. You may strengthen the tribal component by increasing the sentencing limit that you have imposed. You may increase the number of tribal officers on the reservations. You may ask Federal authorities to revisit the way they prosecute matters in Indian Country.

In my written testimony, I echo the United States Attorney's office and their acknowledgment that Federal law enforcement services were built to investigate and prosecute complex interstate crimes. They excel at this and we all benefit from the excellence. They are not currently equipped to address reactive crimes. Reactive crimes are those that are commonly introduced to the system by a 9–1–1 call.

Last year, Tulalip received nearly 14,000 calls for assistance. Since their police forces have increased from two when I arrived, to 47 sworn officers and staff, crime has been cut in half after first ballooning. During the retrocession process in 2001, we gave assurances that we could meet the law enforcement and justice needs and demands as the State ceded criminal authority back to the Federal Government and the tribe became the first line of defense.

We intended to overcome the catastrophic failure of Public Law 280. When I first arrived on the reservation, what I saw was horrific lawlessness. The information contained about the crimes that were not prosecuted at that time can be found in the Indian Child Welfare Act cases inside the records of the Tulalip and Swimomish Tribes.

The tribes that I worked with have responded brilliantly. They effectively police the communities now. What we need to do now is fill in the gaps.

This concludes my remarks for today. I stand prepared to answer some questions.

[The prepared statement of Mr. Weissmuller follows:]

PREPARED STATEMENT OF HON. THOMAS W. WEISSMULLER, CHIEF JUSTICE, MASHANTUCKET PEQUOT TRIBAL NATION; BOARD MEMBER AND TRIBAL REPRESENTATIVE, NATIONAL CRIMINAL JUSTICE ASSOCIATION

Mr. Chairman and members of the Committee, thank you for holding a hearing about this critical issue in tribal communities. I appreciate the opportunity to offer examples of what can happen when federal prosecutors decline to pursue cases in Indian Country. In my written submission, I will touch upon the process of managing cases in tribal court when those cases are presented to the federal authorities for possible prosecution in federal court. I will limit my oral testimony to one current case, one memorable case, and some thoughts about the unique aspects of federal prosecutions of major crimes.

My experiences were formed while I served as a trial judge on a handful in Indian Reservations, including the Tulalip and Swimomish Reservations in Washington State between 1997 and January 1, 2005. At that time I returned to Connecticut to assume my current position as Chief Judge of the Mashantucket Pequot Tribal Nation.

My personal experiences have induced me to participate as a Board Member and Advisory Council Member for the National Criminal Justice Association, (NCJA) where we address, among other things, cross-jurisdictional challenges. I participate as a Board Member of the National American Indian Court Judges' Association, (NAICJA) where we work to assist tribal judges as they attempt to meet the challenges posed by their respective jurisdictions.

As we speak, a man is held at Tulalip under $50,000.00 bond for allegedly raping a five (5) year old child. The matter was forwarded to federal authorities but there has been no word on whether the matter will be presented in federal court. Tulalip continues to hold the man in jail pending trial before the tribal court. At Tulalip

that will be one (1) year in prison and a five thousand dollar ($5,000.00) fine for raping a child.

The Tulalip authorities would like to hold off on the local prosecution but they may not remain idle. DNA evidence must be preserved and produced to the defense; child psychological evaluations and forensic interviews must be conducted to allow the defendant an opportunity to meaningful confront his accuser. Physical barriers must be constructed so the child does not face her alleged assailant in open court, a forum that is inherently harmful to children without this added burden. This is all essential to allow the matter to go forward in Tulalip. It must be repeated, and the child must be subjected to it again, if the matter goes forward in federal court.

The alleged perpetrator in the current Tulalip example remains in jail, but not at the direction of a federal judge. No federal judge has yet considered this claim. In less well funded jurisdictions, the defendant would likely remain free. He might even remain in the same home as the alleged victim. I have presided over hundreds of child dependency matters. In more than I care to mention, this scenario has played out.

The current case at Tulalip is but one example of how tribal courts work to overcome the declination of cases by federal attorneys. I presided over the jury trial of another example. In this instance, the federal authorities were contacted and they did not prosecute. They did not formally decline and I believe the statute of limitations eventually ran. The significant thing about this case is that it was prosecuted successfully in tribal court. I will state my recollection of the testimony.

The case involved a young Native girl and her friend. As I recall, she had just turned thirteen and was belatedly celebrating her birthday with a girl of her own age. They were listening to music and having some soda. They were playing on a federal Indian Reservation.

A Native man in his mid to late twenties began to visit with them and share some of their root-beer. He invited them to listen to music at a friend's place. It was close to home and they agreed. It was alleged that the man laced the root-beer the girls were drinking with a root-beer flavored alcohol. After a time, one of the girls left. The other remained with the man. She drank more root-beer and eventually passed out. Two family members received a call that the girl had been seen with an adult man that the callers knew and identified by name. The relatives began to look for the girl.

As I recall, the relatives testified that they found the young girl after a short search. She was in a bedroom with the door closed. As they opened the door, the man, known to them, was pulling himself off of the girl. They testified that his pants were down. The girl was laid over a pile of blankets, face down so her bottom was elevated. Her pants and underclothes were pulled down to her ankles. Her sweater/shirt and bra were pulled unceremoniously over her head, hiding her face and her hair. As situated, the clothing served to hold her arms above her head. Her body was exposed from her ankles to her neck. She was unconscious. The witnesses called the police.

A team of cross-commissioned law enforcement officers, including a forensic nurse, utilized a forensic "rape kit" to recover fluid samples from inside and outside of the victim's body. The fluid was identified as semen. The chain of evidence revealed that the rape kit was properly logged into and out of each location, and that the samples were treated and tested to extract DNA and blood evidence. This was offered at trial. The eye witnesses recounted what they had seen. The victim testified to the events she could recall.

As indicated, defense counsel secured the suppression of the defendant's confession. The trial was managed pursuant to the federal rules of evidence and the tribal rules of procedure, which basically mirrored the federal rules. All witnesses were cross examined by defense counsel and the defense called supporting witnesses. The defendant did not testify.

When the jury issued the verdict, I set the matter on for sentencing. In a federal system, the defendant might have received 18 years. I heard argument on the benefits of utilizing the full one (1) year and five thousand dollars. I sentenced the defendant to the maximum but suspended $1,000.00 on the condition that he register as a sex offender and undergo sex offender treatment.

In what can only be described as an ironic twist, the defendant was released from jail after serving only nine months pursuant to a federal order intended to alleviate prison overcrowding. It seems the jail identified him as having "nearly completed" his sentence, which was enough to warrant release under the order. After a discussion with the jail wherein the underlying charge was revealed, the facility readmitted him.

**The multi-jurisdictional challenge: Reactive v. Investigative Cases**

Every tribal judge is attuned to the multi-jurisdictional nature of the matters presented in tribal courtrooms. The perspective of tribal judges may assist you in this area of emerging law, for you hold sway over the federal component, may strengthen the tribal component, and may profoundly influence the state component in this equation.

The United States Supreme Court has decreed that tribes lack the jurisdiction necessary to prosecute non-Native people who have allegedly committed crimes on reservations. The United States Congress has decreed that tribes lack the ability to incarcerate Native people for more than one year on any given offense. As long as these decrees stand, innocent people will be asked to repeat their testimony in multiple jurisdictions.

What does this mean to a victim? With each new jurisdiction, a new set of strangers awaits to exercise another level of official discretion. Police exercise it; prosecutors exercise it; judges exercise it. When a case dove-tails into two jurisdictions, efforts are frequently duplicated and the several levels of discretion are revisited.

The discretion phenomenon is most pronounced in systems that handle what some United States Attorneys identify as "reactive" cases. Some justice systems are designed to handle reactive cases, some are not. When a case is initiated with a 9–1–1 call, someone must react. Lives are changed in the moments that follow. For Native Americans living on federal Indian reservations, lives become very complex.

On July 24, 2008, a United States Attorney testified before this Committee, stating that Indian country work is "reactive" not "investigative" and frankly I agree. The Department of Justice (DOJ) is geared for investigations that may be protracted. It is not geared to react to street crime on a case by case basis. (Tribal and state police agencies are designed to do this.) The DOJ yields outstanding results from its investigations and subsequent prosecutions. When they take down a major drug ring, they help to stem the flow of drugs to the dependent populations that commit crimes in every jurisdiction, including tribal jurisdictions. We therefore applaud them. We are on the same team.

Reactive cases, however, like assault, disorderly conduct, and domestic violence, require a police force "on the ground." They need an independent magistrate to conclude that the police officers' allegation of probable cause exists to justify the arrest. Prosecutors then determine whether the matter will go forward. Judges may enter immediate orders to secure the attendance of the defendant and the protection of the victims. They can convene juries to decide the cases as needed. This is a reliable process that moves ahead with speed and impartiality. Most significantly, the collateral domestic cases (petitions for restraint, custody, dissolution, and child protection) may also proceed. When cases move forward, lives are made whole; justice is achieved.

The filter for an Indian case goes beyond the reduction of actual events to paper so a magistrate can formulate immediate protections. It passes in paper form from police officer to supervisor, to tribal prosecutor, and, in the instance of a major crime, a federal investigator.

The tribal prosecutor files a complaint and moves forward with the domestic case. The federal investigator meets with the Assistant United States Attorney Indian Law Liaison, who will in turn streamline the process and direct the matter internally at the Department of Justice to the appropriate section within the criminal division (e.g. the Organized Crime and Racketeering Division, the Child Exploitation and Obscenity Division, or the Gang Squad, to name a few) before it reaches the appropriate prosecutor for investigation, case analysis, and hopefully, presentation to a Grand Jury. This system is not designed to handle reactive cases.

This concludes my remarks today. Mr. Chairman, Senators, thank you for inviting me to speak. I am happy to entertain any questions that you have.

The CHAIRMAN. Mr. Weissmuller, thank you very much.

I want to thank all of you for traveling some distance to be with us and to present testimony from many different perspectives.

Mr. Heffelfinger, you have testified previously, both as a member of the Justice Department and the U.S. Attorneys' Office, and now as a private citizen.

I think that all of you give us perspectives about this. I think most agree that there are problems with respect to the criminal justice system dealing with Indian reservations, and the problems are in many ways structural as well, as you know. I mean, it deals

with Indians versus non-Indians, on and off the reservation, who can make the arrest, who can detain. These are very difficult structural questions.

We put together a piece of legislation that while in some cases controversial, still tries to address some questions that have lingered out there for a long while. We have consulted across the Country with Indian tribes. We have done a lot of work in consultation. We have consulted with local law enforcement authorities. We have consulted with U.S. Attorneys, with local prosecutors, with tribal court systems, with BIA. I mean, we have consulted with almost everyone to put together a piece of legislation.

We know it is not yet perfected, but we introduced it as we wrote it because we think you need to start somewhere.

Mr. Heffelfinger, you today have offered your perspective about some changes. Some of them I think are really well thought out and we want to work with you on that.

Others of you have described your experiences from your perspective in this criminal justice system. Clearly, when you have a maximum sentence that you can issue in a tribal court of one year, that is a serious problem.

Mr. Weissmuller, you have just described it from the perspective of a case.

But Senator Murkowski and I, and Senator Tester and Senator Barrasso and others on this Committee are really very interested in trying to get this right and improve the criminal justice system so that it works better and gives those who live on Indian reservations a sense that they can live in safe communities, and that we can find a way to reduce the rate of violent crime and prosecute those crimes that are committed.

Let me call on Senator Murkowski.

Senator MURKOWSKI. Thank you, Mr. Chairman.

I do have a few questions, but recognizing that both the Chairman and I have appointments at 11:30, I will submit what limited questions I have to you in writing, and appreciate your responses.

I, too, want to thank you for your perspective.

Mr. Heffelfinger, I appreciate some very concrete solutions. You know, they may or may not be ones that we actually adopt, but the fact of the matter is that we need to be looking to what these solutions may be.

I said in my opening that I don't think that the status quo here is acceptable. We can be smart enough to figure this one out. I also appreciate the point that you made that the value in this information, this data that is gathered, is not necessarily—I am sure it certainly helps within the Department of Justice in their internal management. It certainly can help across agencies, but ultimately the true value of this information is really to Indian Country so that we can use that information so that we can learn and truly effect some change.

So again, I appreciate your contributions in so many different areas, all of you.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Murkowski, thank you very much.

This hearing has gone two hours, and both of us have something that we have to do beyond the conclusion of the hearing.

I do want to ask if all of you would be available, we want to submit additional questions to you based on your testimony. I also would ask if you have additional views that you wish to submit, and we are going to keep the hearing record open for others for two weeks to submit additional views.

I want to thank you, Mr. Ragsdale, again, for your attendance here today and the work that you and the BIA do, and thank Mr. Wrigley for being with us, and thank him for his fine work as a U.S. Attorney.

This hearing is adjourned.

[Whereupon, at 11:25 a.m., the hearing was adjourned.]

# A P P E N D I X

## Declining to Prosecute:
## The Failure to Protect Native Women from Sexual Violence in the United States

"To a sexual predator, the failure to prosecute sex crimes against American Indian women is an invitation to prey with impunity." - Dr. David Lisak, Associate Professor of Psychology, University of Massachusetts

In April 2007 Amnesty International released a report entitled "*Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA*". Research on the sexual assault and rape of Native American women was initiated upon learning of U.S. Department of Justice statistics indicating that Native American and Alaska Native women are more than 2.5 times more likely than other women in the United States to be raped. According to these statistics, more than 1 in 3 Native American and Alaska Native women will be raped in their lifetimes, and 86 percent of the perpetrators of these crimes are non-Native men.

In order to achieve justice, Native American survivors of sexual violence frequently have to navigate a maze of tribal, state and federal law. Currently, tribal courts do not have authority to prosecute non-Native perpetrators meaning that only federal prosecutors can pursue such cases. Amnesty International's research suggests that prosecutions for crimes of sexual violence against Native American women are rare in federal courts.

The lack of comprehensive and centralized data collection by federal agencies renders it impossible to obtain accurate statistics about prosecution rates for crimes of sexual violence against Native women. Amnesty International sent questionnaires to the 93 individual US Attorneys who prosecute crimes within Indian Country at the federal level seeking information on prosecution rates for crimes of sexual violence committed against Native American women. Amnesty International was informed by the Executive Office of US Attorneys that individual US attorneys would not be permitted to participate in the survey. The Executive Office for US Attorneys did provide Amnesty International with a list of some of the cases of sexual violence arising in Indian Country that had been prosecuted in recent years. Of the 84 cases provided, only 20 involved adult women. The remaining cases mostly involved children. In the cases listed, prosecutions for sexual violence against adult Native American women took place in only eight of the 93 districts, and only Arizona and South Dakota saw more than two.

While data on sexual violence specifically from Indian Country is not compiled, from October 1, 2002 to September 30, 2003, federal prosecutors declined to prosecute 60.3 per cent of sexual violence cases. These statistics include all cases involving Native and non-Native victims, nevertheless, the numbers provide some indication of the extent to which these crimes go unpunished. Significantly, between 2000 and 2003, the Bureau of Indian Affairs was consistently among the investigating agencies with the highest percentage of cases declined by federal prosecutors.

Congress should develop comprehensive plans of action to stop violence against American Indian women and ensure that survivors have access to justice.

**Key Recommendations:**

- Federal authorities should, in consultation with Native American peoples, collect and publish detailed and comprehensive data on rape and other sexual violence that shows the Indigenous or other status of victims and perpetrators and the localities where such offences take place, the number of cases referred for prosecution, the number declined by prosecutors and the reasons why.
- Prosecutors should vigorously prosecute cases of sexual violence against Native American women, and should be sufficiently resourced to ensure that the cases are treated with the appropriate priority and processed without undue delay. Any decision not to proceed with a case, together with rationale for the decision, should be promptly communicated to the survivor of sexual violence and any other prosecutor with jurisdiction.

*Amnesty International is a grassroots organization with 2.2 million members worldwide working to promote and defend human rights.*
*For information, contact Advocacy Director for the Americas Renata Rendón at 202-544-0200, or visit www.aiusa.org.*

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