



# Department of Justice

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STATEMENT

OF

DREW H. WRIGLEY  
UNITED STATES ATTORNEY  
FOR THE DISTRICT OF NORTH DAKOTA

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS  
UNITED STATES SENATE

HEARING ENTITLED

"DECLINATION REPORTING"

PRESENTED ON

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**WRITTEN STATEMENT OF DREW H. WRIGLEY**  
**UNITED STATES ATTORNEY FOR THE DISTRICT OF NORTH DAKOTA**  
**DEPARTMENT OF JUSTICE**

**Before the**  
**Senate Committee on Indian Affairs**  
**Hearing entitled**  
**“Declination Reporting”**

**Presented on**  
**September 18, 2008**

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. Moreover, 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.