

STATEMENT OF THOMAS B. HEFFELFINGER
BEFORE THE
UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS
CONCERNING LAW ENFORCEMENT IN INDIAN COUNTRY
AND FEDERAL DECLINATION REPORTS

September 18, 2008

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.