

# United States Senate

WASHINGTON, DC 20510

March 14, 2024

U.S. Department of Justice  
Attorney General Garland  
950 Pennsylvania Avenue NW  
Washington DC 20530

Dear Attorney General Garland,

We write with concern regarding the high rates of prosecutorial declinations in Indian Country. As you know, Section 212 of the Tribal Law and Order Act (TLOA) requires the Attorney General to submit an annual report to Congress outlining the investigative efforts of the Federal Bureau of Investigation (FBI) and the disposition of matters received by United States Attorney's Offices (USAOs) with jurisdiction to handle cases in Indian Country.<sup>1</sup> According to the most recent data from 2021, the U.S. Attorney declination rate stood at 18 percent (1,212 out of 6,849 Indian country matters resolved were declined).<sup>2</sup> This is down from 22 percent declined in 2020.<sup>3</sup>

The most common reason for declination (56 percent) was insufficient evidence.<sup>4</sup> The category of insufficient evidence includes witness issues, a lack of evidence regarding criminal intent, and "weak or insufficient evidence."<sup>5</sup> The other reasons for declination included the defendant unavailable (2.3%), prioritization of federal interests (16.3%), alternative to federal prosecution (7.3%), and legally barred (18.1%).<sup>6</sup>

Of the 1,212 cases declined, the majority (56%) involved physical and sexual assaults, homicide, sexual exploitation, or failure to register as a sex offender.<sup>7</sup> The Indian Country declinations by the type of crime for CY 2021 are as follows:

- Assault: 27.4%
- Homicide: 7.9%
- Sexual Assault (child and adult victims), sexual exploitation and failure to register as a sex offender: 20.8%
- Drug, Alcohol, and other offenses: 17.4%
- Financial crimes, public corruption, fraud: 6.8%

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<sup>1</sup> U.S. Department of Justice, Indian Country Investigations and Prosecutions, 2021. at 3.  
[https://www.justice.gov/d9/2023-08/2021\\_-\\_indian\\_country\\_investigations\\_and\\_prosecutions\\_report.pdf](https://www.justice.gov/d9/2023-08/2021_-_indian_country_investigations_and_prosecutions_report.pdf)

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 35.

- Jurisdictional, procedural, penalty, or state statute: 19.6%.<sup>8</sup>

The DOJ's Indian Country Investigations and Prosecutions 2021 report notes "declination rates are not an effective way to measure justice or success."<sup>9</sup> This raises an obvious question, as to how the Department measures success when it comes to justice in Indian country. The Report asserts that "[i]mproved public safety, enhanced reentry opportunities for inmates returning to their Tribal communities, and robust Tribal courts are far better measures of success." This assertion raises additional questions as to whether the Department is providing appropriate resources in the above areas.

According to the Justice Department's own findings, Native American women are two to three times more likely than women of any other race to experience violence, stalking or sexual assault.<sup>10</sup> Yet, the Department declines to prosecute of half of these cases. This in turn contributes to a culture whereby offenders feel emboldened because there is no one to hold them accountable.<sup>11</sup> And families of victims often feel as though law enforcement is not providing regular updates on their cases.<sup>12</sup>

We applaud the Department's June 2023 launch of a missing and murdered Indigenous people outreach program.<sup>13</sup> We hope that the program will provide more meaningful coordination between tribal communities and federal law enforcement. That being said, we remain concerned with the prosecutorial declination rates and request responses to the following questions:

1. Insufficient evidence is cited as the most common reason for prosecutorial declination in Indian Country. Please provide additional details as to why the USAOs lack evidence to prosecute. For example, is there an unwillingness for victims or witnesses to come forward? Or are there insufficient resources to conduct thorough examinations?
  - a. In cases where additional evidence is uncovered or brought forward, what is the procedure for reopening a case or investigation?
  - b. In cases where law enforcement fails to conduct a full and thorough investigation, what ability do USAOs have to push for additional investigations?
2. Approximately 16 percent of declinations are due to "prioritization of federal interests". The 2021 report does not provide a definition of this term. What does "prioritization of

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<sup>8</sup> *Id.* at 34.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> <https://nij.ojp.gov/topics/articles/violence-against-american-indian-and-alaska-native-women-and-men>

<sup>11</sup> <https://alaskapublic.org/2023/12/15/alaska-chapter-of-federal-mmip-report-highlights-historic-violence-legal-hiccups/>

<sup>12</sup> <https://www.adn.com/bristol-bay-times/news/2023/12/11/in-bristol-bay-and-beyond-organizers-push-for-change-in-tackling-mmip-cases/>

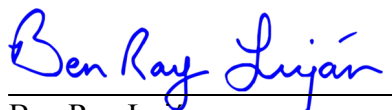
<sup>13</sup> <https://www.justice.gov/opa/pr/justice-department-launches-missing-or-murdered-indigenous-persons-regional-outreach-program>

federal interests” mean? And how does the Department determine what interest to prioritize?

3. Does the Department of Justice and USAOs have a standard operating procedure as to how to investigate referrals? If so, is there an oversight mechanism in place to ensure such standards are followed?
4. What is the Department of Justice policy regarding coordination and information sharing with the Bureau of Indian Affairs’ Murdered and Missing Indigenous Unit?
5. If a USAO declines to prosecute, how is that decision communicated to the victim and/or the victim’s family?
  - a. Is there a process whereby a victim or victim’s family can contest such a decision?
6. If a USAO declines to prosecute, what is the timeline for when that decision is communicated to the victim and/or the victim’s family?
7. If a USAO declines to prosecute, is the victim and/or victim’s family given a detailed reasoning for the declination?

Thank you for your attention to this important matter. We look forward to your response and to working with the Department to further address justice matters in Indian Country.

Sincerely,



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Ben Ray Lujan  
United States Senator



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Martin Heinrich  
United States Senator



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Tina Smith  
United States Senator



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Catherine Cortez Masto  
United States Senator



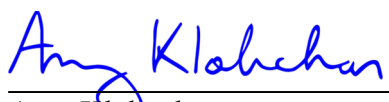
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Kirsten Gillibrand  
United States Senator



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Jacky Rosen  
United States Senator



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Amy Klobuchar  
United States Senator



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Mazie K. Hirono  
United States Senator