

The Ethics of Federal Declinations

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Discussion



Mechanics of Federal Prosecution



Principles of Federal Prosecution



Initiating and Declining Prosecution



Tribal Law and Order Act and Savanna's Act



Indian Country Investigations and Prosecutions Report

Indictment	Initial Appearance	Bond/Detention Hearing	Discovery	Motions	Trial	Sentencing
<p>Indictment returned by grand jury.</p> <p>Arrest warrant or summons is issued.</p> <p>Defendant is arrested pursuant to arrest warrant or served with summons for initial appearance.</p> <p>Fed. R. Crim. P. 3</p>	<p>Promptly, usually within 24 hours of arrest.</p> <p>Defendant is advised of:</p> <ul style="list-style-type: none"> • pending charges • maximum penalties • right to counsel • right to preliminary hearing • general circumstances of pretrial release <p>Fed. R. Crim. P. 5</p> <p>24hrs.</p>	<p>On motion of defendant: no more than 5 days</p> <p>On motion of Government: no more than 3 days</p> <p>Otherwise: immediately</p> <p>18 U.S.C. 3142</p> <p>Up to 5 days</p>	<p>Fed. R. Crim. P. 16</p> <p>70 days</p> <p>plus excludable time 18 U.S.C. 3161</p>	<p>Fed. R. Crim. P. 12, 12.1, 12.2, 12.3</p>	<p>Fed. R. Crim. P. 23, 24, 26.2, 29, 30</p> <p>Approx. 70 days</p>	<p>PSR prepared by Probation Office and provided to parties and court.</p> <p>Objections to PSR and sentencing memoranda filed by parties.</p> <p>Sentencing hearing.</p> <p>Fed. R. Crim. P. 32</p>

Federal Criminal Process

How Are Cases Referred to U.S. Attorney's Office?



Principles of Federal Prosecution - Preface

Decision to prosecute represents a policy judgment that the fundamental interests of society require the application of federal criminal law to a particular set of circumstances.

JM 9-27.001

Principles designed to assist in structuring the decision-making process.

JM 9-27.001

Intended to promote the reasoned exercise of prosecutorial discretion by attorneys for the government.

JM 9-27.110

Principles of Federal Prosecution - Preface

Key ethical considerations in federal declinations

- Legal sufficiency
- Fairness and impartiality
- Transparency and disclosure
- Conflicts of interest
- Victim considerations
- Public interest

Initiating and Declining Prosecution



Probable Cause Requirement, JM 9-27.200

If the government attorney concludes that there is probable cause to believe that a person has committed a federal offense within their jurisdiction, they should consider whether to:

Request or
conduct further
investigation

Commence or
recommend
prosecution

Decline
prosecution and
refer matter for
prosecutorial
consideration in
another
jurisdiction

Decline
prosecution and
commence
pretrial
diversion or
other
disposition

Decline
prosecution
without taking
other action

Probable Cause Requirement, JM 9-27.200

Probable cause standard is the same standard required for the issuance of an arrest warrant or summons upon a complaint and for a magistrate's decision to hold a defendant to answer in the district court.

Fed. R. Crim. P. 4(a) and 5.1(a).

Minimal requirement for indictment by a grand jury.
See Branzburg v. Hayes, 408 U.S. 665, 686 (1972).

Probable Cause Requirement, JM 9-27.200



Threshold consideration only



Failure to meet the minimal requirement of probable cause is absolute bar to initiating a federal prosecution

Grounds for Commencing or Declining Prosecution, JM 9-27.220

Government attorney should commence or recommend federal prosecution if they believe that:

- the person's conduct constitutes a federal offense; and,
- the admissible evidence will probably be sufficient to obtain and sustain a conviction

Unless...

- The prosecution would serve no substantial federal interest;
- The person is subject to the effective prosecution in another jurisdiction; or
- There exists an adequate non-criminal alternative to prosecution

Initiating and Declining Charges: Substantial Federal Interest, JM 9-27.230

In determining whether a prosecution would sever a **substantial federal interest**, the government attorney should weigh all relevant considerations, including:

- Federal law enforcement priorities;
- The nature and seriousness of the offense;
- The deterrent effect of prosecution;
- The person's culpability in connection with the offense;
- The person's history with respect to criminal activity;
- The person's willingness to cooperate in the investigation or prosecution of others;
- The person's personal circumstances; the interests of any victims; and,
- The probable sentence or other consequences if the person is convicted.


Initiating and Declining Charges: Prosecution in Another Jurisdiction, JM 9-27.240

In determining whether a prosecution should be declined because the person is subject to **effective prosecution in another jurisdiction**, the government attorney should weigh all relevant considerations, including:


- The strength of the other jurisdiction's interest in prosecution;
- The other jurisdiction's ability and willingness to prosecute effectively; and,
- The probable sentence or other consequences if the person is convicted in the other jurisdiction.

Prosecution in Another Jurisdiction

When declining prosecution or reviewing whether federal prosecution should be initiated, the attorney for the government should:



Consider whether to discuss matter with state, local, or tribal law enforcement authorities for further investigation or prosecution; and,



Coordinate with those authorities as appropriate.

Reasons for Declination

ALTP - Alternative to Federal Prosecution Appropriate

DEUN - Defendant Unavailable

EVID - Insufficient Evidence

LEBA - Legally Barred

REFM - Matter Referred to Another Jurisdiction

OEOE - Opened in Error/Office Error

RESO - Prioritization of Federal Resources and Interests

Reasons for Declination

REFM - Matter Referred to Another Jurisdiction

OEOE - Opened in Error/Office Error

RESO - Prioritization of Federal Resources and Interests

ALTP - Alternative to Federal Prosecution Appropriate

- Civil proceedings
- Administrative suspension and debarment or exclusion proceedings
- Civil judicial and administrative forfeiture
- Reference of complaints to licensing authorities or professional organizations
- Pre-trial diversion

Reasons for Declination

DEUN - Defendant Unavailable

- Example: Defendant is deceased

EVID - Insufficient Evidence

- Examples: lack of criminal intent, weak or insufficient evidence, or witness/victim issues
- Not enough evidence to prove a federal crime beyond a reasonable doubt
- Government cannot sustain its burden of proof beyond a reasonable doubt and prosecutor must decline these matters

LEBA - Legally Barred

- Statute of limitations
- Lack of jurisdiction

Impermissible Considerations

JM 9-27.260



The person's race, religion, gender, ethnicity, national origin, sexual orientation, or political association, activities, or beliefs



The attorney's own personal feelings concerning the person, the person's associates, or the victim



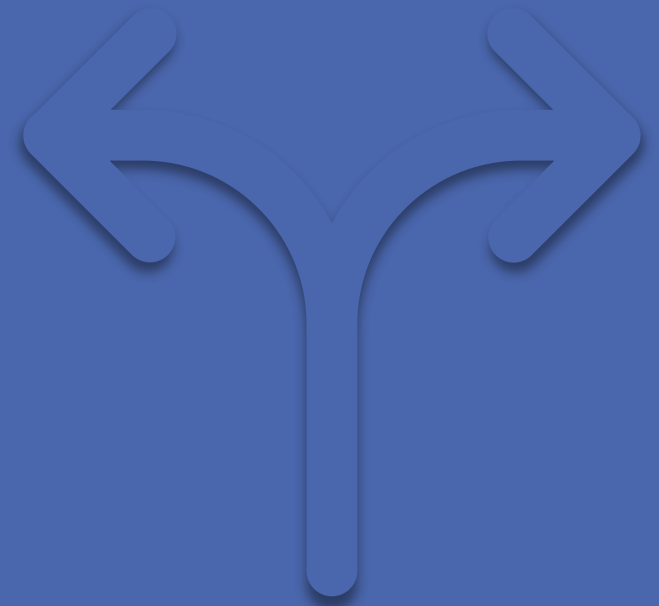
The possible effect of the decision on the attorney's own professional or personal circumstances

Records of Prosecutions Declined, JM 9-27.270

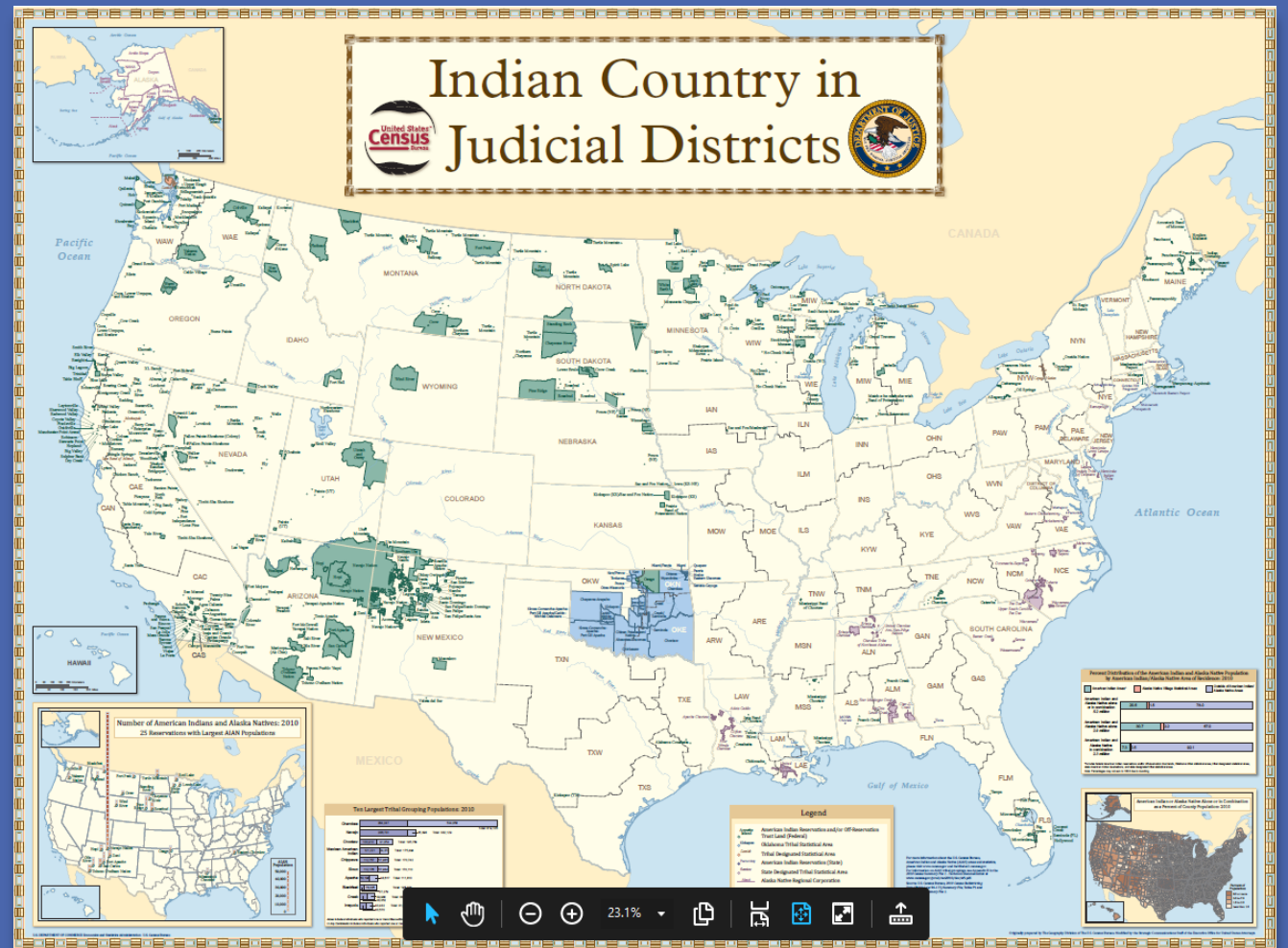
Wherever an attorney for the government declines to commence or recommend federal prosecution, they should ensure that their decision and the reasons therefore are:

- communicated to the investigating agency involved and to any other interested agency
- reflected in the office files to ensure an adequate record of disposition of matters that are brought to the attention of the government attorney for possible criminal prosecution, but that do not result in federal prosecution

When prosecution is declined in serious cases on the understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives their attention.



Indian Country Federal Prosecutions



Indian Country Declinations

Tribal Law and Order Act Senate Report (2009)

- Declination rates in Indian Country cases were 52.2% in 2007 and 47% in 2008
- Declination rates in non-Indian Country cases were 20.7% in 2007 and 15.6% in 2008

GAO-11-167R Declinations of Indian Country Matters

- How many Indian country matters were referred to U.S. Attorney's offices and what were the declination rates for those matters for fiscal years 2005 through 2009?
- What are the reasons for the declinations as recorded in the DOJ's case management system?

Mr. DORGAN, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 797]

[Including cost estimate of the Congressional Budget Office]

The Committee on Indian Affairs, to which was referred the bill (S. 797), to amend the Indian Law Enforcement Reform Act, the Indian Tribal Justice Act, the Indian Tribal Justice Technical and Legal Assistance Act of 2000, and the Omnibus Crime Control and Safe Streets Act of 1968 to improve the prosecution of, and response to, crimes in Indian country, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

I. PURPOSE

The criminal justice system on Indian lands consists of a complex and often overlapping matrix of federal, tribal, and in certain circumstances, state jurisdiction. The complexity of this system has contributed to a crisis of violent crime on many Indian reservations¹ that has persisted for decades. Federal reports have consistently found that the divided system of justice in place on Indian reservations lacks coordination, accountability, and adequate and consistent funding. These shortfalls, the reports find, serve to fos-

¹The terms "Indian reservations", "Indian country", "Indian communities", and "tribal communities" are used interchangeably throughout this Report to refer to the lands on which federally recognized Indian tribes reside. The term Indian country is a term used for purposes of federal

Tribal Law and Order Act

Aimed to increase federal accountability, enhance tribal authority, authorize additional funding, and established the Indian Law and Order Commission

Mandates series of annual reports and evidence sharing between federal and tribal justice officials and prosecutorial agencies when a case is declined

DOJ Indian Country Investigations and Prosecutions Report

Report to Congress on Spending, Staffing, and Estimated Funding Costs for Public Safety and Justice Programs in Indian Country

Tribal Law and Order Act

Prosecutorial Coordination 25 U.S.C. § 2809(a)(3)

If a United States Attorney declines to prosecute or acts to terminate prosecution of an alleged violation of Federal criminal law in Indian country, the United States Attorney shall coordinate with the appropriate tribal justice officials regarding the status of the investigation and the use of evidence relevant to the case in a tribal court with authority over the crime charged.

Tribal Law and Order Act

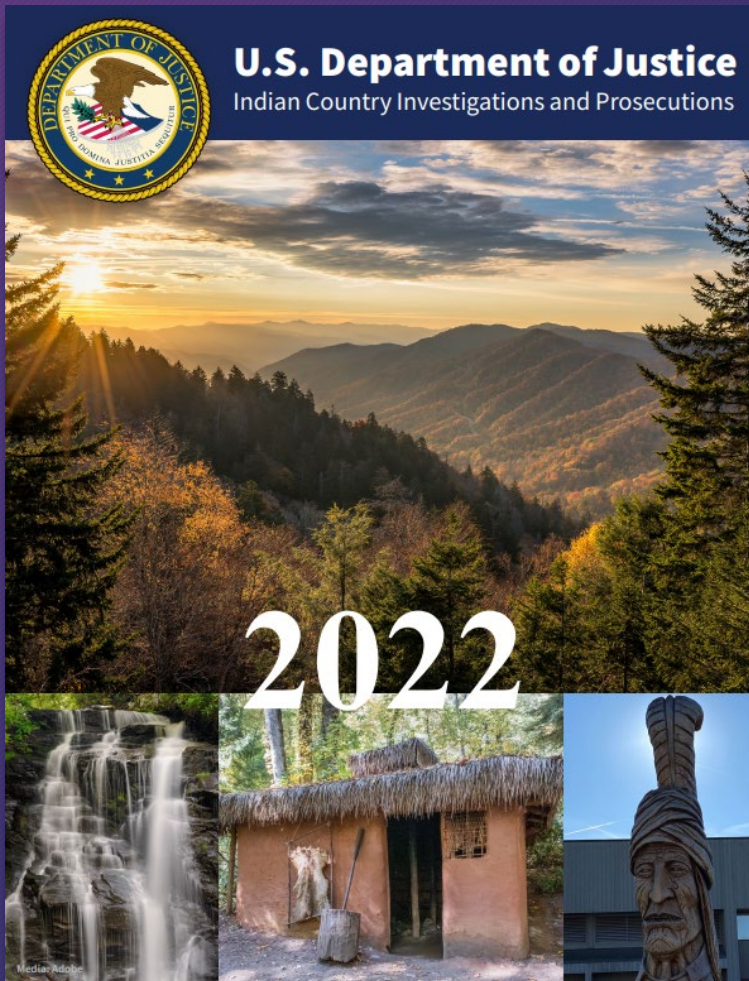
Prosecutorial Coordination

25 U.S.C. § 2809(a)(3)

The United States Attorney shall submit to the Native American Issues Coordinator to compile, on an annual basis and by Federal judicial district, information regarding all declinations of alleged violations of Federal criminal law that occurred in Indian country that were referred for prosecution by law enforcement agencies, including:

- The types of crimes alleged;
- The statuses of the accused as Indians or non-Indians;
- The statuses of the victims as Indians or non-Indians; and,
- The reasons for deciding to decline or terminate the prosecutions

DOJ Indian Country Investigations and Prosecutions Report (2022)

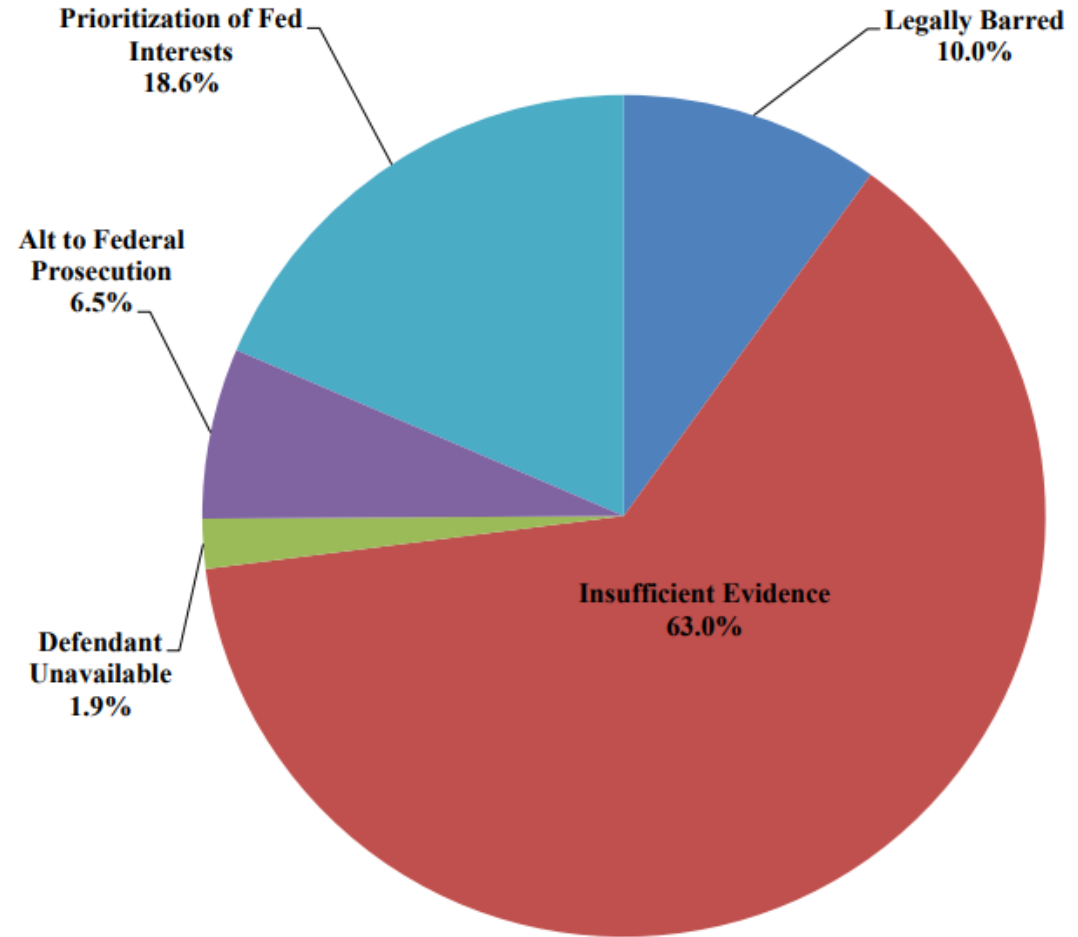


Data from United States Attorney's Offices:

- USAOs resolved 5,989 Indian country matters
- USAO Indian country declination rate was 24%
 - Most common reason for declination (63%) by USAOs was insufficient evidence
- USAOs referred 43% of Indian country matters resolved to another jurisdiction for prosecution

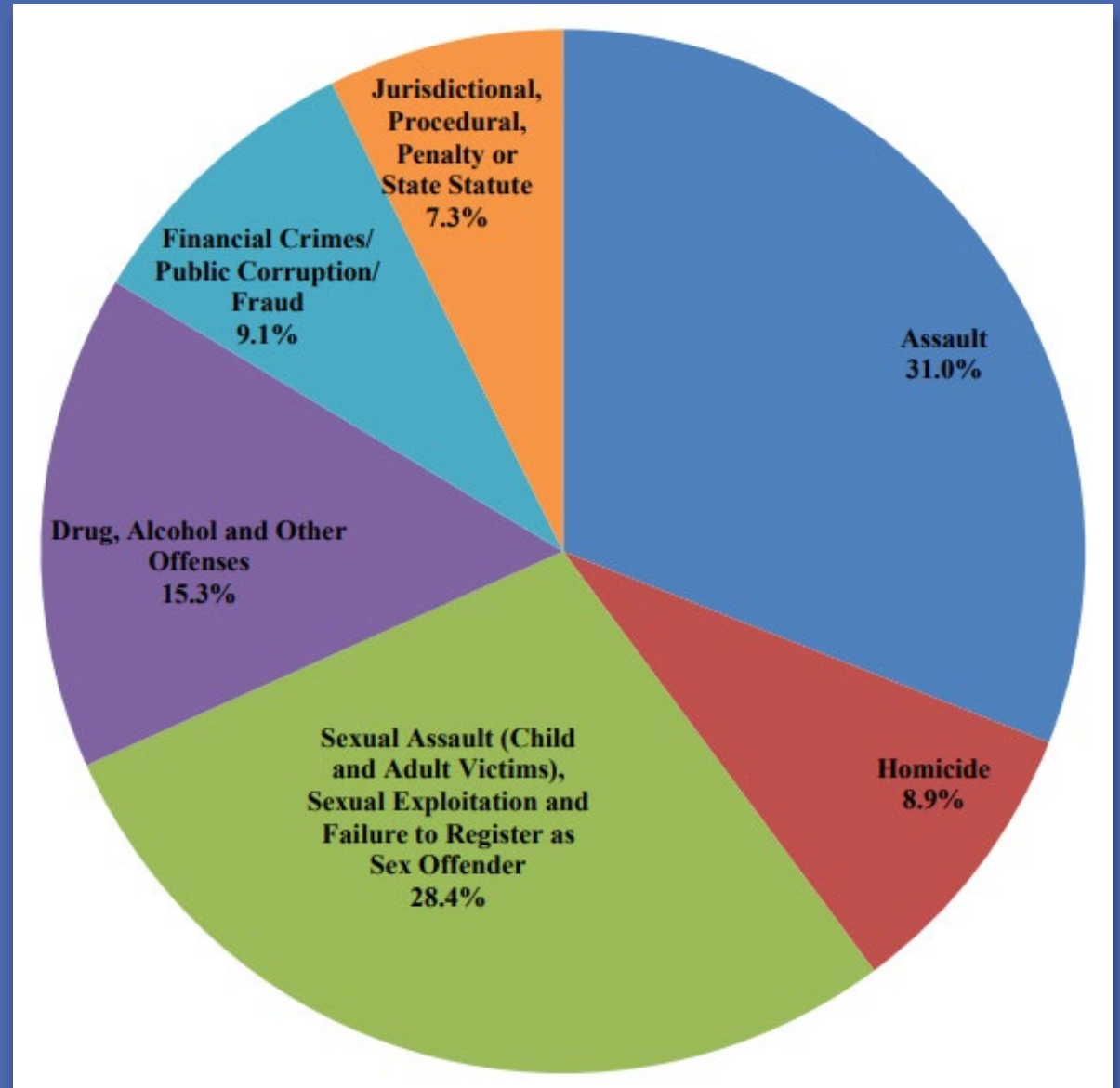
Declinations By Reason in Indian Country Crimes

CY 2022



Indian Country Declinations by Crime Type

CY 2022



Savanna's Act (2010)

Clarify the responsibilities of Federal, State, Tribal, and local law enforcement agencies with respect to responding to cases of missing or murdered Indians;

Increase coordination and communication among Federal, State, Tribal, and local law enforcement agencies, including medical examiner and coroner offices;

Empower Tribal governments with the resources and information necessary to effectively respond to cases of missing or murdered Indians; and,

Increase the collection of data related to missing or murdered Indian men, women, and children, regardless of where they reside, and the sharing of information among Federal, State, and Tribal officials responsible for responding to investigating cases of missing or murdered Indians.

Savanna's Act (2010)

Section 6(a) requires the Attorney General to including in DOJ's annual Indian Country Investigations and Prosecutions report to Congress information that:



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graph TD; A[Section 6(a) requires the Attorney General to including in DOJ's annual Indian Country Investigations and Prosecutions report to Congress information that:] --> B[Includes known statistics on missing Indians in the United States, available to the Department of Justice]; A --> C[Includes known statistics on murdered Indians in the United States, available to the Department of Justice];
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Includes known statistics on missing Indians in the United States, available to the Department of Justice

Includes known statistics on murdered Indians in the United States, available to the Department of Justice

Closing Remarks and Questions

