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The Federal Juvenile Delinquency Act: A Disparate Impact on Native American Juveniles

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Note

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On June 10, 1996, Federal District Court Judge Bruce Black faced an all too-familiar dilemma. Should he allow the prosecution of fifteen-year-old Native American Jerry Paul C. as an adult where he would face a long federal prison term, or should he require the U.S. Attorney to proceed against Jerry as a juvenile where he could receive a maximum of five years confinement in a juvenile detention center for the felony crimes of murder, carjacking, and possession of a firearm?[1] On the one hand, a long prison term would greatly decrease Jerry's chances of rehabilitation. On the other hand, detaining Jerry for such a short period of time would not effectively dispel the danger he posed to society. Limited by these unpalatable alternatives, Judge Black granted, with reservations, the government's motion to transfer Jerry to adult status pursuant to the Federal Juvenile Delinquency Act (FJDA).[2] Judge Black reasoned that because Jerry remained a risk to society, he was forced to try him as an adult even though Jerry would face a

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1. *See* United States v. Jerry Paul C., 929 F. Supp. 1406 (D.N.M. 1996); Amended Motion to Proceed Against Defendant as an Adult at 2, *Jerry Paul C.*, 929 F. Supp. 1406 (No. 96-108 BB) (charging Jerry with felony murder in violation of 18 U.S.C. §§ 1111 & 1153 (1994); carjacking resulting in death in violation of 18 U.S.C. § 2119(3); and possession of a firearm during the commission of a crime in violation of 18 U.S.C. § 924(c)). A juvenile who is under 18 and declared a juvenile delinquent may only be held until he is 21 years old. *See* 18 U.S.C. § 5037(c). A juvenile who committed a crime while a minor but is adjudicated after his eighteenth birthday may be held for a maximum of five years. *See id.*

2. *See Jerry Paul C.*, 929 F. Supp. at 1407; Federal Juvenile Delinquency Act (FJDA), 18 U.S.C. §§ 5031-42. Section 5032 of the FJDA enables the federal government to obtain jurisdiction over a juvenile. *See id.*

"disproportionately long, federal prison sentence [that was] the unfortunate product of Jerry Paul C.'s jurisdictional status as a Native American."[3]

As a result of his transfer to adult status as a federal defendant, the United States Sentencing Commission's Guidelines (Sentencing Guidelines) subjected Jerry to a substantially longer sentence than either tribal[4] or state courts generally would have imposed.[5] If a judge transfers a youthful offender

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3. *Jerry Paul C.*, 929 F. Supp. at 1411. Jerry Paul C. is an enrolled member of the Acoma Pueblo Indian tribe. *See id.* Jerry had already been adjudicated as an adult and sentenced to ten years imprisonment by the State of New Mexico for a separate incident that occurred on the same "night of terror" but fell within state criminal jurisdiction. *Id.* Although Jerry is Native American, the crimes with which he was charged took place on state territory, thereby subjecting him to state criminal jurisdiction. *See id.* The state court of New Mexico convicted and sentenced Jerry Paul C. as an adult for the crimes of armed robbery with a firearm enhancement, conspiracy to commit armed robbery, and false imprisonment. *See id.* at 1408.

4. Congress has prevented tribal courts from imposing more than one year in jail or $5,000 in fines with the Indian Civil Rights Act of 1968 (ICRA). *See* 25 U.S.C. § 1302(7) (1994). ICRA initially limited the punishment a tribal court could impose to six months imprisonment, a $500 fine, or both. *See* Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 559 (1976). Congress enacted ICRA to cure the perceived abuses of judicial power by the tribal courts. *See id.* at 561. For example, because tribal court hearings are informal, trial by jury is generally waived and appeal mechanisms are either "chaotic or unavailable." *Id.* Until the enactment of ICRA, however, tribal courts were not considered arms of the federal government and therefore were not inherently bound by constitutional limitations. *See id.* at 562. While ICRA apparently accepted this view of tribal courts, it imposed a statutory list of constitutional-type guarantees with which tribal courts must comply. *See id.*

5. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A2 (1995) (establishing strict sentencing guidelines, abolishing parole and reducing good behavior adjustments) [hereinafter GUIDELINES MANUAL]; Robert P. Crouch, Jr., *Uncertain Guideposts on the Road to Criminal Justice Reform: Parole Abolition and Truth-in-Sentencing*, 2 VA. J. SOC. POL'Y & L. 419, 422 (1994) (stating that the federal system hits criminals with the "heavier hammer" of no parole and mandatory minimum sentences); Robert E. Shepherd, Jr., *Trying Juveniles in Federal Court*, CRIM. JUST., Fall 1994, at 45, 47 (stating that "'youth' is not even a specific factor for a downward adjustment in a federal sentence under the guidelines"). In *Jerry Paul C.*, Judge Black used the handling of the state action for the same "night of terror" to explain the discrepancy between state and federal sentencing. 929 F. Supp. at 1408. The state of New Mexico convicted and sentenced Jerry as an adult for the crimes of armed robbery with a firearm enhancement, conspiracy to commit armed robbery, and false imprisonment. *See id.* The state court sentenced Jerry to a prison term of 120 months (10 years). *See id.* Under the federal sentencing guidelines, Jerry would have been subject to a sentence of 87 to 108 months, plus 60 consecutive months for the use of a firearm while committing a violent crime. *See id.* Further, New Mexico allows those serving time "to earn good time credits at the

for trial as an adult in the state courts, the criminal sentence is usually half as long with an opportunity for parole or greater allowances for "good time."[6] *Jerry Paul C.* highlights the disproportionate consequences Native American juveniles often face as a result of their jurisdictional status. As a Native American youth committing a felony crime on an Indian reservation, Jerry falls within federal criminal jurisdiction.[7] If Jerry were non-Indian, he would have been subject to state jurisdiction, not federal jurisdiction, and he would have been sentenced according to New Mexico's sentencing guidelines.[8] Thus, based solely on his status as a Native American, Jerry faced the graver consequences of federal prosecution.[9] *Jerry Paul C.* raises the issue of whether transferring juveniles to adult status under the FJDA is in the best interest of justice where the majority of juveniles transferred are Native American.

This Note argues that subjecting Native American juveniles to federal sentencing based purely on their jurisdictional status does not serve the interests of justice. Sentencing American Indian juveniles to longer sentences is in direct conflict with the federal system's goals of reserving criminal prosecution for the most serious instances of juvenile criminal conduct and reducing the occurrences in which minority defendants receive longer sentences than white defendants. Part I provides a brief overview of § 5032 of the FJDA and federal criminal jurisdiction in Indian country. Part II explores the constitutionality of subjecting Native American juveniles to

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rate of 30 days for every month served." *Id.; see also* N.M. STAT. ANN. § 33-2-34 (Michie 1990). By contrast, the federal system limits good time to 54 days per year. *See Jerry Paul C.*, 929 F. Supp. at 1408.

6. *See Jerry Paul C.*, 929 F. Supp. at 1407. The court acknowledged that the "[g]ood time in the federal system is limited to fifty-four days per year. The effect, of course, is that Indian youths tried as adults in the federal system serve a substantially larger percentage of their originally larger sentences than non-Indian youths tried as adults in the State courts." *Id.* at 1408. The federal government also requires that criminal offenders serve at least eighty-five percent of the imposed sentence. *See* Symposium, *Violent Crime Control and Law Enforcement Act of 1994*, 20 U. DAYTON L. REV. 763, 766 (1995). In 1987, the federal government abolished parole and adopted mandatory minimum sentences for certain categories of crimes. *See* Crouch, *supra* note 5, at 420.

7. *See* Major Crimes Act, 18 U.S.C. § 1153 (1994); *infra* notes 71-85 and accompanying text.

8. *See* 18 U.S.C. § 1153; *Jerry Paul C.*, 929 F. Supp. at 1407; *infra* notes 71-85 (discussing the Major Crimes Act and how its application affects Native American defendants).

9. *See supra* notes 5-6 (contrasting New Mexico's sentencing guidelines with the Federal Sentencing Guidelines).

federal criminal jurisdiction where they will face more severe consequences for their actions based solely on their classification as Indians. Part III introduces alternatives to the current practice that would reduce the disparate impact the FJDA has on Indian juveniles without disturbing the integrity of the federal judicial system. This Note concludes that Congress could remedy the disparity by presuming tribal court jurisdiction over Indian juveniles as it already does with state and other local courts. The federal government would be able to rebut this presumption by showing either that the tribal government did not have or refused to exercise jurisdiction over the juvenile or that the tribal government did not have available services and programs adequate for the needs of the juvenile. In addition, Congress should formally recognize youthfulness as a mitigating factor in the federal sentencing of Indian juveniles who face federal adult prosecution based solely on their jurisdictional status rather than the seriousness of the criminal offense.

I. FEDERAL CRIMINAL JURISDICTION AND SENTENCING: HISTORY AND CURRENT DEVELOPMENTS

A. THE HISTORY AND DEVELOPMENT OF FEDERAL JURISDICTION OVER JUVENILES

In 1974, Congress passed the Juvenile Justice and Delinquency Prevention Act (Act of 1974).[10] The Act of 1974 promised to improve the quality of juvenile justice and provided a comprehensive, coordinated approach to juvenile delinquency.[11] The Act of 1974 amended the FJDA, which virtually had been unchanged since its congressional enactment in 1938.[12] Section

10. S. REP. NO. 93-1011 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5283.

11. Juvenile Justice and Delinquency Act, Pub. L. No. 93-415, §§ 101-545, 88 Stat. 1109, 1109-43 (1974) (codified as amended at 42 U.S.C. § 5601 (1994)). The Act of 1974 was enacted to provide "[f]ederal leadership and coordination of the resources necessary to develop and implement at the State and local community level effective programs for the prevention and treatment of juvenile delinquency." S. REP. NO. 93-1011, *reprinted in* 1974 U.S.C.C.A.N. 5283, 5283.

12. *See* S. REP. NO. 93-1011, *reprinted in* 1974 U.S.C.C.A.N. 5283, 5284. The Senate Judiciary Committee believed that it needed to update the Federal Juvenile Delinquency Act by incorporating the due process rights recently granted to juvenile proceedings in the landmark Supreme Court decision *In re Gault*. *See id.*, *reprinted in* 1974 U.S.C.C.A.N. 5283, 5284; *see also In re* Gault, 387 U.S. 1, 31-58 (1967) (granting juveniles due process rights including ade-

5032 of the FJDA allows the Attorney General to initiate delinquency proceedings against juveniles in federal courts.[13] It also permits the criminal prosecution of juveniles as adults.[14]

The purpose of the FJDA is to "remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation."[15] Juvenile justice is premised on the belief that juveniles are less culpable than adults for their criminal acts due to their lack of experience and poor judgment.[16] The Supreme Court has stated that although crimes committed by minors are just as harmful to the victims as those committed by adults, juveniles "deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults."[17] Accordingly, the FJDA reflects the assumption that minors who have committed a wrong or criminal

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quate and timely notice of charges, the right to an attorney, privilege against self-incrimination, and the right to confront and cross-examine witnesses).

13. *See* 18 U.S.C. § 5032. The FJDA defines "juvenile" as "a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday." 18 U.S.C. § 5031. "Juvenile delinquency" is defined as "the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult or a violation by such a person of section 922(x)." *Id.*

14. *See* 18 U.S.C. § 5031; *see also infra* notes 28-42 (describing circumstances under which a juvenile may be prosecuted as an adult in federal court).

15. United States v. One Juvenile Male, 40 F.3d 841, 844 (6th Cir. 1994); *see also* S. REP. NO. 93-1011, *reprinted in* 1974 U.S.C.C.A.N. 5283, 5284 ("The bill also amends the Federal Juvenile Delinquency Act... to provide basic procedural rights for juveniles who come under Federal jurisdiction and to bring Federal procedures up to the standards set by various model acts, many state codes and court decisions."); Jean M. Radler, Annotation, *Treatment Under Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031-5042) of Juvenile Alleged to Have Violated Law of United States*, 137 A.L.R. FED. 481, 496 (1997) (stating that the FJDA "provides rehabilitation rather than punishment, apparently based on the belief that... a juvenile is more amenable to rehabilitation than an adult").

16. *See* Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (proclaiming that "the [Supreme] Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult"); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 114 (1997) (explaining that juvenile criminal acts are "less blameworthy not simply because of reduced culpability and limited appreciation of consequences but because their life-situations have understandably limited their capacity to learn to make fully responsible choices").

17. *Thompson*, 487 U.S. at 834 (citation omitted).

act will be proceeded against as juveniles, not adults.[18] Thus, a juvenile delinquency proceeding under the FJDA is not a criminal conviction but an adjudication of status.[19]

Although the FJDA provides federal courts with jurisdiction over juveniles, it includes a certification procedure with which the Attorney General must comply in order to secure federal jurisdiction over a juvenile.[20] In order to initiate charges against a minor in federal court, the Attorney General[21] must demonstrate to the federal district court judge that: (1) the state[22] juvenile court does not have, or refuses to exer-

18. *See* 18 U.S.C. § 5032 ("A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter unless he has requested in writing upon advice of counsel to be proceeded against as an adult . . . .").

19. *See One Juvenile Male*, 40 F.3d at 844 ("A successful prosecution under the [Federal Juvenile Delinquency Act] does not result in a criminal conviction but rather in an adjudication that the defendant has entered into a state of juvenile delinquency." (quoting United States v. Chambers, 944 F.2d 1253, 1257 (6th Cir. 1991))); United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990) (explaining that "[u]nder this act, prosecution results in an adjudication of status—not a criminal conviction"); United States v. Allen, 574 F.2d 435, 437 (8th Cir. 1978) (stating that a "finding of delinquency under the Federal Juvenile Delinquency Act is an adjudication of status, not a conviction for a crime"); Stacie S. Polashuk, *Following the Lead of the Indian Child Welfare Act: Expanding Tribal Court Jurisdiction over Native American Juvenile Delinquents*, 69 S. CAL. L. REV. 1191, 1208 (1996) (declaring that "[t]he Act does not create a substantive offense with its own jurisdictional basis, but rather establishes a procedural mechanism for the treatment of juveniles who are already subject to federal jurisdiction because of the commission of acts cognizable under other federal criminal statutes" (citation and multiple quotation marks omitted)).

20. *See* 18 U.S.C. § 5032; United States v. Baker, 10 F.3d 1374, 1395 (9th Cir. 1993); United States v. Juvenile K.J.C., 976 F. Supp. 1219, 1222 (N.D. Iowa 1997).

21. The Attorney General may delegate her power of certification to the U.S. Attorney's Office of the appropriate federal district. *See* 28 C.F.R. § 0.57 (1999); *see also* United States v. Angelo D., 88 F.3d 856, 859-60 (1996) (holding that "the Attorney General may delegate her power to the Assistant Attorney General who may in turn delegate his power to the United States Attorneys who may delegate their power to the Assistant United States Attorneys"); United States v. Dennison, A.L., 652 F. Supp. 211, 213 (D.N.M. 1986) (rejecting argument that certification was deficient because filed by U.S. Attorney rather than Attorney General, since power to certify has been properly delegated to the U.S. Attorney).

22. Section 5032 defines "State" as a "State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States." 18 U.S.C. § 5032. Indian tribes are not included within the statute's definition of a "State." *See id.* The definition of Indian tribes used for the purposes of the FJDA is provided by the Indian Self-Determination and Education Assistance Act (ISDEAA). *See* 25 U.S.C. § 450b(e) (1994). The ISDEAA defines "Indian tribe" as any "Indian tribe, band, nation, or other or-

cise, jurisdiction over the minor; (2) the state lacks adequate programs or services for the minor; or (3) the offense charged is a firearms offense, a drug trafficking offense or importation offense, or a violent felony, and there is a "substantial Federal interest"[23] in the case or offense to warrant federal jurisdiction.[24] Examples of cases warranting a substantial federal interest include participation in large scale-drug trafficking, willful destruction of U.S. property, and the assassination of a federal official.[25] If the U.S. Attorney does not meet these requirements, the juvenile will be "surrendered" to the legal authorities of the state.[26] If the requirements are met, the appropriate federal district court will oversee the proceedings.[27]

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ganized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *Id.*

23. Congress added the "substantial Federal interest" requirement to § 5032 in 1984. *See* Comprehensive Crime Control Act of 1984, tit. II, Pub. L. No. 98-473, 98 Stat. 1976 (1984) [hereinafter CCCA of 1984]. Congress stated that a finding of "substantial Federal interest" should be based on the nature of the offense or whether "the circumstances of the case give rise to special Federal concerns." H.R. REP. NO. 98-1030 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3529.

24. *See* 18 U.S.C. § 5032. The third certification provision was added to the certification provisions of § 5032 as part of the CCCA of 1984. *See* CCCA of 1984, *supra* note 23. Congress stated that it was adding the third category so that juvenile delinquency cases dealing with serious felony offenses would be handled by federal proceedings. *See* H.R. REP. NO. 98-1030, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3529.

25. *See* H.R. REP. NO. 98-1030, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3529. Congress provided the following examples as cases involving a substantial federal interest: "assault on, or assassination of, a Federal official, an aircraft hijacking, a kidnapping where State boundaries are crossed, a major espionage or sabotage offense, participation in large-scale drug trafficking, or significant and willful destruction of property belonging to the United States." *Id.* Congress stated that it was limiting the category of substantial federal interest and violent felonies so that the federal government would continue to defer to state authorities for less serious offenses. *See id.; see also, e.g.*, United States v. NJB, 104 F.3d 630, 635 (4th Cir. 1997) (finding a substantial federal interest in the criminal act of killing in furtherance of a continuing criminal enterprise since the legislative history of FJDA expressly includes "'large scale drug trafficking' as an example of an offense that raises special federal concerns"); United States v. Juvenile Male # 1, 86 F.3d 1314, 1321 (4th Cir. 1996) (holding the crime of carjacking to be an act of substantial federal interest because Congress had federalized the crime by statute and imposed harsh penalties for its commission). *But see, e.g.*, United States v. Male Juvenile, 844 F. Supp. 280, 283 (E.D. Va. 1994) (declaring that a single instance of bank robbery does not raise a substantial federal interest).

26. *See* 18 U.S.C. § 5032; *see also Juvenile Male # 1*, 86 F.3d at 1319 (stating that "there is a clear congressional intent to limit the types of cases that the executive *should* bring in federal court"); Major Richard L. Palmatier,

Even though Congress created the FJDA to remove juveniles from the criminal process, the federal government retains the authority to place them there.[28] There are two provisions by which a minor may be prosecuted as an adult: a discretionary transfer provision and a mandatory transfer provision.[29] The discretionary provision requires a case-by-case judicial determination of whether prosecuting the minor is justifiable, whereas the mandatory provision automatically assumes criminal jurisdiction over repeat juvenile offenders.[30] The provision by which a juvenile will be transferred to adult status depends upon the juvenile's age, the nature of prior criminal acts, and the seriousness of the present offense charged.[31]

Either the Attorney General or the juvenile may initiate a transfer under the discretionary provision.[32] A juvenile, upon the advice of counsel, may wish to be tried as an adult in order to be protected by the procedural safeguards granted to adults.[33] For example, because a juvenile does not enjoy the constitutional right to a trial by jury, the juvenile can only receive a jury trial if he or she is tried as an adult.[34] It is more likely, however, that the Attorney General will move to treat

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Jr., *Criminal Offenses by Juveniles on the Federal Installation: A Primer on 18 U.S.C. § 5032*, ARMY LAW., Jan. 1994, at 3 (opining that by creating federal jurisdiction over juveniles, the Act of 1974 "broke with the history of reserving the matter for the individual states[,]" but added that the certification provisions of § 5032 demonstrated Congress's presumption that juvenile matters are best handled by state authorities).

27. *See* 18 U.S.C. § 5032.

28. *See id.*

29. *See id.*

30. *See id.* This provision applies only to those juveniles who purportedly have committed an act of juvenile delinquency, but have not been turned over to the legal authorities of the state. *See id.* In order to be prosecuted as an adult, the juvenile must be fifteen years or older, except in the case of a crime involving a firearm where a juvenile thirteen years or older may be transferred to adult status. *See id.*

31. *See id.*

32. *See id.; see also* United States v. Juvenile K.J.C., 976 F. Supp. 1219, 1223 (N.D. Iowa 1997) (declaring that "the juvenile is generally subject to be proceeded against in juvenile delinquency proceedings unless the juvenile requests to be proceeded against as an adult or the district court, upon motion by the United States Attorney General and after a hearing, determines that transfer to adult criminal prosecution would be 'in the interest of justice'").

33. *See* 18 U.S.C. § 5032.

34. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 529 (1971) (denying juveniles the right to trial by jury); *see also* U.S. CONST. amend. VI (providing that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury").

the juvenile as an adult.[35] In order to do so, the Attorney General must file a transfer motion with the appropriate district court judge who conducts a hearing to determine whether the transfer would be "in the interest of justice."[36] In assessing whether treating the youth as an adult is appropriate, the judge must consider and make findings in the record on six factors, such as the age of the juvenile, the seriousness of the offense, and the availability of treatment centers geared toward the juvenile's needs.[37]

Juveniles may also be transferred automatically to a district court for criminal prosecution under the mandatory transfer provision.[38] The mandatory provision requires a district

35. *See, e.g., Juvenile K.J.C.*, 976 F. Supp. at 1223.

36. 18 U.S.C. § 5032 ("[C]riminal prosecution on the basis of the alleged act may be begun by motion to transfer of the Attorney General in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice."); *see also, e.g.*, United States v. One Juvenile Male, 40 F.3d 841, 844 (6th Cir. 1994) (stating that a motion to transfer a juvenile to adult status is granted when "the risk of harm to society posed by affording the defendant more lenient treatment within the juvenile justice system outweighs the defendant's chance for rehabilitation"). The federal government bears the burden of showing whether the juvenile's transfer to adult status is in the interests of justice. *See Juvenile K.J.C.*, 976 F. Supp. at 1224. The government's burden of proof, however, is only that of a preponderance of the evidence. *See* United States v. Parker, 956 F.2d 169, 171 (8th Cir. 1992); *Juvenile K.J.C.*, 976 F. Supp. at 1224.

37. *See* 18 U.S.C. § 5032. The six factors, in full, are the following:

> the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

Id. Section 5032 also requires the court to consider "the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms." *Id.* The statute further provides that "[s]uch a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer." *Id.* Courts have applied these factors in various manners. *Compare* United States v. Leon, D.M., 132 F.3d 583, 589 (10th Cir. 1997) (stating that a court is not required to give equal weight to each factor), *and One Juvenile Male*, 40 F.3d at 845-46 (stating that a court may give greater weight to the nature of the alleged offense than the other factors), *with* United States v. Juvenile JG, 139 F.3d 584, 586 (8th Cir. 1998) (stating that "[i]n weighing these factors the court must balance the likelihood of rehabilitation before the juvenile reaches majority with the risk of harm to the public from treating violent crime more leniently").

38. *See* 18 U.S.C. § 5032. Congress added the mandatory transfer provision in 1984 as part of the CCCA of 1984. *See* CCCA of 1984, *supra* note 23.

court to transfer the juvenile to adult status if: (1) the minor was at least sixteen when the alleged act was committed; (2) the charged offense would be a felony if committed by an adult and has an element of physical violence or is a controlled substance offense specifically enumerated in the statute; and (3) the minor has previously been convicted of an act (which if committed by an adult would be a felony) of violence or controlled substance offense provided by the statute.[39] Although the statute does not expressly provide for a judicial hearing under the mandatory provision, courts will hold hearings to ensure that all three factors are present before the transfer occurs.[40] The judge need not make a finding of whether the transfer is in the interest of justice.[41] Consequently, if all three factors are met, the juvenile automatically faces criminal prosecution regardless of whether the transfer is in the youth's best interest. Before the juvenile may be prosecuted, however, the Attorney General must first certify to the court that no state or local entity has the authority to proceed against the youth.[42] Federal judges sentence juveniles tried as adults under the Sentencing Guidelines and impose guideline sentences equivalent to what an adult would receive for the same offense.[43] Most juveniles, however, are proceeded against in state court,[44] with the exception of Native Americans.[45]

Congress stated it was adding the mandatory provision to extend federal jurisdiction to youths committing particularly serious offenses but reiterated that generally the matter would be preserved for the states. *See* H.R. REP. NO. 98-1030 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3529. Congress stated that it was preserving "the principles that criminal prosecution should be reserved for only the most dangerous juvenile offenders and permitted only when merited under the facts of a particular case." *Id., reprinted in* 1984 U.S.C.C.A.N. 3182, 3531.

39. *See* 18 U.S.C. § 5032; *Juvenile K.J.C.*, 976 F. Supp. at 1223 n.8 (listing the three factors required to transfer a juvenile to adult status under the mandatory transfer provisions).

40. *See* 18 U.S.C. § 5032; *see also, e.g.*, United States v. David H., 29 F.3d 489, 492 (9th Cir. 1994) (per curiam) ("Since both mandatory and discretionary transfer depend on the existence of particular (although different) facts, a court must hold a hearing and make findings before a transfer may occur.").

41. *See* 18 U.S.C. § 5032; *David H.*, 29 F.3d at 492.

42. *See* 18 U.S.C. § 5032; H.R. REP. NO. 98-1030 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3529 n.10.

43. *See* GUIDELINES MANUAL, *supra* note 5, § 1B1.12.

44. The Bureau of Justice Statistics of the U.S. Department of Justice (Bureau) estimates that in 1992, 11,700 juvenile delinquency cases were transferred to state criminal court by judicial waiver. *See* MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, HOW JUVENILES GET TO CRIMINAL COURT 1 (1994). This figure does not include transfer by prosecutorial discretion or

American Indian juveniles charged with a felony offense committed in Indian country[46] are subject to federal jurisdiction.[47] Tribal courts only retain exclusive jurisdiction where both the perpetrator and the victim are Native American and the charged offense does not fall under the Major Crimes Act.[48] Consequently, despite Congress's desire to keep juveniles in the

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statutory exclusion from juvenile court jurisdiction. *See id.* By contrast, the Bureau estimates that in 1994 only 65 juveniles were referred to the Attorney General for transfer to adult status. *See* JOHN SCALIA, U.S. DEP'T OF JUSTICE, JUVENILE DELINQUENTS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 2 (1997). The Bureau did not have any estimates on how many juveniles were directly charged as adults based on their prior criminal records. *See id.*

45. In 1997, the total number of Native American juvenile offenders entering federal prison was 137, as compared with the following non-Indian juvenile offenders: 5 Asian; 13 African-American; and 34 Caucasian. *See* Federal Justice Statistics Resource Center (visited June 25, 1999) <http://fjsrc.urban.org>; *see also* United States v. Jerry Paul C., 929 F. Supp. 1406, 1407 (D.N.M. 1997) (stating that the transfer to adult status within the federal system and, thus, the sentencing under the federal guidelines "catches only a small class of individuals: those who voluntarily enter federal enclaves and facilities, or Native Americans"); SCALIA, *supra* note 44, at 3 (providing that 61% of juvenile delinquents confined by the Federal Bureau are Native Americans); Palmatier, *supra* note 26, at 7 ("Much of the federal case law deals with incidents occurring on Indian reservations.").

46. "Indian Country" is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States . . . (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.

47. *See id.* §§ 1152-53, 5032; *infra* notes 62-85 and accompanying text (explaining federal jurisdiction over Indian country).

48. *See infra* notes 71-76 and accompanying text (describing the Major Crimes Act, which includes such crimes as arson, murder, assault with intent to kill and burglary); United States v. Antelope, 430 U.S. 641, 643 n.2 (1977) ("Except for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of the tribal courts."); United States v. Johnson, 637 F.2d 1224, 1231 (9th Cir. 1980) ("[E]xcept for the crimes specifically enumerated in section 1153, the general rule is that tribal courts have retained exclusive jurisdiction over all crimes committed by Indians against other Indians in Indian country."). *But see infra* note 78 and accompanying text (arguing that tribal and federal governments have concurrent jurisdiction over major felony offenses). States do not have jurisdiction over Native Americans who commit crimes on Indian reservations unless Congress has specifically granted the state jurisdiction. *See, e.g.*, Blackwolf v. District Court, 493 P.2d 1293 (Mont. 1972). In *Blackwolf*, the court stated that "[i]t is abundantly clear that state court jurisdiction in Indian affairs on reservations does not exist in the absence of an express statutory grant of such jurisdiction by Congress . . . ." *Id.* at 1295.

state or local system,[49] the federal government may assume jurisdiction over Indian juveniles charged with serious offenses without obtaining tribal consent.[50] Thus, the government may prosecute a fifteen year-old Native American youth as an adult without conferring with the tribe.[51] The government may not, however, prosecute a thirteen or fourteen year-old[52] Indian child as an adult, unless the tribal government has refused jurisdiction.[53] If the transfer is granted, the juvenile faces more severe consequences than her non-Indian counterpart who would be prosecuted as an adult in state court.[54] Although some federal court judges are disturbed by the discrepancy,

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49. *See supra* notes 25-26 and accompanying text.

50. *See* 18 U.S.C. § 5032 (excluding "tribes" from the statute's definition of a state); United States v. Juvenile Male, 864 F.2d 641, 644-45 (9th Cir. 1988) ("The language and history [of § 5032] provide no basis for assuming that Congress intended Indian juveniles otherwise subject to federal jurisdiction under the Major Crimes Act to be subject to tribal jurisdiction."); United States v. Allen, 574 F.2d 435, 438-39 (8th Cir. 1978) (holding that the plain meaning of the statute limits its applicability to the exercise of concurrent state jurisdiction and to the availability of state facilities).

51. *See* 18 U.S.C. § 5032. The Congressional Minority of the 105th Congress argued that out of traditional respect for tribal sovereignty, Indian Tribes should have a say in determining whether the Attorney General will prosecute Native American juveniles when the sole basis for federal jurisdiction is that the crime occurred in Indian country. *See* S. REP. NO. 105-108, at 185 (1997).

52. *See* 18 U.S.C. § 5032. In 1994, Congress amended § 5032 to allow for the prosecution of juveniles thirteen years of age and older for "serious violent federal felonies of assault or murder, and, in cases where the juvenile possessed a firearm during the offense, bank robbery, robbery, rape, or the sexual abuse of a child." H.R. REP. NO. 103-465, at 2 (1994). Congress stated that it was adding this provision "to allow the Federal government to prosecute as adults those juveniles who have committed truly heinous and egregious crimes, and who show little likelihood of responding to rehabilitative efforts." *Id.*

53. *See* 18 U.S.C. § 5032. The tribal "opt-in" clause was also added in 1994 "in recognition of the fact that the great majority of Federal juvenile prosecutions involve Native American youth." *See* S. REP. NO. 105-108, at 185 (1997).

54. *See* United States v. Jerry Paul C., 929 F. Supp. 1406, 1408 (D.N.M. 1996); *see also* United States v. Anthony Y., 990 F. Supp. 1310, 1313 (D.N.M. 1998) (referencing Judge Black's comments in *Jerry Paul C.* and noting that "Native American juveniles in New Mexico who commit crimes in Indian Country and who are transferred to adult status in federal court face much longer terms of incarceration than do juveniles who are prosecuted in the New Mexico state court system"); CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, COMPARING FEDERAL AND STATE PRISON INMATES, 1991, at 1 (1994) (stating that on average, federal inmates are expected to serve 6.5 years on a sentence of 10.5 years and state inmates are expected to serve 5.5 years on a 12.5 year sentence).

they are legally obligated to follow the transfer provisions of the FJDA.[55] In order to provide a complete analysis of this issue, it is necessary to review the extent to which the federal government exercises criminal jurisdiction over Indian country.

B. THE HISTORY AND DEVELOPMENT OF FEDERAL CRIMINAL JURISDICTION OVER INDIAN COUNTRY

The United States government originally treated Indian tribes as separate, independent nations.[56] Treaties were the primary source of coordinating relations between the federal government and Native Americans.[57] With this arrangement, Indian tribes generally retained their sovereignty and jurisdiction over internal tribal matters.[58] In 1871, the practice of creating Indian law by treaty ended when Congress decided that statutes rather than treaties would control Indian affairs.[59]

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55. *See* United States v. Dion L., 19 F. Supp. 2d 1224, 1225 (D.N.M. 1998) ("[A] transfer order will result in a teenager being incarcerated with repeat offenders for decades."); *Anthony Y.*, 990 F. Supp. at 1313 ("The disproportionate sentences for Native American youth . . . deeply trouble me, especially when I consider that any transfer to adult status should be 'in the interest of justice.' Nevertheless, I must apply the Juvenile Delinquency Act as Congress has written it . . . ." (citation omitted)); *Jerry Paul C.*, 929 F. Supp. at 1408 ("In spite of what appears to be a very disparate impact on those, mostly Indian, juveniles who are subject to the jurisdiction of the federal criminal system, this Court is obligated to follow federal law and deal with Jerry Paul C. under the six factors enumerated in 18 U.S.C. § 5032.").

56. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556-57 (1832) (stating that the United States treated the Indian nations as sovereign when it succeeded the British Crown); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) (recognizing the Cherokee nation "as a distinct political society, separated from others, capable of managing its own affairs and governing itself"); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 399 (1993) (stating that the opinions of *Cherokee Nation* and *Worcester* reflected Chief Justice Marshall's general presumptions that "prior to discovery, tribes possessed complete, inherent sovereignty; that discovery had reduced their sovereignty only with respect to external sovereign relations; and that in the treaty-making process neither Great Britain nor the United States had sought to interfere with internal tribal governance").

57. *See Worcester*, 31 U.S. (6 Pet.) at 558; *Cherokee Nation*, 30 U.S. (5 Pet.) at 16. The President had exclusive authority, subject to Senate ratification, to enter into treaties with the various tribes. *See* U.S. CONST. art. II, § 2; *id.* art. VI.

58. *See Worcester*, 31 U.S. (6 Pet.) at 581; *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

59. *See* 25 U.S.C. § 71 (1994) ("No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . ."). Section 71, however, left intact those treaties already in force.

Thereafter, Congress subjected Indian tribes and their members to direct legislation regardless of whether tribal members gave their consent.[60] Seeking to diminish tribal sovereignty further, Congress passed the Major Crimes Act in 1885 that departed from the government's long-held policy of reserving for Indian tribe's control over intra-Indian crimes committed in Indian country.[61]

Although the Major Crimes Act dealt a great blow to Indian self-government, federal criminal jurisdiction over Indian country existed prior to its enactment.[62] In 1817, Congress passed the General Crimes Act to permit punishment of all crimes committed by non-Indians in Indian country in addition to some crimes committed by Native Americans against non-Indians.[63] The General Crimes Act was an extension of the Assimilative Crimes Act (ACA)[64] that covered those areas under exclusive federal jurisdiction (i.e., federal enclaves) that were devoid of any criminal law infrastructure.[65] The ACA allowed the federal government to apply state criminal law to federal enclaves, such as military installations or national parks, when no federal statute existed to prosecute the offender's conduct.[66] Neither the General Crimes Act nor the ACA, however, created state jurisdiction over Indian country.[67] Although the General Crimes Act appeared to grant broad authority and jurisdiction over Indian country, it included three important limitations that afforded Indian tribes a substantial measure of self-government.[68] For example, it exempted from federal jurisdic-

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See id.; *see also* Frickey, *supra* note 56, at 421 n.164 (asserting that the House of Representatives replaced treaties with legislation because it "demanded a role in federal Indian policy").

60. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 379-80 (1886).

61. *See* Major Crimes Act, ch. 341, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153 (1994)).

62. *See* General Crimes Act, ch. 645, 62 Stat. 757 (1817) (codified as amended at 18 U.S.C. § 1152 (1994)).

63. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 122 (2nd ed. 1988); Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 332 (1989).

64. *See* Assimilative Crimes Act, 18 U.S.C. § 13 (1994).

65. *See id.*; CANBY, *supra* note 63, at 122.

66. *See* 18 U.S.C. § 13.

67. *See id.* §§ 13, 1152.

68. *See id.* § 1152. The second paragraph of § 1152 provides:

> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipula-

tion crimes committed by one Indian against another Indian on Indian country (i.e., intra-Indian crimes).[69] Nevertheless, congressional enactment of the Major Crimes Act substantially undermined this intra-Indian exception.[70]

The Major Crimes Act gave the federal government jurisdiction over eight specified crimes committed within Indian country.[71] Congress enacted the statute in response to *Ex parte Crow Dog*, the Supreme Court decision holding that tribal courts had exclusive jurisdiction over intra-Indian crimes.[72] Displeased with this decision, Congress effectively overturned *Ex parte Crow Dog* and provided for federal jurisdiction over offenses committed by Native Americans against either Indians or non-Indians in Indian country.[73] Thereafter, the Supreme Court upheld the Major Crimes Act as a legitimate exercise of congressional power over Indian tribes.[74] The Court explained that because "Indian tribes *are* the wards of the nation" and therefore dependent upon the federal government for their protection, daily food, and political rights, Congress may extend federal jurisdiction to intra-Indian offenses committed on Indian reservations.[75] Today, the Major Crimes Act includes fourteen enumerated crimes and remains the major federal jurisdictional statute for offenses committed by Native Americans on tribal land.[76] Although the statute states that the federal

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tions, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Id.; see also Clinton, *supra* note 4, at 524 (declaring that "the coverage of section 1152 is far more limited than the language suggests" because of the numerous situations excepted from coverage).

69. *See* 18 U.S.C. § 1152.

70. *See id.* §§ 1152-53; Clinton, *supra* note 4, at 524 (stating that the federal policy of affording tribal governments a measure of self-governance by excluding from federal jurisdiction intra-Indian crimes was undermined by the enactment of the Major Crimes Act).

71. *See* Major Crimes Act, ch. 321, §§ 328-29, 35 Stat. 1151 (1909) (codified as amended at 18 U.S.C. § 1153 (1994)). The original eight enumerated crimes included: murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, and larceny. *See id.*

72. 109 U.S. 556, 571-72 (1883).

73. *See* 18 U.S.C. § 1153.

74. *See* United States v. Kagama, 118 U.S. 375, 383 (1886); *see also* CANBY, *supra* note 63, at 105-06 ("The Major Crimes Act was the first systematic intrusion by the federal government into the internal affairs of the tribes. The Supreme Court held that this exercise of congressional power was justified by the dependent status of the tribes as wards of the federal government.").

75. *Kagama*, 118 U.S. at 383-84.

76. *See* 18 U.S.C. § 1153.

government has "exclusive" jurisdiction over these crimes,[77] it is unsettled whether the Major Crimes Act actually divests tribal courts of jurisdiction over crimes covered under the statute.[78]

In sum, tribal courts have exclusive jurisdiction over Indian defendants for all crimes not covered under the General Crimes Act or the Major Crimes Act.[79] Federal courts arguably have exclusive jurisdiction over all major crimes committed on Indian country[80] unless both the perpetrator and victim are non-Indian, in which case the state has jurisdiction.[81] Federal courts also exercise jurisdiction over crimes committed by non-Indians against Indians[82] and all acts made criminal only by federal law.[83] State courts do not have jurisdiction over any offenses committed by or against Native Americans on Indian land unless Congress has expressly delegated jurisdiction to that state.[84] It is important to note, however, that although the

77. *See id.*

78. *See* Pommersheim, *supra* note 63, at 333. Some commentators have maintained that federal jurisdiction under the Major Crimes Act may only be exclusive against the states, not tribal governments. *See* Vincent C. Milani, *The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control*, 31 AM. CRIM. L. REV. 1279, 1286 (1994). Milani explains that both the Supreme Court and Congress have expressed uncertainty as to whether the Major Crimes Act deprives a tribal court of jurisdiction. *See id.* at 1286 n.39. Robert Clinton also argues that tribal courts may share concurrent jurisdiction with the federal government over major crimes. *See* Clinton, *supra* note 4, at 559. Clinton argues that nothing in the text or legislative history of the Major Crimes Act indicates that Congress "intended to extinguish concurrent tribal jurisdiction over serious offenses" committed on Indian land involving an Indian perpetrator and victim. *Id.* at 559 n.295; *see also Statement for the Record Before Senate Comm. on Indian Affairs*, 102d Cong. (1995) (statement of Joseph A. Myers, Executive Director of National Indian Justice Center), *available in* 1995 WL 50663. Mr. Myers declared that the Major Crimes Act and the General Crimes Act trigger concurrent tribal and federal jurisdiction. *See id., available in* 1995 WL 50663 at *12.

79. *See* United States v. Antelope, 430 U.S. 641, 643 n.2 (1977); United States v. Johnson, 637 F.2d 1224, 1231 (9th Cir. 1980); United States v. Allen, 574 F.2d 435, 437 (8th Cir. 1978).

80. *See* 18 U.S.C. § 1153.

81. *See* United States v. McBratney, 104 U.S. 621, 624 (1881) (holding that state courts, not federal courts, have jurisdiction over non-Indians committing crimes against non-Indians on Indian land).

82. *See* 18 U.S.C. § 1152.

83. *See id.* § 13. Examples of federal criminal acts include "counterfeiting, treason, assaulting a federal officer and tampering with the mail." STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: AN AMERICAN CIVIL LIBERTIES UNION HANDBOOK 121 (1983).

84. *See, e.g.*, 18 U.S.C. § 1162. Section 1162(a) granted six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) exclusive criminal

federal government has limited tribal court criminal jurisdiction, it continues to recognize American Indian tribes as self-governing entities and encourages tribal autonomy and development.[85]

As a result of federal criminal jurisdiction over major felonies in Indian country, many Native Americans are sentenced according to the federal Sentencing Guidelines. This is problematic because individuals convicted in federal court are generally subject to harsher penalties than those convicted in state or tribal courts.[86]

C. THE UNITED STATES SENTENCING GUIDELINES: THE ABOLITION OF PAROLE AND SPECIFIC OFFENDER CHARACTERISTICS AS MITIGATING FACTORS

Formerly, federal criminal sentencing was based upon a rehabilitative model where the federal judge had wide discretion to assess a criminal defendant's prospects for rehabilita-

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jurisdiction over offenses committed by or against Indians in Indian country, excluding a few Indian reservations and non-major intra-Indian crimes. *See id.* Section 1162 originally allowed other states to assert criminal jurisdiction over Indian territory voluntarily, but the statute was amended in 1968 to require tribal consent before assuming jurisdiction. *See id.* (citing 28 U.S.C. § 1360 (1994)). This Note's analysis, however, only pertains to those jurisdictions in which the federal government has not withdrawn its criminal jurisdiction over Indian country and granted it to the states.

85. *See* Janet Reno, Department of Justice, *Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes* (last modified Apr. 9, 1998) <http://www.usdoj/otj/sovtrb.html> [hereinafter *Department of Justice Policy*] (stating that the "Department [of Justice] recognizes that Indian tribes as domestic dependent nations retain sovereign powers, except as divested by the United States, and further recognizes that the United States has the authority to restore federal recognition of Indian sovereignty in order to strengthen tribal self-governance"); William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 1 (1987); *see also, e.g.*, Indian Tribal Justice Act, 25 U.S.C. § 3613 (1994) (providing financial assistance for the development, enhancement, and operation of tribal justice systems); Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450, 455-58 (1994). *But cf.*, Milani, *supra* note 78, at 1291 (stating that a tribe "retains as much of its sovereignty as is not legislated away by Congress or ceded through consensual treaty"). The basic principle of federal Indian policy is that "tribal powers are inherent, but they can be extinguished by Congress." PEVAR, *supra* note 83, at 69. Pevar maintains that despite congressional ability to restrict tribal power, "Indian tribes retain an enormous amount of authority, especially with respect to regulating reservation activities and the conduct of tribal members." *Id.* at 70.

86. *See supra* notes 3-6 and accompanying text (explaining that federal sentences are substantially longer than either state or tribal court sentences, providing no chance for parole and fewer allowances for good time).

tion and sentence accordingly.[87] The judge's unregulated discretion, however, produced widely disparate sentences for offenders convicted of the same crime.[88] This was especially true for minorities who received longer prison terms than their white counterparts.[89] In an effort to provide greater certainty and uniformity in sentencing, Congress enacted the Sentencing Reform Act (Reform Act) that rejected the concepts of rehabilitation, indeterminate sentencing, and parole release.[90] Pursuant to the Reform Act, the United States Sentencing Commission[91] created federal sentencing guidelines that abolished parole, created fixed mandatory minimum sentences and specifically excluded reliance on offender characteristics, such as age or race, to justify departures from the guideline range.[92] As a result, a federal sentence under the Sentencing Guidelines is based on the offense level of the crime charged, mitigating and aggravating factors related only to the defendant's culpability in the commission of the crime, and the individual's prior criminal record.[93] A federal judge may not take into account an

87. *See* Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1186 (1993).

88. *See* Palcido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357, 362 (1994); Lear, *supra* note 87, at 1188-89.

89. *See* Gomez, *supra* note 88, at 359 (providing that "[i]n 1979, blacks accounted for 10.1% of this country's adult male population, yet occupied 48% of the beds in our state prisons"); Lear, *supra* note 87, at 1189 (stating that before the creation of the Sentencing Guidelines, the federal system tended to give minority offenders longer prison terms than their white counterparts).

90. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551-59 (1994); 28 U.S.C. §§ 991-98 (1994)) [hereinafter Reform Act]; Mistretta v. United States, 488 U.S. 361, 367 (1989) (stating that the Reform Act "rejects imprisonment as a means of promoting rehabilitation . . . and it states that punishment should serve retributive, educational, deterrent, and incapacitative goals"); Gomez, *supra* note 88, at 362; Lear, *supra* note 87, at 1189.

91. The Reform Act created the United States Sentencing Commission (Commission) to design sentencing guidelines for federal courts in determining the sentence to be imposed in a criminal case. *See* 28 U.S.C. §§ 991-98.

92. *See* 18 U.S.C. §§ 3551-59; 28 U.S.C. §§ 991-98. Section 994(d) provides that "[t]he Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." *Id.* § 994(d).

93. *See* GUIDELINES MANUAL, *supra* note 5, § 1B1.1. The Reform Act does provide, however, that the judge may depart from the guidelines in a particular case if he finds an aggravating or mitigating factor present (other than those already discussed) that the Commission did not adequately consider when formulating the guidelines. *See* 18 U.S.C. § 3553(b); *Mistretta*, 488 U.S. at 367.

offender's age or race to exercise leniency toward the defendant or to impose a more rigid penalty.[94] Some commentators argue, however, that prohibiting sentencing judges from considering the individual characteristics of an offender are too restrictive and often lead to the imposition of unjust sentences.[95]

Most criminal offenders are prosecuted in the state system and do not face the harsher consequences of the Sentencing Guidelines; Native Americans are the exception. As a result of their jurisdictional status, Native Americans often receive the harsher federal penalty for committing crimes that are normally adjudicated in state court. Thus, American Indians have argued that the disproportionate consequences they face under the federal system violate their equal protection rights.[96] The Supreme Court, however, has consistently upheld federal statutes that create substantial disparities between Indians and non-Indians, reasoning that the statutes are not based on impermissible racial classifications.[97]

D. FEDERAL REGULATION OF INDIAN AFFAIRS: POLITICAL VERSUS RACIAL CLASSIFICATION

The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[98] The Equal Protection Clause limits Congress's ability to classify similarly-situated individuals into groups for the purpose of treating them differently.[99] Racial

94. *See* GUIDELINES MANUAL, *supra* note 5, § 1B1.1.

95. *See* Gomez, *supra* note 88, at 380 (stating that "race neutrality could petrify, and may even amplify the effects of discrimination that have occurred at earlier stages in the [criminal] process"); David Yellen, *What Juvenile Court Abolitionists Can Learn from the Failures of Sentencing Reform*, 1996 WIS. L. REV. 577, 586-87 (stating that mandatory minimum statutes force judges to impose unjust sentences "because the judges are precluded from considering the unique circumstances of offenders").

96. *See, e.g.*, United States v. Juvenile Male, 864 F.2d 641, 645 (9th Cir. 1988).

97. *See, e.g.*, Fisher v. District Court, 424 U.S. 382, 390 (1976) (stating that the tribal court's exclusive jurisdiction derived from the "quasi-sovereign status" of the tribe rather than the race of the plaintiff); Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (stating that an employment hiring preference for Native Americans was political rather than racial in nature).

98. U.S. CONST. amend. XIV, § 1.

99. *See id.* The Equal Protection Clause applies to the federal government through the Due Process Clause of the Fifth Amendment. *See id.* amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (providing that although the Fifth Amendment does not contain an Equal Protection

classifications are immediately suspect and receive heightened judicial scrutiny.[100] Most other classifications are presumed constitutional and receive a rational basis review.[101] Although federal regulation of Native Americans might appear to be racially based, the Supreme Court has stated that the category "Indian" is a political classification.[102] Because political classifications are non-suspect, legislation expressly singling out Native Americans as a group only warrants a rational basis review, and the statute is presumed to be constitutional.[103] The Supreme Court reasoned that the category "Indian" is political because federal regulation of Indian affairs is the governance of a "once-sovereign political communit[y]" and not that of a "'racial' group consisting of 'Indians.'"[104]

1. *United States v. Antelope*: The Constitutionality of Subjecting Native American Offenders to Harsher Federal Criminal Sanctions

In *United States v. Antelope*, the Supreme Court rejected the claim that a federal criminal statute was unconstitutional because it subjected Native American defendants to federal prosecution by virtue of their status as "Indians."[105] In *Antelope*, a Native American was charged with killing a non-Indian

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Clause, the denial of equal protection is so "unjustifiable as to be violative of due process"); *see also* Kathryn A. McAluney, *Equal Protection*, 27 RUTGERS L.J. 1074, 1074 n.2 (1996) (explaining that the United States Supreme Court uses three levels of review to determine whether a governmental classification violates the Equal Protection Clause: strict scrutiny, intermediate level of scrutiny, and rational basis review).

100. *See* McAluney, *supra* note 99, at 1074 n.2 ("Under strict scrutiny, a classification will be upheld only if it is 'narrowly tailored,' or the 'least restrictive means' to a *compelling* government interest.").

101. *See id.* ("Rational basis review, the easiest level of review to satisfy, merely requires that a classification have a *reasonable* relationship to a *legitimate* state goal.").

102. *See Fisher*, 424 U.S. at 390 (stating that the tribal court's exclusive jurisdiction derived from the "quasi-sovereign status" of the tribe rather than the race of the plaintiff); *Morton*, 417 U.S. at 553 n.24 (stating that an employment hiring preference for Native Americans was political rather than racial in nature).

103. *See Fisher*, 424 U.S. at 391 (denying Indian tribal members access to state court because giving tribal courts exclusive jurisdiction over the subject matter promoted Indian interests in self-government); *Morton*, 417 U.S. at 555 (holding that an employment hiring preference for Native Americans was rationally tied to Congress's unique obligation toward Indian tribes).

104. United States v. Antelope, 430 U.S. 641, 646 (1977).

105. *See id.* at 646-47.

woman.[106] Because the crime was committed on an Indian reservation, appellant Antelope was charged under the felony-murder provisions of the federal-enclave murder statute as made applicable to Antelope by the Major Crimes Act.[107] Antelope argued that his conviction of felony-murder was racially discriminatory and violated his equal protection rights.[108] He maintained that a non-Indian charged under the same set of circumstances would not have been convicted of felony-murder, which carries a harsher penalty.[109] The Supreme Court disagreed and stated that the federal criminal statutes did not violate equal protection because the statutes were not based on racial classifications.[110]

In addition, the Court stated that it was of no consequence that the federal law differed from state law as long as it was applied evenhandedly.[111] The Court reasoned that because the federal statutes provided Native Americans with all the procedural benefits and privileges of any other federal statute and treated Native Americans the same as any other individual falling under federal jurisdiction, they were constitutional.[112] Although the Supreme Court has never addressed whether the disproportionate impact of § 5032 of the FJDA is unconstitutional, the Ninth Circuit has upheld the validity of the certification provisions of § 5032 as applied toward Native American juveniles.[113]

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106. *See id.* at 642-43.

107. *See id.* at 642-44; *see also supra* notes 71-78 and accompanying text (discussing the Major Crimes Act).

108. *See Antelope*, 430 U.S. at 642-44.

109. *See id.* If Antelope were non-Indian he would not have been convicted of felony-murder because the Major Crimes Act does not apply to non-Indian defendants, and the state in which the reservation was located did not have a felony-murder statute.

110. *See id.* at 645. The Court explained that expressly singling out Indian tribes as subjects of legislation is expressly provided for by the Constitution under the Indian Commerce Clause. *See id.* Article I, § 8 of the U.S. Constitution provides that "Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" U.S. CONST. art. I, § 8. The Court further explained that the classification of Indians is supported by the "ensuing history of the Federal Government's relations with Indians." *Antelope*, 430 U.S. at 645.

111. *See Antelope*, 430 U.S. at 647-50.

112. *See id.* at 649.

113. *See* United States v. Juvenile Male, 864 F.2d 641, 645 (9th Cir. 1988).

2. *United States v. Juvenile Male*: Is Failure To Require Certification as to Tribal Authority Constitutional?

In *United State v. Juvenile Male*, an Indian juvenile argued that he was the victim of an impermissible race distinction because the first two certification provisions[114] of § 5032 deprived him of the benefit of local treatments programs.[115] He argued that because § 5032 did not require certification with respect to tribal authority, the statute violated his equal protection rights.[116] The appellant maintained that if he were non-Indian, he would only be subject to federal jurisdiction if the Attorney General could prove that the state did not (or refused to) exercise jurisdiction and that no adequate delinquency programs were available, or that a substantial federal interest was involved.[117] In contrast, because states rarely exercise jurisdiction over Native Americans, the first two certification provisions were automatically met to provide federal jurisdiction over his case.[118] The court responded that because the differences in treatment were a result of the juvenile's political membership in an Indian tribe rather than his race, this disparity did not violate equal protection.[119] Although *Juvenile Male* did not expressly apply the rational basis test, it reasoned that exercising federal jurisdiction over serious offenses would be more appropriate because federal law limits the punishment tribal courts can impose to a $5,000 fine or one-year imprisonment.[120]

II. COMBINING FEDERAL JUVENILE DELINQUENCY POLICY WITH AMERICAN INDIAN LAW: AN UNJUST RESULT

Subjecting Indian juveniles to the Sentencing Guidelines based purely on their jurisdictional status does not serve the interests of justice. Although punishing Indian juveniles more

114. *See supra* notes 21-24 and accompanying text.

115. *See Juvenile Male*, 864 F.2d at 645.

116. *See id.*

117. *See id.*; *supra* notes 21-27 and accompanying text (describing the certification process).

118. *See Juvenile Male*, 864 F.2d at 645; *supra* notes 71-85 and accompanying text (describing Major Crimes Act and its application on Indian territory in non-Public Law 280 states).

119. *Juvenile Male*, 864 F.2d at 645.

120. *See id.*; *supra* note 4 (discussing the federal restrictions on tribal court fines).

harshly may be lawful or even constitutional in theory, this practice is in direct conflict with the purpose of the FJDA.[121] Allowing for the transfer of Indian juveniles, regardless of whether their respective tribe is willing and able to assume jurisdiction, undermines the federal government's policy of recognizing juvenile delinquency as a state and local problem and threatens the remaining vestiges of tribal sovereignty.[122] The current system not only disregards congressional intent to only adjudicate serious felony offenses, but it also contradicts the Sentencing Guidelines' goal of reducing the occurrences in which minority defendants receive longer sentences than white defendants.[123]

A. CONSTITUTIONALITY VERSUS PRACTICALITY

Although the FJDA is technically constitutional, its effect on Native American juveniles is neither rational nor reasonable. The statute provides that the federal government will only assume jurisdiction over the most serious violent felonies.[124] In practice, however, the FJDA subjects most Indian juveniles to federal prosecution—not solely those who have committed serious violent felonies.[125] For example, in *United States v. Dion L.*, Judge Black granted the government's motion for transfer as an adult not because Dion L. had committed the most serious violent crime, but because he did not feel that five years was a sufficient amount of time to rehabilitate Dion and protect the public's safety.[126] Exposing Native American juveniles to the harsher penalties of the adult criminal justice system solely because the federal system does not have adequate juvenile facilities[127] or cannot detain the juvenile for an ade-

121. *See supra* notes 15-19 and accompanying text (explaining that the purpose of the FJDA is to remove juveniles from the criminal process and encourage treatment and rehabilitation).

122. *See supra* note 85 and accompanying text (describing policy regarding Indian sovereignty).

123. *See supra* notes 88-95 and accompanying text (discussing racially disparate sentencing and the Sentencing Guidelines).

124. *See supra* note 24 and accompanying text.

125. *See supra* notes 47-55 and accompanying text.

126. 19 F. Supp. 2d 1224, 1224-25 (D.N.M. 1998). Judge Black stated that because the FJDA would only permit the incarceration of Dion for a maximum of five years, he was forced to allow Dion's transfer as an adult where he would be incarcerated "with repeat offenders for decades." *Id.* at 1225.

127. The Federal Bureau of Prisons does not have its own juvenile facilities, forcing the federal government to contract with both private and public juvenile facilitates that provide counseling and rehabilitation services. *See id.*

quate period of time is not rationally tied to the FJDA's overall purpose. Rather than keeping less serious offenders out of the criminal process and prosecuting only the most serious Indian juvenile offenders, the system facilitates the criminal prosecution of mainly Indian juveniles.

Furthermore, while federal adjudication of cases involving a substantial federal interest is justifiable, failure to determine tribal jurisdiction and the availability of tribal juvenile facilities before proceeding against an Indian juvenile committing a less serious offense is unreasonable. Congress expressly provided that as long as state (or local) authorities are able or willing to exercise jurisdiction over the juvenile and the state has adequate programs for the juvenile's needs, federal courts will continue to defer to state authorities for less serious juvenile offenses.[128] But because § 5032 of the FJDA does not expressly require a certification as to tribal authority, the federal government readily assumes jurisdiction over Native American juveniles regardless of whether the tribal system is better equipped to handle the youth.[129] This practice of taking tribal disputes from the reservation and placing them in federal court deprives Indian juveniles of the benefits of local treatment programs that may be more appropriate for their rehabilitation.[130]

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at 1227. Unfortunately, however, contracts change frequently and "juveniles are often assigned depending on where space is then available." *Id.*

128. *See id.*

129. *See* United States v. Juvenile Male, 864 F.2d 641, 645 (9th Cir. 1988). In reaching its conclusion that certification as to tribal authority was not required, *Juvenile Male* incorrectly assumed that the federal government exercises exclusive jurisdiction over all acts covered under the Major Crimes Act. *See id.* It is still unsettled whether the Major Crimes Act deprives tribal court of jurisdiction over crimes covered under the Major Crimes Act. *See supra* note 78 and accompanying text. *Juvenile Male* also implied that because Congress had limited the punishment a tribe could impose, tribal courts were ill-equipped to oversee the prosecution of serious juvenile offenders. *See Juvenile Male*, 864 F.2d at 645. Many tribal courts, however, rely on mediation and arbitration rather than punishment to resolve their disputes, making the federal limit on sentence length irrelevant. *See, e.g.*, Gomez, *supra* note 88, at 377 n.105 ("[T]he ultimate goal of sanctions within many tribal systems is a reconcilability of interests between the tribal community and the offender.").

130. *See* Gomez, *supra* note 88, at 377 n.104 (stating that "despite the clear intention of the Indian [sic] Major Crimes Act to bring all major crimes into federal court, there is still a strong interest in allowing tribes to control their own dispute resolution mechanisms").

B. IN THE INTEREST OF JUSTICE: DID CONGRESS INTEND TO PUNISH NATIVE AMERICAN JUVENILES MORE SEVERELY THAN NON-INDIANS?

Although § 5032 provides for federal adjudication of Indian and non-Indian juveniles, Congress did not deliberately intend that the vast majority of juveniles subjected to the federal criminal justice system and the Sentencing Guidelines would be Native American. Neither the Major Crimes Act nor the FJDA contemplated this point. In fact, the FJDA only mentions Native Americans in the context of the tribal opt-in provision.[131] Even though federal authority to prosecute young offenders may have increased over the years, the government continues to profess that federal criminal prosecution is not appropriate for most juvenile offenders and that state and local authorities are better equipped to handle juvenile matters.[132]

When Congress provides for Indian juveniles to be processed through the federal criminal justice system, and the possibility of transferring a juvenile to adult status applies to all juveniles who fall under the FJDA's jurisdiction, then the federal prosecution of those juveniles becomes at least theoretically possible.[133] It does not necessarily follow, however, that Congress deliberately concluded that it would be appropriate to subject primarily Indian juveniles to the adult criminal justice system.

Congress enacted the FJDA for many reasons that were unrelated to the federal prosecution of Native American juveniles. For example, Congress initially enacted the FJDA to provide federal leadership and coordination in the efforts to develop programs for the prevention and treatment of juvenile delinquency.[134] Similarly, when Congress enacted the FJDA it prescribed a preference for state and local treatment, recognizing that juvenile matters are best handled by state authori-

131. *See supra* note 53 (describing the tribal opt-in provision).

132. *See* H.R. REP. NO. 98-1030 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3530.

133. A similar analysis may be found in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (O'Connor, J., concurring). Justice O'Connor reasoned that because the Oklahoma legislature did not deliberately choose to authorize capital punishment for crimes committed at the age of fifteen, the Court could not assume that the legislature authorized the death penalty for some fifteen-year old felons. *See id.* at 853.

134. *See supra* notes 15-19 and accompanying text.

ties.[135] These reasons contradict the notion that Congress believed Indian juvenile matters were best handled by federal prosecutors.[136] Nor is there any evidence that Congress directly considered that the intersection between the FJDA and the Major Crimes Act would lead to the federal prosecution of primarily Indian juveniles. There is no legislative history suggesting that Congress considered this implication when it enacted the FJDA.[137]

Furthermore, the assumption of federal jurisdiction over Indian juveniles invades upon tribal sovereignty. In *United States v. Wheeler*,[138] the Supreme Court held that a federal statute appearing to invade on tribal sovereignty would not be so read, absent a clear statement to the contrary.[139] Thus, even though § 5032 does not expressly provide for certification as to tribal authority, courts should presume that certification is required, absent statutory language or congressional intent to the contrary. Instead of reading congressional silence in favor of tribal sovereignty, *Juvenile Male* incorrectly held that the federal government could exercise jurisdiction over Indian juvenile matters without requiring certification of tribal authority.[140] Because the statute does not expressly abrogate tribal sovereignty, § 5032 should only apply to Native American juveniles if the Attorney General finds that the tribe lacks jurisdiction or

135. *See* 18 U.S.C. § 5032 (1994); H.R. REP. NO. 98-1030, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3529.

136. *See* Gomez, *supra* note 88, at 377 (discussing separatist relationship between tribal and American legal systems); Shepherd, *supra* note 5, at 45 (stating that § 5032 establishes a strong presumption against federal prosecution). Section 5032 never expressly mentions Native American juveniles. *See* 18 U.S.C. § 5032.

137. *See* S. REP. NO. 93-1011 (1974); *supra* notes 10-18 (describing the purpose of the FJDA as avoiding the stigma of a prior criminal conviction and encouraging treatment and rehabilitation).

138. 435 U.S. 313 (1978). The *Wheeler* Court proclaimed that "[f]ederal pre-emption of a tribe's jurisdiction to punish its own members for infractions of tribal law would detract substantially from tribal self-government." *Id.* at 332.

139. *See id.* at 332; *see also* Frickey, *supra* note 56, at 418 n.158 (stating that the canons of interpretation are "designed to promote narrow interpretation of federal treaties, statutes, and regulations that intrude upon Indian self-determination and to promote broad interpretation of provisions that benefit Indians").

140. United States v. Juvenile Male, 864 F.2d 641, 645 (9th Cir. 1988).

adequate juvenile facilities.[141] Doing otherwise flouts congressional intent and tribal sovereignty.

Finally, Congress expressly provided that federal courts would only prosecute the most serious instances of juvenile criminal conduct.[142] Again, there is no indication that Congress deliberately intended that Native Americans would be the exception to the rule. The statutory and legislative history are silent in this respect.[143] Without intentionally providing that Native American juveniles would be treated differently under the statute, subjecting Indian juveniles to federal prosecution for typical state law crimes, such as assault or burglary, is not in the interest of justice and infringes upon tribal sovereignty.[144] Furthermore, a primary goal of the Sentencing Guidelines was to address the fact that minority defendants receive longer sentences than their white counterparts.[145] The disproportionate consequences that Indian juveniles face as a result of their transfer to adult status within the federal system directly contradicts this goal and undermines our criminal justice system.

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141. Frickey, *supra* note 56, at 417 (stating that "the Supreme Court has long applied a clear-statement requirement to congressional acts that appear to invade tribal sovereignty"). Currently, the Attorney General is only required to obtain tribal consent for the criminal prosecution of Indian juveniles between the ages of thirteen and fourteen. *See* 18 U.S.C. § 5032; H.R. REP. NO. 103-465 (1994).

142. *See* 18 U.S.C. § 5032; S. REP. NO. 98-225, at 389 (1984), *reprinted in* 1984 U.S.C.C.A.N. 1839, 1845 ("The Committee intends this legislation to allow the Federal government to prosecute as adults those juveniles who have committed truly heinous and egregious crimes and who show little likelihood of responding to rehabilitative efforts."); H.R. REP. NO. 98-1030, at 389 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3529.

143. *See* 18 U.S.C. § 5032; S. REP. NO. 105-108, at 1 (1997); H.R. REP. NO. 103-465, at 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839; H.R. REP. NO. 98-1030, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182.

144. *See, e.g.*, S. REP. NO. 105-108, at 182. (Additional, Minority, and Supplemental Views) (declaring that Native Americans, as opposed to any "other group of Americans, bear[] the burden of living exclusively in Federal enclaves and therefore no other group of Americans is subject to Federal law for typical State law crimes like robbery or assault").

145. *See* United States v. Jerry Paul C., 929 F. Supp. 1406, 1408 (D.N.M. 1996); Lear, *supra* note 87, at 1189-92; *see also* 28 U.S.C. § 994(d) (1994) (explaining that "[t]he [Sentencing] Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders").

III. REMEDIAL OPTIONS: TRIBAL CONSENT AND YOUTHFULNESS AS A MITIGATING FACTOR

In order to rectify the disparate impact produced by § 5032, Congress must amend the statute to require tribal authority certification for less serious offenses. Recognizing tribal jurisdiction over Native American juveniles would better reflect the federal government's goal of removing juveniles from less appropriate federal channels and promoting tribal self-governance.[146] Congress initially enacted the FJDA to provide for the rehabilitation of juveniles. Today, the federal system has taken a more punitive approach towards juvenile offenders that may not be in accordance with Indian tribes' cultural or moral values. Currently, the certification provisions respect a state's juvenile delinquency policy, which may be very different than the federal government's policy, but do not grant the same courtesy towards tribal governments. Allowing tribal governments to adjudicate their own youth promotes the interests of the juvenile and the tribal government's ability to manage its own affairs.[147] Furthermore, the certification provisions would only require the Attorney General to defer to the tribal government if the tribe had original jurisdiction over the youth and adequate treatment facilities for the treatment or rehabilitation of the juvenile.[148] The federal government would still maintain jurisdiction over violent felony offenses in which the federal government has a substantial federal interest.[149]

In addition, Congress should provide alternative sentencing options for less serious youthful offenders who are transferred to adult status. Congress could accomplish this by allowing federal judges to formally recognize "youthfulness" as a

146. *See* S. REP. NO. 93-1011 (1974); *Department of Justice Policy*, *supra* note 85 (explaining that the federal government has a "fundamental policy of federal respect for tribal self-government").

147. Although Native American tribal courts vary from one reservation to another, they closely resemble state and federal courts. *See* PEVAR, *supra* note 83, at 85-86. In 1934, Congress passed the Indian Reorganization Act (IRA), which authorized Indian tribes to establish their own courts. *See* 25 U.S.C. §§ 461-94 (1994). The IRA promoted a broad policy of Indian self-government and authorized tribes to establish their own courts and draft their own laws subject to the U.S. Secretary of the Interior's approval. *See* PEVAR, *supra* note 83, at 86.

148. *See supra* text accompanying note 23.

149. *See supra* notes 23-25 and accompanying text. In order to meet a potential influx of juvenile cases, the tribal government should also be allowed to opt out of the sentencing restrictions Congress has placed on them.

mitigating factor for less serious juvenile criminal acts.[150] For example, where federal courts would allow the transfer of Indian juveniles primarily because the juvenile system is not able to detain the individual for an adequate period of time,[151] the judge or jury would be able to consider the mitigating effect of the defendant's age in evaluating his culpability and in imposing his sentence.[152] The court would then be allowed to use youthfulness to provide a more appropriate sentence without excusing the youth's criminal conduct.[153] Protecting juveniles from the full penal consequences of their actions would more accurately reflect federal emphasis on rehabilitation over punishment.[154]

Congress could also create a sentencing formula whereby an Indian juvenile would be required to serve 50-60% of her federal sentence as opposed to 85% of her sentence.[155] For example, the courts could adopt the concept of "youth discount" that represents a sliding scale of criminal responsibility for younger offenders at sentencing.[156] The youth discount approach rests upon the belief that juveniles are less culpable than adult offenders because of their limited capacity to make responsible choices.[157] This approach would reduce sentencing based on the defendant's age.[158] Accordingly, thirteen year-old juveniles would face shorter criminal sentences than juveniles nearing their eighteenth birthday.[159] In the alternative, Congress could create intermediate sentencing guidelines that would automatically reflect the sentence reduction and would apply only to those juveniles who are subject to federal prosecution based on their jurisdictional status. Both of these options

150. *See* Feld, *supra* note 16, at 116 (describing "youthfulness" as a mitigating factor in state courts); *supra* notes 90-94 and accompanying text (describing how the U.S. Sentencing Guidelines specifically prohibit the use of offender characteristics, such as age or race, to justify a departure from a federal guidelines sentence).

151. *See, e.g., supra* note 120 and accompanying text.

152. *See* Feld, *supra* note 16, at 99.

153. *See id.* at 100.

154. *See supra* notes 15-19 and accompanying text (explaining that the purpose of the FJDA is to encourage treatment and rehabilitation, rather than punishment, because juveniles are unable to fully appreciate the consequences of their acts due to immaturity and lack of experience).

155. *See supra* note 6 and accompanying text.

156. *See* Feld, *supra* note 16, at 118-19.

157. *See id.*

158. *See id.*

159. *See id.*

would provide a tighter correlation between the nature of the offense and the rehabilitation potential of the juvenile offender.[160] Furthermore, the sentencing alteration would reduce the disparity between state and federal sentencing of Indian juveniles and provide for a more equitable judicial system.

Congress's failure to adopt these measures reflects a misunderstanding of the relationship between the United States and Native American tribes. For example, the Senate Judiciary Committee has argued against increased tribal authority over juvenile offenders because, it claims, it will *create* sentencing disparities, not uniformity.[161] The Committee asserts that because federal law limits the amount of punishment a tribe may impose on a criminal defendant,[162] persons committing murder, rape, robbery, or burglary in Indian country would receive a maximum of one-year imprisonment.[163] This, the Committee asserts, is unreasonable and violates the equal protection component of the Fifth Amendment's Due Process Clause.[164] What the Committee fails to consider, however, is that Congress could readily prevent this problem by lifting the limitations it has imposed on tribal sentencing and fines. Lifting the limitations would provide further impetus for Congress's efforts to strengthen tribal self-governance and it would allow persons committing more serious crimes to be punished accordingly.

Notwithstanding these restrictions, however, allowing tribes to penalize their members in accordance with their own methods of punishment and restitution would not violate equal protection. As the Supreme Court has repeatedly stated, legislation benefiting or burdening tribal members is presumed constitutional and only warrants a rational basis review.[165] Surely, granting tribes the ability to experiment with progressive solutions to the escalating problem of juveniles who commit violent crimes is rationally tied to Congress's unique obligation toward Indian tribes.[166] This is especially true in light of

160. *See id.* at 119.

161. *See* S. REP. NO. 105-108, at 76-80 (1997).

162. *See supra* note 4 and accompanying text.

163. *See* S. REP. NO. 105-108, at 77.

164. *See id.*

165. *See supra* notes 102-04 and accompanying text.

166. *See* S. REP. NO. 105-108, at 3 (stating that the federal government should not impose specific strategies or programs on the states but should encourage states to experiment with their own solutions to the growing problem of increased violent juvenile offenses).

the fact that the vast majority of the victims of juvenile crime committed by Native Americans are Native American.

CONCLUSION

The procedural safeguards provided by the FJDA serve only to ensure that all but the most serious non-Indian juvenile offenders remain in the state system. In contrast, Native Americans are readily funneled into the federal system, regardless of the seriousness of the crime or the tribe's ability or willingness to exercise jurisdiction over its tribal member. Furthermore, once Native American juveniles are under federal jurisdiction, the decision to prosecute the juvenile as an adult is more likely to be based upon the length of the defendant's possible incarceration rather than the egregiousness of the juvenile's offense.

In order to remedy this contradiction, Congress should presume tribal court jurisdiction over Indian juveniles for less serious offenses and provide tribal courts the opportunity to sanction their members with more appropriate measures. In addition, Congress should create alternative sentencing options for those juvenile offenders subject to the Sentencing Guidelines purely because of their status as American Indians. These sentencing options could entail either reestablishing "youthfulness" as a mitigating factor or implementing a youth discount sliding scale. Giving federal judges the discretion to depart from the Sentencing Guidelines would be the right step toward ensuring that Indian juveniles' punishment would more accurately fit their crime and their rehabilitation potential.