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Judicial Review & the Policy of Federal Abstention: A Juvenile's Right to Ensure the Existence of a "Substantial Federal Interest"

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NOTES

Judicial Review & the Policy of Federal Abstention: A Juvenile's Right to Ensure the Existence of a "Substantial Federal Interest"

Matthew Drexler

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INTRODUCTION

"The problem of juvenile delinquency must be dealt with in an effective and meaningful manner if we are to reduce the ever increasing levels of crime and improve the quality of life in America."¹ With these words, the United States Senate opened its report in support of the first major federal juvenile delinquency statute in almost forty years.² The goal of the statute and of federal involvement in juvenile delinquency proceedings was to give the highest attention to prevent-

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1. S. REP. NO. 93-1011, at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 5283, 5285.

2. See S. REP. NO. 93-1011 (1974), reprinted in 1974 U.S.C.C.A.N. 5283, 5284.

ing juvenile crime and to minimizing the involvement of juveniles in the juvenile and criminal justice systems.³

Until 1974, the federal government played a relatively minor role in the juvenile delinquency system. In that year, Congress, in accordance with a general trend toward federalizing crime, greatly expanded the jurisdiction of the federal government over juvenile crime.⁴ Historically, crime, and particularly juvenile crime, was the responsibility of state governments with very little involvement by the federal government.⁵ In fact, the only major statute that dealt with juvenile crime was the Federal Juvenile Delinquency Act of 1938 ("FJDA").⁶ The FJDA offered the United States Attorney General discretion in deciding whether to prosecute a juvenile under the age of eighteen who had not been surrendered to state officials or had been charged with offenses punishable by life imprisonment or death.⁷ The federal government rarely employed this statute, and therefore federal involvement in juvenile delinquency proceedings remained virtually nonexistent until 1974. In that year, Congress passed the Juvenile Justice and Delinquency Prevention Act of 1974 ("JJDP")⁸ because it felt that federal intervention was necessary to stem rising juvenile crime rates, specifically, violent juvenile crime.⁹

Congress's enactment of the JJDP was also motivated in part by the haphazard way in which the federal government had previously been attempting to alleviate the problem of juvenile delinquency. The Senate, in 1974, stated that there was "[l]ittle coherent national planning or established priority structure among the major programs dealing with the problems of youth development and delinquency prevention . . . . The present array of programs demonstrates the lack of priorities, emphasis and direction in the Federal Government's efforts to combat delinquency."¹⁰

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3. See S. REP. NO. 93-1011, at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 5283, 5285.

4. Since 1970, Congress has created over forty percent of what comprises the current federal criminal code. See Task Force on the Federalization of Criminal Law, American Bar Association, Criminal Justice Section, *The Federalization of Criminal Law* 7 (1998) (visited Dec. 21, 1999) <<http://www.abanet.org/crimjust/fedreport.html>> [hereinafter ABA Report].

5. See NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960-1993, at 8 (1994).

6. See Federal Juvenile Delinquency Act of 1938, Pub. L. No. 75-666, §§ 1-9, 52 Stat. 764, 764-66 (1938) (codified as amended at 18 U.S.C.A. §§ 5031-5042 (West Supp. 1998)).

7. See §§ 1-9, 52 Stat. at 764-66.

8. See 18 U.S.C.A. § 5032 (1974), amended by 18 U.S.C.A. § 5032 (West Supp. 1998).

9. See S. REP. NO. 93-1011, at 7 (1974), reprinted in 1974 U.S.C.C.A.N. 5283, 5285-86. As stated in the Senate Report, "[j]uveniles under 18 are responsible for 51 percent of the total arrests for property crimes, 23 percent for violent crimes, and 45 percent for all serious crimes." *Id.*

10. 1974 U.S.C.C.A.N. at 5290 (quoting S. REP. NO. 92-220 (1971)).

The JJDPa drastically changed federal involvement in the field of juvenile delinquency. Congress created a broad federal approach that addressed both treatment and prosecution of juvenile offenders. The major focus of the legislation was to provide funding for research and programs to assist the states in their efforts to address the delinquency problem.¹¹ In addition to these programs, Congress vastly expanded the basis for assuming federal jurisdiction over juvenile offenders.¹² As currently amended,¹³ the JJDPa provides for prosecution of a juvenile in federal court when:

[T]he Attorney General,¹⁴ after investigation, certifies to the appropriate district court of the United States that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile . . . , (2) the State does not have available programs and services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony or [one of a specified number of drug or gang-related crimes], and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.¹⁵

Accordingly, a United States Attorney who desires to proceed against a juvenile in federal court must certify the existence of one of the three factors listed above and that a substantial federal interest exists in the prosecution.¹⁶ In practice, this requirement is often met by a certification simply stating that these elements exist, without further explanation or support.¹⁷

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11. See *infra* notes 67-83 and accompanying text for a discussion of the JJDPa.

12. The change from the FJDA to the JJDPa was significant because Congress created precise procedural guidelines for trying juveniles in federal court that did not exist under the FJDA. See 18 U.S.C.A. § 5032. Accordingly, these changes provided the United States with the means to assume federal jurisdiction over juvenile offenders. Furthermore, the JJDPa, as will be seen in the remainder of this Note, devoted substantial federal resources to the problem of juvenile delinquency. See Section I.A.

13. Congress made significant amendments to the JJDPa in 1984, see Pub. L. No. 98-473, § 1201 (adding the "substantial Federal interest" requirement, lowering the transfer age to fifteen, and expanding jurisdiction by adding additional crimes), and in 1988, see Pub. L. No. 100-690, § 6467(a) (significantly expanding federal jurisdiction).

14. "Under the authorization found in 28 C.F.R. § 0.57, the Attorney General has delegated her certification and transfer authority to the United States Attorneys." *United States v. Juvenile Male #1*, 86 F.3d 1314, 1317 n.3 (4th Cir. 1996).

15. 18 U.S.C.A. § 5032 (citations omitted).

16. There is a separate split in the federal circuits over whether the "substantial federal interest" prong is required in all certifications or just for certifications involving a crime of violence. This issue is beyond the scope of this Note and not relevant to the determination of the issue that it addresses. This Note will argue that courts should review the certification whenever the substantial federal interest must be asserted, regardless of how often this occurs. For a general discussion of this issue, see *United States v. Juvenile #1*, 118 F.3d 298, 303 n.6 (5th Cir. 1997).

17. A typical certification would include the following information: that there was "a substantial federal interest in the case and the offenses warrant[ed] the exercise of Federal

In response to the federalization of juvenile delinquency and the increasing focus on federal jurisdiction, some juveniles have questioned whether a substantial federal interest exists in their case and have sought judicial review of the prosecutor's certification.¹⁸ The circuit courts are split over the appropriateness of judicial review in this context. The Fourth Circuit has held that the certification should be reviewable by courts.¹⁹ In so holding, it relied on the legislative history of the JJDPa, which stresses the importance of states' control over juvenile delinquency, and Supreme Court precedent stating that certain certifications regarding jurisdiction over juveniles made by prosecutors should be subject to judicial review.²⁰ Many circuits, however, have disagreed with the Fourth Circuit's approach.²¹ With slight variation, these courts have argued that the plain language of the JJDPa precludes judicial review.²² Furthermore, their holdings state that when the certification is based upon a judgment call by a prosecutor, the certification belongs to a category of unreviewable prosecutorial decisions.²³

The Supreme Court established the ability of a lower court to substantively review a certification by a federal prosecutor in *Gutierrez de Martinez v. Lamagno*.²⁴ The Fourth Circuit relied on this case in *United States v. Juvenile Male #1*²⁵ to permit review of a federal prosecutor's certification under the JJDPa. In *Gutierrez de Martinez*, the

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jurisdiction." *United States v. Juvenile Male J.A.J.*, 134 F.3d 905, 906 (8th Cir. 1998) (quoting from the Certification to Proceed under the JJDPa) (alterations in original).

18. See, e.g., *United States v. Jarrett*, 133 F.3d 519 (7th Cir. 1998); *United States v. Juvenile Male J.A.J.*, 134 F.3d at 908.

19. See *United States v. Juvenile Male #1*, 86 F.3d at 1314.

20. See *United States v. Juvenile Male #1*, 86 F.3d at 1314.

21. See *Jarrett*, 133 F.3d at 541 (holding that "courts cannot review the substantive basis of the Attorney General's certification of a 'substantial federal interest' "); *United States v. Juvenile Male J.A.J.*, 134 F.3d at 908; *United States v. Juvenile No. 1*, 118 F.3d 298, 304 (5th Cir. 1997); *United States v. I.D.P.*, 102 F.3d 507, 511 (11th Cir. 1996) (holding that "[i]n the absence of purely formal error on the face of the certification or proof of bad faith on the part of the government . . . certifications made in accord with section 5032 customarily 'must be accepted as final' "); *United States v. Doe*, 49 F.3d 859, 866-67 (2d Cir. 1995) (permitting judicial review of whether the offense charged met the statutory requirements of the JJDPa); *United States v. Vancier*, 515 F.2d 1378, 1380 (2d Cir. 1975).

22. See *supra* note 21. Despite claims by some courts that the JJDPa precludes substantive review of the certification, all of the circuits are in agreement that courts do have the authority to review the certification for technical compliance with the requirements of the JJDPa. See, e.g., *United States v. Baker*, 10 F.3d 1374, 1396 (9th Cir. 1993) (reviewing the age of the juvenile and its application to the statute's requirements for prosecution); *United States v. Cuomo*, 525 F.2d 1285, 1287-89 (5th Cir. 1976) (ensuring that the certifying party was the proper one and that the certification was timely).

23. See, e.g., *Jarrett*, 133 F.3d at 539-40; *United States v. C.G.*, 736 F.2d 1474, 1478 (11th Cir. 1984).

24. 515 U.S. 417 (1995).

25. 86 F.3d 1314 (4th Cir. 1996).

Supreme Court upheld review of a prosecutor's certification under the Westfall Act that a federal employee was acting in the "scope-of-employment."²⁶ In Westfall Act certifications, the prosecutor certifies that a federal government employee was acting in the scope of his or her employment when an incident, usually a tort, occurred.²⁷ Once the certification is made, the United States is substituted as the defendant in the litigation.²⁸ In *Gutierrez de Martinez*, the Court first noted that because "federal judges traditionally proceed from the 'strong presumption that Congress intends judicial review,'"²⁹ review will not be precluded unless there is a "*persuasive* reason to believe that such was the purpose of Congress."³⁰

Based upon this presumption, the *Gutierrez de Martinez* Court relied on three primary elements of the Westfall Act in permitting review. First, the Court examined the statutory language and concluded that Congress made no mention of a court's inability to review a prosecutor's certification.³¹ Second, the Court found it significant that the legislative history of the Westfall Act showed that Congress did not "commit . . . 'scope-of-employment' [decisions] . . . to the unreviewable judgment of the Attorney General."³² Based on these textual examinations, the Court held that it did not find any persuasive basis "discernible from the statutory fog" to conclude that Congress intended to restrict judicial review.³³ Instead, the Court found just the opposite — that evidence existed indicating Congress may have favored review.³⁴ The third element in the Court's consideration involved important policy considerations that militated against precluding review. The Court found that the United States has a strong financial incentive in the certification of the employee as acting within the scope of his employment.³⁵ Additionally, the substitution of the United States for the employee defendant upon certification under the Westfall Act could result in the dismissal of the suit by the court under sovereign immunity principles.³⁶ The Court concluded that the com-

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26. See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995).

27. See 28 U.S.C.A. § 2679(d)(1) (West Supp. 1994).

28. See 28 U.S.C.A. § 2679(d)(1).

29. *Gutierrez de Martinez*, 515 U.S. at 424 (citing cases).

30. 515 U.S. at 424 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)) (emphasis added).

31. See 515 U.S. at 430-34.

32. 515 U.S. at 426.

33. 515 U.S. at 425.

34. See 515 U.S. at 431.

35. See 515 U.S. at 427.

36. Under the Federal Tort Claims Act, there is an exception for acts that occur in a foreign country. In *Gutierrez de Martinez*, the incident in question occurred in Colombia, and therefore the Federal Tort Claims Act did not apply. See 515 U.S. at 420.

bination of these two policy considerations and the lack of a statutory bar to judicial review supported the notion that Congress did not intend to preclude judicial review of the prosecutor's certification.³⁷ Thus, the Court held that review of the certification should be permitted.

Following the *Gutierrez de Martinez* framework, this Note argues that the review of certifications under the JJDPa should be permitted. In the limited area of juvenile delinquency law, traditional notions of prosecutorial discretion should yield to the unique circumstances surrounding the prosecution of children. Children should not be treated as if they are simply young adults. They have unique needs and require special treatment by the legal system.³⁸ As a result, courts should scrupulously review the certification for compliance with terms of the JJDPa to ensure that federal jurisdiction is assumed only when a substantial federal interest exists.³⁹ Part I of this Note analyzes the plain language and legislative history of the JJDPa to show that Congress intended to limit the bases for federal jurisdiction and to provide for judicial review over certification of juvenile cases to federal courts. Part II argues that the policy of federal abstention and the law's special treatment of children support judicial review of certifications in the juvenile delinquency arena. The historical difference in treatment of juvenile offenders is sufficient to overcome the traditional deference given to prosecutorial decisionmaking. Courts should review the certifications providing for federal jurisdiction over a child to ensure that a substantial federal interest is present in the prosecution of a child in the federal courts.

I. ANALYZING THE JJDPa: THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE JJDPa SUPPORT JUDICIAL REVIEW

In enacting the JJDPa and its subsequent amendments, Congress has gradually expanded the bases for federal jurisdiction over juvenile delinquency.⁴⁰ At the same time, Congress has retained substantive limitations on federal jurisdiction.⁴¹ These jurisdictional limitations

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37. See 515 U.S. at 424-26.

38. See ABA CENTER ON CHILDREN AND THE LAW, A JUDGE'S GUIDE TO IMPROVING LEGAL REPRESENTATION OF CHILDREN xiii (1998) (Foreword by Judge (Retired) Thomas Hornsby).

39. Traditional notions of prosecutorial discretion would either categorically prohibit judicial review or would limit challenges to substantive compliance, such as if the crime committed is in fact a felony.

40. For a discussion of the amendments to the JJDPa, see *supra* note 13.

41. For a list of the statutory requirements for certification, see *supra* text accompanying note 15.

must be viewed in light of the history and philosophy of the JJDPa. When federal jurisdiction is sought, it becomes clear that judicial review of prosecutorial certifications, to ensure that juveniles are tried in the most appropriate forum, is a central component of federal involvement in the juvenile delinquency system.

In order to determine whether Congress intended to preclude judicial review, courts review the plain language and legislative history of statutes.⁴² The Court has found judicial review to be precluded either when Congress has expressly barred review or when a statute provides no meaningful standards to guide judicial review.⁴³ Section I.A argues that the plain language of the statute exhibits no congressional intent to preclude judicial review. Section I.B analyzes the legislative history to show that Congress stressed the importance of state control of juvenile delinquency proceedings. This Part argues that Congress established standards for judicial review of the prosecutor's certification to effectuate this policy of federal abstention.

A. *The Plain Language of the Statute Demonstrates No Congressional Intent to Preclude Judicial Review*

The plain language of the JJDPa does not preclude judicial review of the prosecutor's certification.⁴⁴ In the section of the JJDPa discussing the certification procedure, there is no mention of a court's review of a prosecutor's certification.⁴⁵ While some courts have pointed to the lack of specific authorization of judicial review in the JJDPa as indication of a congressional intent to prevent review,⁴⁶ the failure of Congress to mention judicial review, standing alone, does not bar such oversight.⁴⁷ In *Gutierrez de Martinez*, the Court noted that the Westfall Act itself made no direct mention of the standards for courts to conduct review of the prosecutor's certification.⁴⁸ Yet although the Supreme Court found that Congress did not clearly address the pre-

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42. See, e.g., cases cited *supra* note 21. In each of these cases, the courts examined the text of the JJDPa and the legislative history to determine if judicial review was precluded.

43. See *Webster v. Doe*, 486 U.S. 592, 599-600 (1988) (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

44. See 18 U.S.C.A. § 5032 (West Supp. 1998).

45. See 18 U.S.C.A. § 5032; see also *United States v. Juvenile No. 1*, 118 F.3d 298, 304 (5th Cir. 1997).

46. See *supra* note 21 (listing cases).

47. See *United States v. Juvenile Male #1*, 86 F.3d 1314, 1319 (4th Cir. 1996) (discussing the *Gutierrez de Martinez* case).

48. See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) ("Congress did not address the precise issue unambiguously, if at all.").

cise issue, it held that courts have the authority and the ability to review substantively the prosecutor's certification under the Act.⁴⁹

Some courts have distinguished the absence of preclusion language in the JJDPa from the Westfall Act because the section of the JJDPa that describes the transfer provision⁵⁰ contains standards by which a court can determine if the transfer of a juvenile to criminal court is in the interest of justice.⁵¹ Some courts have argued that the inclusion of standards in one section of the statute (the transfer provision) and not in another (the certification provision) demonstrates that Congress knew how to craft these standards if it desired to do so.⁵² Therefore, Congress can be assumed to have purposefully excluded the standards from the other section.⁵³

Although this construction may create a presumption that Congress intended to exclude review of the certification, it is insufficient to overcome the *Gutierrez de Martinez* Court's rationale for judicial review.⁵⁴ The review of the prosecutor's certification is critical to the court's traditional constitutional role of protecting the citizenry from arbitrary and unconstitutional actions by other coordinate branches of government.⁵⁵ Without the oversight role of the courts, the judicial branch would be relegated to the "rubber-stamp work" of making decisions in cases based entirely upon actions of the Executive Branch.⁵⁶ The mission of the courts and the process of judicial deliberation is not consistent with this type of "mechanical judgment."⁵⁷

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49. See *Gutierrez de Martinez*, 515 U.S. at 436-37.

50. The transfer provision permits the courts to transfer a juvenile from juvenile to adult status. Section 5032 discusses both the certification procedure, which establishes federal jurisdiction, and the transfer procedure. The transfer provision explicitly provides for judicial review: "Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice." 18 U.S.C.A. § 5032.

51. The statute lists the following such factors: "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." 18 U.S.C.A. § 5032.

52. See, e.g., *United States v. Juvenile No. 1*, 118 F.3d 298, 305 (5th Cir. 1997).

53. See, e.g., *United States v. Juvenile Male J.A.J.*, 134 F.3d 905, 908 (8th Cir. 1998) (applying Supreme Court precedent from *Russello v. United States*, 464 U.S. 16, 23 (1983), which states that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (emphasis added)); see also *United States v. Juvenile No. 1*, 118 F.3d at 305.

54. See *supra* notes 30-37 and accompanying text.

55. See Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1340-41 (1997).

56. See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 426 (1995) ("[It would be] perplexing [to see] Article III judges in the role of petty functionaries, persons required to enter

The Supreme Court has stated time and again that judicial review of executive branch actions “will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.”⁵⁸ Federal judges have traditionally proceeded from the “strong presumption that Congress intends judicial review” of executive branch actions and decisions.⁵⁹ Therefore, given the *Gutierrez de Martinez* Court’s focus upon the failure of Congress to preclude judicial review in the statute and the importance of the policy considerations supporting review,⁶⁰ the mere presumption of a statutory construction is insufficient to evidence congressional intent to preclude judicial review.⁶¹

B. *The Legislative History Highlights the Role of the State in Juvenile Delinquency Proceedings*

Although Congress did not address the question of judicial review in the text of the statute, the legislative history of the JJDPa evinces congressional intent to provide for judicial review of the prosecutor’s certification. First, it emphasizes the importance of the policy of federal abstention. Second, the legislative history establishes standards by which courts can review the certification to determine if the crime at issue implicates the substantial federal interest needed to override the policy of federal deference to the states.

1. *Federal Abstention*

The legislative history of the JJDPa includes an exhaustive overview of the activities and efforts by states to address the problem of juvenile delinquency.⁶² As was stated by the 1974 drafters and reiterated in the subsequent amendments to the juvenile justice statute, “juvenile delinquency matters should generally be handled by the States.”⁶³ Congress recognized that the certification requirement was

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as a court judgment an executive officer’s decision, but stripped of capacity to evaluate independently whether the executive’s decision is correct.”).

57. See *Gutierrez de Martinez*, 515 U.S. at 434.

58. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (citing numerous cases).

59. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

60. For a discussion of the policy considerations supporting review in *Gutierrez de Martinez*, see *supra* notes 35-37 and accompanying text. For a discussion of the corresponding policy arguments supporting judicial review under the JJDPa, see *infra* Section II.B.

61. The scope of prosecutorial discretion will be discussed *infra* Section I.B.3.

62. See S. REP. NO. 93-1011 (1974), reprinted in 1974 U.S.C.C.A.N. 5283, 5283 (“[This] bill . . . provides for Federal 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.” (emphasis added)).

63. S. REP. NO. 98-225 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3526.

intended to limit federal jurisdiction over juveniles.⁶⁴ While substantive limitations on federal jurisdiction, alone, do not "necessarily implicate a concomitant judicial power to look behind such decision[s],"⁶⁵ the legislative history shows that Congress intended the court to restrict jurisdiction to only those cases that truly merit federal involvement. Thus, Congress chose to abstain from juvenile delinquency matters absent the existence of a substantial federal interest.⁶⁶

Although the JJDPa establishes a mechanism that increases the federal role in the prosecution of juvenile crime, the statute is, first and foremost, a funding mechanism authorizing grants to states, local governments, and private agencies to coordinate and encourage the development of programs designed to address the juvenile delinquency problem.⁶⁷ Congress recognized that federal intervention in the juvenile delinquency field was imperative in order to "provide needed financial assistance and resources" to help with "a State and local problem which must be dealt with by the State and local governments."⁶⁸ Rather than creating a federal infrastructure for the prosecution and treatment of juvenile offenders, the JJDPa established federal programs that focused primarily on researching the effectiveness of various delinquency and preventative programs.⁶⁹ Although the JJDPa established a new program to coordinate juvenile delinquency programs operated by the federal government, the primary purpose of this program was to provide comprehensive national leadership for addressing the problems of juvenile delinquency.⁷⁰ Because juvenile delinquency efforts involve areas of society that are co-

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64. *United States v. Juvenile Male #1*, 86 F.3d 1314, 1318 (4th Cir. 1996).

65. *United States v. Juvenile Male #1*, 86 F.3d at 1319.

66. See *United States v. Male Juvenile*, 844 F. Supp. 280, 284 (E.D.Va. 1994) (citing *United States v. Sechrist*, 640 F.2d 81, 84 (7th Cir. 1981), which recognizes that the certification process is a part of the general policy of federal abstention). It is important to remember that prior to the enactment of the JJDPa, Congress had minimal involvement in juvenile delinquency prosecutions and that the JJDPa represented an attempt to include the federal government in this field. The policy of abstention recognizes that Congress will not enter this particular field unless there is a substantial federal interest.

67. See S. REP. NO. 93-1011, at 8 (1974), reprinted in 1974 U.S.C.C.A.N. 5283.

68. S. REP. NO. 93-1011, at 8 (1974), reprinted in 1974 U.S.C.C.A.N. 5283, 5287.

69. According to the Department of Justice, over forty percent of these federal programs are research-related, as opposed to programs that provide treatment to juvenile offenders. See Helen N. Connelly, *Juvenile Delinquency Development Statements* (visited Oct. 26, 1998) <<http://www.ncjrs.org/txtfiles/fs-9524.txt>>.

70. See H.R. CONF. REP. NO. 93-1298 (1974), reprinted in 1974 U.S.C.C.A.N. 5333, 5333 ("[P]rovide a comprehensive, coordinated approach to . . . juvenile delinquency. . ."). Another primary reason for the Act was to encourage the States to adopt the constitutional guarantees that the United States Supreme Court had extended to juveniles in delinquency proceedings. These provisions included, for example: the right to an attorney, right to a speedy trial, and right to confront witnesses. See *Breed v. Jones*, 421 U.S. 519 (1975); *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

ordinated by state and local governments, such as "law enforcement, education, [and] recreation,"⁷¹ Congress recognized that community resources and state and local organizations are critical in dealing with juvenile offenders effectively and humanely.⁷² In fact, the legislative history primarily discusses how congressional action will assist the states in improving their own juvenile justice systems.⁷³ It is therefore significant to recall that even today, the federal government has no detention facilities to offer services to children adjudicated as delinquents in federal district court.⁷⁴

Even as Congress expanded the areas of federal jurisdiction into drug offenses and serious violent felonies,⁷⁵ Congress did not eliminate the focus upon the idea that the State should exercise primary control over juvenile delinquency. Specifically, Congress rejected full adoption of recommendations by the Attorney General's Task Force on Violent Crime that would have eliminated the policy of federal abstention and provided federal courts with original jurisdiction over federal crimes by juveniles.⁷⁶ Instead, Congress concluded that the policy of federal abstention is an important and beneficial concept that should be respected, absent a determination that a substantial federal interest is involved.⁷⁷ Thus, Congress recognized that the state juvenile courts were the appropriate place to handle the problem of delinquency.

While subsequent amendments to the 1974 statute have expanded the grounds for assumption of jurisdiction by the federal government for serious violent felonies,⁷⁸ the inherent preference for state jurisdiction over delinquency proceedings is still present.⁷⁹ Congress reiter-

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71. S. REP. NO. 93-1011, at 65-66 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5286.

72. *See supra* note 62.

73. *See* S. REP. NO. 93-1011 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5283 (finding that this Act provides grants to communities and State and local governments who submit juvenile delinquency program models that adopt federal guidelines and standards for trying juveniles in court).

74. *See* Connelly, *supra* note 69; John Scalia, *Juvenile Delinquents in the Federal Criminal Justice System*, February 1997, Bureau of Justice Statistics Special Report, at 3 (Feb. 1997) <<http://www.ojp.usdoj.gov/bjs/pub/ascii/jdfcjs.txt>>. Because a conviction in juvenile court is different from a criminal court conviction, children who are found guilty are deemed to have been adjudicated as delinquent.

75. *See* Pub. L. No. 100-690, § 6467(a) (1988) (codified as amended in 18 U.S.C.A. § 5032 (West Supp. 1998)). This provision extends federal jurisdiction to crime that involves the knowing or intentional manufacture, distribution, or purchase of certain controlled substances. *See also* 21 U.S.C.A. § 841(a) (West Supp. 1998).

76. *See* S. REP. NO. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3529.

77. *See* S. REP. NO. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3529.

78. The amendments to the JJDPa in 1984 and 1988 expanded the grounds upon which the federal government could assume jurisdiction over juveniles. *See supra* note 13.

79. "The essential concepts of the [JJDPa] are that juvenile delinquency matters should generally [be] handled by the States and that criminal prosecution of juvenile offenders

ated this preference for state jurisdiction in its 1984 amendments when it stated that the prosecution of juvenile offenders should be reserved for only those cases involving particularly serious conduct.⁸⁰ In order to define serious conduct and the substantial federal interest concept, Congress stated that it intends that:

[A] determination that there is a "substantial Federal interest" [should] be based on a finding that the nature of the offense or the circumstances of the case give rise to special Federal concerns. Examples of such cases could include an 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.⁸¹

Thus, federal jurisdiction was intended only for a small subset of cases that truly implicate federal interests.⁸² The certification requirement is an integral component of the federal policy of abstention, ensuring that only those cases with a *substantial federal interest* enter the federal court system.⁸³

2. *Establishment of Standards*

The enactment of the JJDPa and its subsequent amendments comprised a significant expansion of federal involvement in juvenile delinquency prosecution. In the 1984 amendments to the JJDPa, Congress found it necessary to outline the standards the court system should consider in assuming federal jurisdiction over a child and to define the "substantial federal interest" prong of the JJDPa.⁸⁴ The Supreme Court has stated that judicial review is permitted only where

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should be reserved for only those cases involving particularly serious conduct by older juveniles. The committee continues to endorse these concepts . . ." *United States v. Juvenile Male #1*, 86 F.3d 1314, 1321 n.9 (4th Cir. 1996) (quoting the legislative history from the 1984 amendment to the JJDPa).

80. See S. REP. NO. 98-225 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3529, 3531 (reiterating the statement of the 1974 Congress that juvenile delinquency matters should be primarily handled by the states).

81. S. REP. NO. 98-225, at 389 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3529.

82. The examples provided in the legislative history are in line with examples cited by judicial commentators and scholars who find a need to limit federal involvement in juvenile crime. See *infra* Section II.B; see also COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS, at 22-30 (1995) [hereinafter COMMITTEE ON LONG RANGE PLANNING] (recommending that Congress should allocate criminal jurisdiction to the federal courts only under limited circumstances, such as when the proscribed activity targets the federal government itself or involves an international component, a complex enterprise, or widespread state or local government corruption).

83. See COMMITTEE ON LONG RANGE PLANNING, *supra* note 82, at 22-30.

84. See *supra* note 81 and accompanying text.

there are meaningful standards to aid a court in its review.⁸⁵ Accordingly, the courts that have conducted review of the "substantial federal interest" prong of a federal prosecutor's certification have followed one of two tests: (a) a comparison of the crime committed to the list of crimes enumerated in the legislative history of the JJDPa, or (b) a review of the legislative history of the criminal statute violated. These approaches present workable and manageable standards for review of the reasons underlying the government's decision to proceed in federal court, and thus satisfy the Court's requirements for permitting judicial review.⁸⁶

First, a court can determine if a "substantial federal interest" has been implicated by comparing the list of circumstances giving rise to special federal concerns in the JJDPa's legislative history to the crime allegedly committed by the juvenile. While the list of sample crimes noted above is not exhaustive, it provides a useful basis for determining by analogy whether Congress intended a crime to provide a sufficient basis to assume jurisdiction over a juvenile.⁸⁷ Courts in the Fourth Circuit have found this list to be an integral part of the statutory restrictions that Congress placed upon the assumption of federal jurisdiction and to provide meaningful standards for reviewing the certification to determine if a "substantial federal interest" exists in a prosecution.⁸⁸ As the Fourth Circuit wrote in *United States v. NJB*,⁸⁹ "[w]hen an offense is listed among the examples in the legislative history," a court can find that the "substantial federal interest" prong has been satisfied.⁹⁰ A court could also resolve the "substantial federal interest" question by determining if the alleged crime rises to the level of the crimes included in the list in the legislative history. For example, in *United States v. Male Juvenile*,⁹¹ the federal prosecutor filed a certification under the JJDPa alleging that a "single instance of ordinary bank robbery" amounted to a "substantial federal interest."⁹² In rejecting this argument, the court held that this crime is "clearly different in kind from those offenses suggested by the [legislative his-

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85. See *Webster v. Doe*, 486 U.S. 592, 600 (1988) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

86. See *supra* note 85.

87. See *United States v. Male Juvenile*, 844 F. Supp. 280, 283-84 (E.D. Va. 1994). For the list of crimes in the legislative history, see *supra* note 81 and accompanying text.

88. See *United States v. NJB*, 104 F.3d 630 (4th Cir. 1997); *United States v. Juvenile Male #1*, 86 F.3d 1314 (4th Cir. 1996); *United States v. Male Juvenile*, 844 F. Supp. 280 (E.D. Va. 1994).

89. 104 F.3d 630 (4th Cir. 1997).

90. *NJB*, 104 F.3d at 635.

91. 844 F. Supp. 280 (E.D. Va. 1994).

92. *United States v. Male Juvenile*, 844 F. Supp. at 284-85.

tory].”⁹³ At this point, the court shifted the burden of proof of compliance with the JJDPa back to the prosecutor to assert some substantial allegation of federal concern.⁹⁴ The court found the prosecutor’s justifications to be unpersuasive and accordingly declined jurisdiction.⁹⁵ If this type of certification were permitted, the court held, then the doors of the federal court would be open to virtually any violent federal felony and would “make a mockery of the general policy of [federal] abstention.”⁹⁶

A second way that courts can reach the “substantial federal interest” inquiry is to review the legislative history of the violated statute to determine if the threshold of 18 U.S.C.A. § 5032 has been met. For example, *United States v. Juvenile Male #1*⁹⁷ involved an allegation that a juvenile had violated the federal carjacking statute.⁹⁸ The juvenile respondent attempted to minimize the level of federal interest involved by claiming that the theft of an automobile was not a federal concern.⁹⁹ The court then analyzed the legislative history of the carjacking statute to determine the intent of Congress in passing the prohibition.¹⁰⁰ The court determined that Congress acted with serious concern regarding the increase of carjackings, particularly by juveniles, and therefore imposed harsh penalties for the violation of the Act.¹⁰¹ Ultimately, due to these factors, the court held that there are

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93. 844 F. Supp. at 284.

94. See 844 F. Supp. at 284. The Assistant United States Attorney argued, over his own objection that he was not required to make this defense, that the bank in question was “FDIC insured; that the robbery was particularly violent in that the defendant threatened to kill certain bank employees; that roughly twenty-five percent of bank robberies in this district are tried in Federal court, and those are usually cases like this one which involve violence; and that the defendant has a violent background.” 844 F. Supp. at 284-85 (internal citations omitted).

95. See 844 F. Supp. at 284.

96. 844 F. Supp. at 285.

97. 86 F.3d 1314 (4th Cir. 1996).

98. In 1992, Congress federalized the crime of carjacking. See Pub. L. No. 102-519, § 101(a) (codified at 18 U.S.C.A. § 2119 (West Supp. 1998)).

99. See *United States v. Juvenile Male #1*, 86 F.3d 1314, 1321 (4th Cir. 1996) (noting additionally that the use of a firearm and nature of the crime of carjacking itself might also be relevant to the federal nature of the case).

100. See *United States v. Juvenile Male #1*, 86 F.3d at 1321.

101. See 86 F.3d at 1321. That Congress considered this offense to be particularly serious can be seen in the punishment prescribed for violators of the Act — imprisonment for up to fifteen years in circumstances where no one is injured and the provision for the possibility of the death penalty if the carjacking results in the victim’s death. See 86 F.3d at 1321. The court also found relevant the legislative history of the carjacking statute, which discussed the “rash of theft by juveniles” and the “substantial threat [they pose] to public safety.” 86 F.3d at 1321 (quoting 138 CONG. REC. S17,961 (1992) (remarks of Sen. Lautenberg)).

"strong indicators [that] more than a run of the mill federal interest" was involved.¹⁰²

3. Prosecutorial Discretion

Some courts have rejected the argument that the JJDPa or the statute's legislative history supports judicial review of a prosecutor's certification.¹⁰³ Instead of favoring judicial review, these critics hold that based upon traditional notions of prosecutorial discretion, judges are not competent to address this question at all.¹⁰⁴ It has been the longstanding practice of the American criminal justice system to commit prosecutorial decisions to the complete discretion of the prosecutor.¹⁰⁵ The decision about whether to prosecute — the charging decision — is typically considered to be one of the most prominent decisions committed to the prosecutor's discretionary power.¹⁰⁶ Some courts have considered the certification of a "substantial federal interest" to be a "perfunctory corollary to the decision to prosecute itself," and accordingly have held that this decision should be free from judicial oversight.¹⁰⁷ This argument reasons that because prosecutors make the determination of the existence of a "substantial federal interest" in every case, they alone are competent to conclude that the statutory requirements of the certification have been met.¹⁰⁸

Proponents of this viewpoint look to standards outlined by the United States Department of Justice for the determination of whether a "substantial Federal interest would be served by prosecution,"¹⁰⁹ and conclude that judges are "ill-equipped" to review the factors upon

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102. 86 F.3d at 1320-21. The application of this reasoning seems to accept the troubling rationale that a response to political pressure can be an adequate reason for Congress to federalize a crime. Yet this rationale at least provides a principled means for courts to limit the expansion of juvenile crime to areas where Congress did not intend federal jurisdiction to extend.

103. For a list of these cases, see *supra* note 21.

104. See *supra* note 21.

105. Prosecutors have the authority to decide whom to prosecute, for what charge, and oftentimes, due to the sentencing guidelines, what sentence to impose. In these areas of broad discretion, courts typically do not review the prosecutor's decisions and actions. See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 736-59 (1996).

106. See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1992) (granting discretion over the charging decision); Lara Beth Sheer, *Prosecutorial Discretion*, 86 GEO. L.J. 1353, 1353-55 (1998).

107. *United States v. Jarrett*, 133 F.3d 519, 540 (7th Cir. 1998).

108. See *Jarrett*, 133 F.3d at 539-40.

109. United States Dept. of Justice, Attorney's Manual, § 9-27.220 (Sept. 1997) [hereinafter Attorney's Manual]. The Manual states that the determination of a "substantial federal interest" is integral to every decision whether to prosecute. See *id.*

which prosecutors rely.¹¹⁰ The "substantial federal interest" factors listed in the Department of Justice manual are:

[f]ederal law enforcement priorities; [t]he nature and seriousness of the offense; [t]he deterrent effect of prosecution; [t]he person's culpability in connection with the offense; [t]he person's history with respect to criminal activity; [t]he person's willingness to cooperate in the investigation or prosecution of others; and [t]he probable sentence or other consequences if the person is convicted.¹¹¹

It is argued that these factors are "administrative in nature, [determined] after a studied assessment of the Government's policy visions and priorities," and that just like a prosecutor's charging decision, this decision is ill suited to judicial review.¹¹² The charging decision is normally not subject to judicial review because the prosecutor makes the determination based on the strength of the evidence and the probable success of a trial on the charge.¹¹³ Arguably, these considerations may be beyond the expertise of reviewing courts.¹¹⁴

Yet the ability of courts to review the actions of a prosecutor, based upon the Justice Department's standards, is not outside the bounds of judicial action. Significantly, even the Department of Justice Manual states that United States Attorneys should take great care in determining whether a "substantial federal interest" exists under the JJDP, because the decision will likely be scrutinized and challenged.¹¹⁵ Moreover, unlike the considerations that are beyond the expertise of reviewing courts, judges routinely consider and review the factors that the Department of Justice believes comprise the determination of a "substantial federal interest" in the JJDP.

Courts, for instance, often review decisions by prosecutors that incorporate the standards set out by the Department of Justice in two

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110. See Elisabeth Alden Bresee, *Prosecutorial Discretion*, 75 GEO. L.J. 859, 859 n.1045 (1987) (citing cases supporting the general principle).

111. Attorney's Manual, *supra* note 109, at § 9-27.230 (numbers omitted); see also John S. Austin, *Prosecutorial Discretion and Substantial Assistance: The Power and Authority of Judicial Review — United States v. Wade*, 15 CAMPBELL L. REV. 263, 284 (1993).

112. *Jarrett*, 133 F.3d at 540.

113. For instance, prosecutors decide to prosecute some defendants but not others based on the strength of evidence and the probable success at trial. See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 727 (1997).

114. See *Jarrett*, 133 F.3d at 540.

115. See Robert E. Shepherd, Jr., *Trying Juveniles in Federal Court*, 9 CRIM. JUST., Fall 1994, at 45. The United States Department of Justice Manual advises U.S. Attorneys to abstain from prosecutions if "[n]o substantial federal interest would be served by prosecution." Attorney's Manual, *supra* note 109, at § 9-27.220. While the fact that the Justice Department cautions restraint does not mandate judicial review, it does provide evidence that even prosecutors themselves are aware of the possibility of the overzealous pursuit of federal prosecutions, thus providing further support for judicial oversight.

settings: good faith challenges and transfer proceedings.¹¹⁶ While prosecutors' decisions are typically considered to be made in good faith, this consideration is only a presumption. When this good faith standard is challenged, courts must consider the government's objective in the prosecution.¹¹⁷ In making this determination, courts have traditionally had a role in examining the rationality of a prosecutor's charging decision.¹¹⁸ Courts then are in the position of "second-guessing policy decisions [made by the prosecutor] that play a role in [the] charging [decisions]."¹¹⁹ Defendants in a criminal case making a good faith, selective prosecution challenge are requesting that the government inform the court of the basis for the prosecution to ensure that the prosecutor is not improperly charging one defendant over another.¹²⁰ Similarly, in the juvenile context, the juvenile defendant wishes to ensure that the JJDPa's guidelines for assuming federal jurisdiction have been met. Thus, judicial review, in addition to protecting the policy of federal abstention, can temper concerns regarding potential prosecutorial misconduct.¹²¹ If judges are not capable of countering prosecutorial pressure toward broad interpretations of statutes aimed at obtaining more convictions, the statutory requirement of a "substantial federal interest" would be "reduced to mere surplusage."¹²² Specifically, such broad interpretations of the JJDPa could result in virtually any case involving a violent felony rising to the level of a "substantial federal interest."¹²³

Furthermore, in the context of juveniles, Congress and the judicial system have determined that courts *are* competent to make these types of policy determinations. According to the *Trial Manual for De-*

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116. For a discussion of good faith challenges, see *infra* note 117 and accompanying text. For a discussion of transfer proceedings and cases that address juvenile transfers, see *supra* notes 50-53.

117. See *Wayte v. United States*, 470 U.S. 598 (1985); *Daum v. Blumstein*, 405 U.S. 330, 342, 343 (1972) (holding that the equal protection strict scrutiny test includes an inquiry into whether there are other means by which the government could achieve its objective); *Clymer*, *supra* note 113, at 728.

118. See *Clymer*, *supra* note 113, at 727 n.350.

119. *Id.* at 728.

120. See generally *id.*; *Heller*, *supra* note 55.

121. See *United States v. Male Juvenile*, 844 F. Supp. 280, 283 (E.D. Va. 1994) (noting that the court had "grave concerns that the case was certified for reasons other than those articulated by the Government at the hearing").

122. *United States v. Male Juvenile*, 844 F. Supp. at 284.

123. See Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1139-40 & n.66 (1997) (discussing the Department of Justice's belief that its attorneys will exercise discretion in prosecuting federal crimes and the failure of this policy, particularly as demonstrated by the repeated attempts by prosecutors to circumvent the mailing element in mail fraud cases).

fense Attorneys in Juvenile Cases,¹²⁴ when a juvenile is being transferred to criminal court, courts typically review both the juvenile's past record and the seriousness of the offense — two factors that are also part of the determination of whether a "substantial federal interest" exists.¹²⁵ If courts are capable of reviewing these factors when a juvenile is transferred, they are also competent to review the certification for these same factors in the decision to assume federal jurisdiction. Yet these policy decisions are the very ones that many claim are "particularly ill-suited to judicial review."¹²⁶

Despite this evidence that courts have the competence to review the factors that prosecutors use to determine whether a "substantial federal interest" exists in the prosecution, some commentators have argued that judicial review should be limited only to constitutional settings.¹²⁷ Although review of the prosecutor's decisionmaking in federal adult criminal law occurs under restricted circumstances, the remainder of this Note will argue that the strong deference to federal abstention and the acceptance of separate procedural protections for juveniles merit an extension of the ability to review prosecutorial decisions in the certification process.

II. POLICY CONSIDERATIONS JUSTIFYING JUDICIAL REVIEW

Congress has repeatedly stated that "[t]he United States has a long tradition of dealing differently with juveniles than with adults . . . in the hope that juveniles can be rechannelled into becoming law abiding citizens."¹²⁸ Children are not simply young adults; accordingly, the law has developed different procedures and rules that recognize the unique circumstances that surround childhood. Because of society's special treatment of children, the usual deference given to prosecutors should not extend to the juvenile delinquency context. In the *Gutierrez de Martinez* case, the Court relied heavily on policy con-

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124. RANDY HERTZ ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE CASES (1991).

125. See HERTZ ET AL., *supra* note 124, at § 13.11; see also 18 U.S.C.A. § 5032 (West Supp. 1998); *Kent v. United States*, 383 U.S. 541, 566-67 (1961) (asserting that the factors for review of a transfer decision should include the seriousness of the offense, the prosecutorial merit or the likelihood of indictment, and whether the client is amenable to treatment).

126. *Wayte v. United States*, 470 U.S. 598, 607 (1985); see also *United States v. Juvenile Male J.A.J.*, 134 F.3d 905, 909 (8th Cir. 1998) (holding that the charging decisions involve criteria that are "precisely the sort of policy judgments invested in the executive, not the judicial, branch of government" (citations omitted)).

127. See *Clymer*, *supra* note 113 (noting that the charging decision is limited by the constitutional protections of the Due Process and Equal Protection clauses).

128. S. REP. NO. 93-1011, at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 5283, 5290 (quoting NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 247 (1973)).

cerns in its decision to permit judicial review.¹²⁹ With regard to the JJDPa, there are equally important policy concerns that militate against a finding that judicial review should be prohibited.¹³⁰ Such policy considerations are an appropriate basis for permitting judicial review.

This Part argues that these policy considerations — which include the importance that society places on the proper treatment of children and the need for an appropriate forum to meet children's needs — mandate that courts should have the opportunity to review a prosecutor's certification in these cases. Section II.A argues that the law's separate and different treatment of children and adults provides a justification for judicial review of certifications under the JJDPa. Section II.B then argues that the goals of the juvenile court system and the current societal conception of the child cannot be respected by transforming the federal district court into a juvenile court. This Part concludes that the federal government should abstain from assuming jurisdiction in juvenile delinquency proceedings unless a sufficiently important federal interest is implicated.

A. *The Status of the Child*

The different treatment of children has an extensive historical foundation. At least as far back as the seventh century, society accepted that criminal law should treat juveniles differently than adults.¹³¹ Philosophers such as John Stuart Mill recognized an age before which individuals are not capable of making rational decisions about their own actions.¹³² These philosophers introduced the notion that until children possess the maturity and rationality of adults, the law should treat them differently to enable them to become productive members of adult society.¹³³ American society has adopted these

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129. See *supra* notes 35-37 and accompanying text.

130. See *United States v. Juvenile Male #1*, 86 F.3d 1314, 1319-20 (4th Cir. 1996) ("[O]ther perhaps weightier considerations . . . militate against finding that . . . judicial review has been overcome in the juvenile justice arena." (internal quotations and citations omitted)).

131. King Ine's proscription against stealing sets the age of majority at ten: "If any one steal, so that his wife and his children know it not, let him pay LX . . . A boy of X years may be privy to a theft . . . ." CHARLES H. SHIREMAN & FREDERIC G. REAMER, *REHABILITATING JUVENILE JUSTICE* 3 (1986) (quoting WILEY B. SANDERS, *JUVENILE OFFENDERS FOR A THOUSAND YEARS: SELECTED READINGS FROM ANGLO SAXON TIMES TO 1900* (1970)). While King Ine declared a ten-year-old to be capable of criminal activity, it is important to remember that the JJDPa defines a juvenile as a person under eighteen years of age. See 18 U.S.C.A. § 5032 (West Supp. 1998).

132. See JOHN STUART MILL, *ON LIBERTY* 13 (Elizabeth Rapaport ed., Hackett Publishing Co., Inc. 1978); see also SHIREMAN & REAMER, *supra* note 131, at 4 (discussing philosophies of Jeremy Bentham and John Stuart Mill).

133. See SHIREMAN & REAMER, *supra* note 131, at 4.

principles by applying different legal rules and principles in the relationships between children and both the state and their families.¹³⁴ Within each of these settings, the law presumes that a child is incapable of voicing a rational preference and therefore substitutes another's articulation of the child's interests.¹³⁵

Within the law of the family, parents have constitutional rights to direct the upbringing and care of their children.¹³⁶ The Supreme Court has held that the state can infringe upon this constitutional right only in the most extreme settings.¹³⁷ Under this deferential standard, parents have the right, for example, to punish their children physically,¹³⁸ direct the medical treatment their children may receive,¹³⁹ and to voluntarily commit their children to a mental institution.¹⁴⁰

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134. These settings involve a combination of both state and federal law. The majority of laws that address a child's relationship to his family are governed by state law, such as divorce, child custody, and abuse and neglect proceedings. Federal law also makes significant contributions to the understanding that the law should apply differently to children. See *infra* notes 136-148 and accompanying text.

135. There has been much scholarly research and debate about the ability and appropriateness of substituting a child's voice with that of either a parent or the state. Instead of assuming that a child's voice can be adequately voiced through other means, many scholars have recommended a new standard where children's voices are recognized for their uniqueness. See, e.g., Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 12 (1994). The law can be said to "presume" that a child is incapable of voicing a rational preference, because some children will not be immature but will still be accorded this status. For instance, a child could have significant experience and expertise in dealing with money and contracts and still be able to void a contract on the basis of his age, while an adult without such experience would not be accorded the same protection.

136. See *Wisconsin v. Yoder*, 406 U.S. 205 (1971) (permitting parents to direct the educational upbringing of their children); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) ("[W]e think it entirely plain that the [statute in question] interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.").

137. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that clear and convincing evidence is required to terminate one's parental rights).

138. See Fitzgerald, *supra* note 135, at 37-38.

139. See, e.g., *Newmark v. Williams*, 588 A.2d 1108 (Del. 1991) (permitting parents to reject a chemotherapy treatment for their child); *In re Hofbauer*, 393 N.E.2d 1009 (N.Y. 1979) (permitting parents to choose nutritional therapy for their child's Hodgkin's disease, despite the recommendations of the child's physicians). But see *People v. Rippberger*, 231 Cal. App. 3d 1667 (Ct. App. 1991).

140. See *Parham v. J.R.*, 442 U.S. 584 (1979) (upholding a statute that permitted the institutionalization of a child without an adversary hearing); see also Lois Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 788-91 (1988) (discussing how most juveniles admitted to psychiatric facilities have problems associated with normal development, not severe or acute mental illness). These standards are in stark contrast to laws that prohibit assault against adults and commitment laws that require a person to be a threat to themselves or others before they can be involuntarily institutionalized. Compare VA. CODE ANN. §§ 16.1-335 et seq. (1998) with § 16.1-345(1) (comparing Virginia statutes for commitment of adults and minors).

It is not only in these intra-family settings that family law has treated children differently than adults.¹⁴¹ Children are not permitted to appear as parties in divorce proceedings that involve decisions on their custodial arrangements, nor may they be privy to child support hearings.¹⁴² Instead, the "best interest" standard has developed to substitute the state's voice as a proxy for the child's.¹⁴³ Because children are not treated simply as little adults, the law has developed the "best interest" standard to address the unique needs of children.¹⁴⁴

This different treatment extends beyond family law into relations between children and the state. Historically in this country, many children were subject to the same criminal proceedings and sentences as adult criminals were.¹⁴⁵ Progressive reformers of the nineteenth century saw this undifferentiated treatment as a great injustice to children, who were viewed by many as incapable of possessing criminal intent and in need of specialized treatment.¹⁴⁶ Accordingly, these reformers formalized their ideas for a new approach to dealing with young offenders in the establishment of the juvenile court system.¹⁴⁷ The juvenile court, thus, "was part of a general movement directed

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141. See Fitzgerald, *supra* note 135, at 14 (noting that the law "consigns children to the private realm of their parents' care and control"). Furthermore, it is interesting to note that in certain contexts, such as those involving free speech rights and the ability to petition a court for an abortion, children are given standing in legal disputes that are "of keen interest to us as adults." *Id.* at 15.

142. See Fitzgerald, *supra* note 135, at 42, 46-47.

143. The "best interest" standard is utilized in a variety of family law settings, including abuse and neglect proceedings, custody disputes, guardianship, and judicial waiver hearings. Statutes that mandate that decisions be made in the best interests of the child often specify the standards by which a judge should make his or her determination. For example, in Michigan, the "best interests of the child" standard means the "sum total of the following factors [are] to be considered, evaluated, and determined by the court: (a) The love, affection, and other emotional ties existing between the parties involved and the child. (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the educating and raising of the child in its religion or creed, if any. (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs . . . . (k) Any other factor considered by the court to be relevant to a particular dispute . . . ." MICH. COMP. LAWS. ANN. § 700.424c(5) (West 1995 & Supp. 1999).

144. It is possible to argue that permitting the prosecutor to file an unreviewable certification is simply another application of the best interest standard — substitution of the voice of the prosecutor for that of the child. This argument is unpersuasive. Unlike the traditional best interest standard in which the role of the party whose voice is substituted for that of the child is to assist or protect, the role of the prosecutor is to punish and penalize the child.

145. See Joseph F. Yeckel, Note, *Violent Juvenile Offenders: Rethinking Federal Intervention in Juvenile Justice*, 51 WASH. U. J. URB. & CONTEMP. L. 331, 334 (1997).

146. See SHIREMAN & BEAMER, *supra* note 131, at 4.

147. To that end, in 1899, Illinois became the first state to establish a juvenile court. By 1945, every state had established a juvenile court system. See ANTHONY M. PLATT, *THE CHILD SAVERS* 9 (2d ed. 1977); ROBERT M. MENNELL, THORNS & THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES 1825-1940, at 132 (1973).

toward removing adolescents from the criminal law process and creating special programs for delinquent, dependent, and neglected children.¹⁴⁸

Today, juvenile courts continue to operate in a procedurally and substantively different manner than criminal courts. For example, the juvenile court system considers rehabilitation to be its primary goal.¹⁴⁹ The courts recognize that children are fundamentally different from adults in their cognitive abilities and their amenability to treatment.¹⁵⁰ While states have instituted more punitive measures for juvenile delinquents, which include an increased focus on incarceration as opposed to probation, the severity and purpose of sentencing in juvenile as opposed to criminal court is still dramatically different.¹⁵¹ Significantly, sentences for juveniles normally terminate when a child is no longer considered a juvenile, typically at age eighteen or twenty-one. Unlike an adult sentence, which does not relate to the age of the offender, a juvenile sentence "recognizes the unique physical, psychological, and social features of young persons in the definition and application of delinquency standards."¹⁵² The changes in the juvenile court system throughout the states have not altered this central function of the court.¹⁵³ These changes recognize that while juveniles are

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148. *Id.* at 10.

149. Significantly, researchers have concluded that rehabilitative treatment — for example, community-based interventions — works. The question that remains is how to develop the most effective means of providing these services to children. See Thomas F. Geraghty, *Justice for Children: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190, 210 n.43 (1997) (citing a comprehensive directory of treatment services). It is significant that Congress, in permitting the prosecution of serious, violent juvenile crime, explicitly recognized that the purpose of 18 U.S.C. § 5032 was to "preserve the principles that criminal prosecutions should be reserved for only the most dangerous juvenile offenders." S. REP. NO. 98-225, at 391 (1984), reprinted in 1984 U.S.C.A.N. 3182, 3531. This language shows that Congress intended to maintain the juvenile court's rehabilitative focus, unless the crime is so severe that the presumption for rehabilitation is no longer appropriate.

150. The amenability to treatment was a central component of progressive reformers' vision that delinquency was a condition that could be cured. See Geraghty, *supra* note 149, at 211-12.

151. See CHRISTOPHER P. MANFREDI, *THE SUPREME COURT AND JUVENILE JUSTICE* 31 (1998); Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389, 396 n.4 (1999). Furthermore, the Supreme Court has recognized that the juvenile delinquency proceeding is not a criminal proceeding. See *In re Gault*, 387 U.S. 1, 17 (1967) (describing delinquency hearing as "civil" in nature).

152. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 146 n.39 (1997) (quoting INSTITUTE OF JUDICIAL ADMINISTRATION: ABA JUVENILE JUSTICE STANDARDS, Standards Relating to Dispositions, 1.1, commentary at 3, (1982) [hereinafter ABA STANDARDS]). Juvenile sentencing should also reflect the "slow process of intellectual and emotional maturation during adolescence." *Id.* (citing ABA STANDARDS, *supra*, at 1.1, commentary at 19).

153. The increase in the use of punitive measures against juvenile offenders has occurred as many have questioned the continued need for a separate juvenile court. States

responsible and blameworthy for their actions, it is unrealistic to treat them as if they are fully mature individuals capable of rational adult decisionmaking.¹⁵⁴ Accordingly, states have lowered the age at which a child is presumed capable of making rational decisions and therefore subject to criminal prosecutions.¹⁵⁵ These individuals are then removed from the juvenile court and transferred to adult criminal proceedings.¹⁵⁶ While the juvenile justice legislation has stated that younger children can face criminal prosecution, the juvenile court remains the forum where children's interests and uniqueness are still recognized.¹⁵⁷

Although the Supreme Court has recognized and extended certain due process protections to children,¹⁵⁸ the law continues to recognize the inherent differences between children and adults. For example, the federal Constitution does not extend the right to a jury trial to children.¹⁵⁹ The Supreme Court has justified this different treatment on the ground that juries will increase the adversarial nature of the proceeding — an aspect that juvenile forums attempt to minimize.¹⁶⁰

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have responded to the criticism of the alleged failure of the juvenile courts by easing the standards for the transfer of children from juvenile to criminal court. Commentators supporting this view claim that the juvenile court was not established nor equipped to deal with violent juvenile crime. The societal view is that juveniles who commit violent crime are not capable of rehabilitation. See Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997). As the concern about the rising rate of juvenile crime and the possible inability of rehabilitative intervention to succeed has increased, some states have responded by adopting blended sentencing schemes that permit juvenile court judges to impose both juvenile and adult sentences at the same time. After a child has been given rehabilitative intervention, the court can determine how the child has responded and whether the adult sentence needs to be imposed. See Geraghty, *supra* note 149, at 191 n.3 (citing PATRICIA TORBET ET AL., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 55-56 (1996)).

154. See Scott & Grisso, *supra* note 152, at 146.

155. See, e.g., GA. CODE ANN. § 15-11-5 (1999) (providing for transfer at age thirteen).

156. See, e.g., 18 U.S.C.A. § 5032 (West Supp. 1998) (discussing transfer provision).

157. See Geraghty, *supra* note 149; Scott & Grisso, *supra* note 152; Stephen J. Schulhofer, *Youth Crime and What Not to Do About It*, 31 VAL. U. L. REV. 435 (1997). Furthermore, while the JJDPa provides for transfer of juveniles to adult court, the fact that a judge must make a determination that a criminal court is the appropriate forum is another example of the law's different treatment of juveniles. See 18 U.S.C.A. § 5032. The law obviously does not provide a similar hearing for adults to determine whether they should be tried in a criminal court.

158. See, e.g., *In re Winship*, 397 U.S. 358, 359 (1970) (providing for "beyond a reasonable doubt" standard in delinquency prosecutions); *In re Gault*, 387 U.S. 1, 10 (1967) (providing right to counsel, notice of charges, cross-examination and confrontation, and privilege against self-incrimination); *Kent v. United States*, 383 U.S. 541, 555 (1966) (holding that children are not entitled to bail or indictment by grand jury).

159. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

160. See Geraghty, *supra* note 149, at 223-24 (discussing that jury trials do not take into account the special needs of children and that children have little comprehension of the process).

Although the presumption of prosecutorial discretion is fairly well entrenched in the adult criminal system, the legal system's different treatment of children provides compelling reasons to deviate from that standard.¹⁶¹ Importantly, in the federal system, all felony defendants are afforded the constitutional protection of a grand jury indictment.¹⁶² Accordingly, the independent review over the charging decision is accomplished in an adult proceeding by the grand jury indictment.¹⁶³ Federal prosecutors, however, proceed against children by information.¹⁶⁴ While it may be somewhat duplicative to provide for judicial review of a charging decision against an adult defendant, the lack of a comparable check upon the federal prosecutor in a juvenile proceeding is glaring.¹⁶⁵

This lack of protection is even more significant given the ability of prosecutors to transfer a juvenile to adult status.¹⁶⁶ Children who are transferred to adult status would thus be treated more harshly than adult defendants who are given the protections of the grand jury indictment requirement. This lack of protection is significant because federal prosecutors attempt to try most children brought to federal court as adults.¹⁶⁷ Therefore, the lack of important protections for juveniles in the federal system should permit judicial review of the prosecutor's certification in order to protect children from potential abuse by the justice system.

This special relationship between children and the state supports the continued existence of the juvenile court system and the different treatment of children from adult offenders.¹⁶⁸ Because the purpose and structure of the juvenile justice system differs from the adult sys-

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161. See *supra* Section II.A.

162. See U.S. CONST. amend. V; see also Robert Johnston et al., *Procedural Issues*, 36 AM. CRIM. L. REV. 983, 985-86 & n.8 (1999).

163. See Johnston et al., *supra* note 162, at 985-86.

164. See 18 U.S.C.A. § 5032 (West Supp. 1998).

165. While there is much current debate about the value of the grand jury system to protect the interests of defendants, the federal government, as opposed to many state governments, has not shed its requirement of prosecution by indictment for felony defendants. Accordingly, children are being denied the protection of independent review by a grand jury.

166. See 18 U.S.C.A. § 5032 (permitting the transfer of a child as young as age thirteen). While the decision to transfer a child to adult status is subject to review, the initial decision to bring a child into federal court might not be. The factors that establish a substantial federal interest are different from the criteria for determining whether a child is mature enough to be prosecuted as an adult. Therefore, review of the transfer decision is not sufficient protection.

167. It appears that most children brought to federal court are tried as adults. Only 200 or so juveniles are tried in federal court each year. Most of these children are Native Americans. Because many federal prosecutions are politically motivated attempts to obtain higher sentences, the majority of federal prosecutors attempt to try children as adults. See Scalia, *supra* note 74, at 3; see also ABA Report, *supra* note 4, at 15.

168. See *supra* note 153 (challenging this premise).

tem, different protections and procedures are required.¹⁶⁹ The different status of children in their relationship to the state serves as an important policy justification for judicial review. Just as policy played an important role in the *Gutierrez de Martinez* Court's decision to permit judicial review, this policy rationale justifies different procedural rules for children and a potentially broader role for judicial review in the juvenile context.¹⁷⁰

B. The Benefits of the Juvenile Court Cannot Be Recreated in an Infrequently Used Federal District Court

An additional policy reason justifying judicial review of the prosecutor's certification under the JJDPa is that federal courts are unequipped to capably handle juvenile delinquency cases.¹⁷¹ Traditionally, law enforcement and specifically the adjudication of delinquency have been state functions.¹⁷² Over the past thirty years, however, the federal government has created an increasing number of new federal crimes, many of which overlap with state prosecution of similar activity.¹⁷³ Until the latter part of this century, federal crimes were limited primarily to crimes that had a distinct federal interest.¹⁷⁴ The majority of other criminal offenses were prosecuted by local officials in the state courts. This separation of functions was important because crime was understood as primarily a local concern, where communities would determine the criminal law in connection with local customs and interests. Many commentators have challenged the value of creating federal jurisdiction in an area of traditional state control.¹⁷⁵ This Section argues that the rampant nature of the federalization of crime does a significant disservice to children, particularly in the adjudica-

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169. See *In re Gault*, 387 U.S. 1, 36 (1967).

170. See Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1257 (1996).

171. It is important to remember that in the context of the JJDPa, the United States District Court is transformed into a juvenile courtroom, whose function is to operate procedurally and substantively as a juvenile court.

172. See MARION, *supra* note 5, at 8.

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

174. Federal offenses were typically limited to "treason, bribery of federal officials, perjury in federal court, theft of government property, and revenue fraud." Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996). Furthermore, many commentators initially questioned the very ability of the federal government to assume jurisdiction over common law crimes. See 2 George L. Haskins & Herbert A. Johnson, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 633-43 (1971); Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 546-48 (1925).

175. See, e.g., *Chief Justice Raises Concerns on Federalism*, THE THIRD BRANCH (Administrative Office of the United States Courts), Jun. 1998, at 1-2; ABA Report, *supra* note 4, at 26; Clymer, *supra* note 113, at 645-46.

tion of juvenile delinquency. Moreover, important policy considerations, which establish that state courts are the best forum to address the unique needs of juvenile respondents, provide the same support for judicial review that other policy rationales did for the Court in *Gutierrez de Martinez*.¹⁷⁶

As previously noted, Congress has expanded the types of crimes that can be prosecuted in federal court. It is questionable, however, whether these new laws will address the problem they were designed to solve. First, due to the limited amount of resources and reach of federal law enforcement, federal criminal law will have a limited impact upon the conduct that Congress seeks to regulate. As a report issued by the American Bar Association noted, it is unlikely that the federalization trend will have any appreciable effect on crime without a significant infusion of money.¹⁷⁷ Accordingly, the rising trend of juvenile crime, which Congress cited as a primary factor behind the enactment of the JJDP, is unlikely to be addressed by trying juveniles in federal court.¹⁷⁸ Second, the enactment of a federal criminal statute may give the false impression of greater crime control and that adequate resources have been applied to the problem. This impression could disrupt the funding of state criminal processes that are not tied to federal enforcement.¹⁷⁹ Because state juvenile courts and treatment programs already receive less funding than their adult counterparts, the false impression of greater crime control could lead to fewer resources being directed to the state juvenile delinquency system.¹⁸⁰

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176. For a discussion of the *Gutierrez de Martinez* decision and the policy considerations supporting it, see *supra* notes 31-37 and accompanying text.

177. See ABA Report, *supra* note 4, at 18-19 (noting that no effect will be likely without a "massive (and unlikely) infusion of federal money" and that police executives have stated that it is "unrealistic to expect that federal authorities will have the resources and inclination to investigate and prosecute traditionally state and local offenses"). This report also notes that federal prosecution of domestic drug trafficking, the largest segment of federal prosecutions, amounts for only two percent of all prosecutions in the nation. See ABA Report, *supra* note 4, at 20.

178. It is possible to argue that many of the federal crimes that have been enacted are in direct response to political pressure to address rising crime rates. Thus, federal interests have been determined on the basis of a crime's seriousness and the level of public concern, rather than its connection to a substantial federal interest in the prosecution. See ABA Report, *supra* note 4, at 15. While passing legislation may address immediate public pressure for a direct response to a particular incident, the enactment of a federal criminal code will not solve the crime problem and may exacerbate the effect. For a discussion of the legislative history of the JJDP, see *supra* Section I.B.

179. See ABA Report, *supra* note 4, at 21 (noting that two highly publicized federal statutes enacted in 1994 — involving drive-by shootings and interstate domestic violence, were not cited in a single prosecution in 1997). Furthermore, the prosecution of crimes at the federal level may have the concurrent effect of decreasing the stature of the state criminal justice system that remains the primary body addressing criminal law in American society.

180. See Geraghty, *supra* note 149, at 218 & n.67.

Finally, the federalization of crime that is duplicative of state and local prosecutions places significant burdens on an already overwhelmed federal system.¹⁸¹ The increase in federal criminal proceedings reduces the time that federal judges can allocate to the traditional functions of the federal judiciary.¹⁸² The Judicial Conference of the United States has noted that the federalization trend will "negatively impact on the ability of the federal courts to hear federal criminal prosecutions, as well as carry out vital civil responsibilities in a timely manner."¹⁸³

In addition to these concerns with the federalization of crime generally, two important differences between the federal and state system make federal adjudication of juvenile delinquency both unwise and harmful to the goals of the juvenile justice system: (1) federal judges and other court officials lack the experience to work with juvenile offenders, and (2) the federal government does not have the programs or facilities to address the needs of juvenile offenders.

First, as opposed to federal judges, prosecutors, and defense counsel, who may not even have one federal juvenile case each year,¹⁸⁴ state court officials have well-developed experience in the most effective ways to deal with children themselves and the unique rules and customs of a juvenile proceeding.¹⁸⁵ The state juvenile court is organized

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181. See generally ABA Report, *supra* note 4.

182. See *id.* Furthermore, it is important to note that the burden of additional federal crimes also impacts the enforcement and treatment of offenders. Probation officers and social workers are of great importance in the juvenile system. In fact, most juvenile probation officers have lighter caseloads so they can put more time and effort into these cases. See Geraghty, *supra* note 149, at 228.

183. ABA Report, *supra* note 4, at 36 & n.62, (quoting *September 1992 Report of the Proceedings of the Judicial Conference of the United States* 57); see also Chief Justice Rehnquist *Raises Concerns on Federalism*, *supra* note 175, at 1-2.

Additionally, it is significant that federal criminal cases generally are given scheduling priority over civil cases (whether between an individual and the government, or between individuals). Finally, it should also be noted that some commentators have opined that the reduction in time for traditional federal judicial functions may have the effect of eroding the quality and distinctiveness of the federal judiciary, as either more judges are added or judges cannot adequately and capably handle the judicial tasks before them. See ABA Report, *supra* note 4, at 35-39.

184. While only 150 to 200 children are tried as juveniles each year in federal court, the certification issue is critical for two reasons. First, as is described in this Section, even for these 200 children, state courts continue to be the best forum to address their interest. Second, the certification requirement is the first step to the prosecution of children as adults in federal court. Each year, approximately 60 to 70 children are transferred to criminal court once the certification of a substantial federal interest has been accepted. See Scalia, *supra* note 74, at 1.

185. Juvenile delinquency proceedings have different procedural rules than criminal trials. See 18 U.S.C.A. § 5032 (West Supp. 1998). For example, there are complicated rules regarding the confidentiality of the proceedings. Questions such as these, which would be commonplace in a state court, could occupy a significant portion of a federal trial. The extension of the trial for these reasons does not serve the interests of the court, the public, or

around the concept that children are fundamentally different from adults and therefore focuses on the unique problems associated with the adjudication of children.¹⁸⁶ Juvenile courts are flexible systems that permit judges to take creative steps to lessen the trauma that simply appearing in court may cause a child.¹⁸⁷ The juvenile court is a place where the aggressiveness of the adult criminal court should be kept to a minimum.¹⁸⁸ Thus, it is more likely that the participants in a state juvenile proceeding will be committed to outcomes that focus on the best interests of the child involved.¹⁸⁹ Juvenile court judges, due to their experience with children, have the ability and knowledge to modify trials to take into account the needs of children and to control attorneys from deviating from the court's specialized purpose.¹⁹⁰ In the few cases they will ever hear, however, federal officials will not receive the training or experience they need to sensitize themselves to the unique needs of children in delinquency proceedings. Furthermore, scant federal prosecutorial and judicial resources are wasted when these actors must gain expertise in this different trial procedure.¹⁹¹

The lack of experience of court officials can also have a significant impact upon the success of the disposition or rehabilitation. As opposed to criminal courts, where sentences are based upon statutory guidelines, dispositions in juvenile court are based upon the particular needs of the individual child.¹⁹² States typically do not have formulas for sentencing juveniles and instead grant discretion to the trial judge to adopt an appropriate disposition.¹⁹³ While the JJDPA also grants

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the child. The inefficient use of resources is only compounded when the availability of the state juvenile court is considered.

186. See Geraghty, *supra* note 149, at 206; Scott & Grisso, *supra* note 152, at 139 ("Modern developmental psychology provides substantial, if indirect, evidence that adolescent choices about involvement in crime and their decisions as defendants in the legal process reflect cognitive and psychosocial immaturity.").

187. See Geraghty, *supra* note 149, at 224. The flexibility of the juvenile court system has long historical roots. See SHIREMAN & REAMER, *supra* note 131, at 6 (quoting from the first juvenile court judge in Illinois as to how he, as a juvenile court judge, acts differently toward children).

188. See Geraghty, *supra* note 149, at 224.

189. See *id.* at 223-26 (arguing that because the participants in the juvenile court understand the cognitive differences between children and adults, they will incorporate this philosophy into their trial practice).

190. A judge could keep a prosecutor from overzealously cross-examining a child witness or from moving the proceeding away from its rehabilitative focus. Furthermore, in states that permit jury trials, the judge could adopt "flexible" systems that could minimize the impact of a jury upon a child's courtroom experience. See *id.* at 224-25.

191. See *supra* notes 177-183 and accompanying text.

192. See HERTZ ET AL., *supra* note 124, at § 38.01.

193. Unlike criminal court, where sentencing is based upon the crime for which one is convicted, juvenile court sentences are based upon the needs of the child. If a child does not

this discretion to the trial judge,¹⁹⁴ it is unlikely that a federal judge will have the interdisciplinary connections that are necessary to address the special needs of the child.¹⁹⁵ Furthermore, the United States Sentencing Guidelines, which were not drafted with children in mind, restrict the discretion of the court.¹⁹⁶ Thus, without the experience of daily work with children and the interdisciplinary connections that are developed through this work, the federal court is unable to achieve a child-centered focus as successfully as have state juvenile courts.

Second, the lack of involvement of the federal government in the treatment of juveniles impedes its ability to assist in achieving the goals of the juvenile delinquency system. The states have traditionally been the administrative body that has dealt with juvenile crime.¹⁹⁷ Because the goal of these proceedings is to help the juvenile re-enter society,¹⁹⁸ juvenile courts need to be connected with services and programs that can achieve this purpose. The federal system is not equipped to address the needs of juvenile offenders.¹⁹⁹ The federal government does not offer the treatment programs and services that juveniles require.²⁰⁰ Instead, these programs, which include both residential and nonresidential programs, are located and operated in the communities where juveniles live. State juvenile court officials know the programs that are successful in these communities because they refer juveniles there every day. In fact, the federal government does not even operate a residential treatment facility for juvenile offenders or employ juvenile probation or parole officers or attorneys (either prosecutors or defense attorneys) with specific experience in representing juvenile clients.²⁰¹

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require treatment, a sentence may not be imposed. Even for serious crimes, a juvenile court can typically dismiss the delinquency finding, concluding that the respondent does not require treatment. *See id.* at § 38.03(a).

194. *See* 18 U.S.C.A. § 5037 (West Supp. 1998).

195. These interdisciplinary connections can include, for example, relationships with social workers, community-based delinquency programs, and child psychologists. *See* Scott & Grisso, *supra* note 152, at 181-89. Because the juvenile justice system is child-focused, a close analysis of the causes of delinquency and the potential for constructive intervention is required. *See* Geraghty, *supra* note 149, at 210-11.

196. Significantly, the Federal Sentencing Guidelines "take no account of adolescent development." ABA Report, *supra* note 4, at 11 n.17. These are features which are central to the rehabilitative sentencing function of a juvenile court and which, according to Congress, are still important and primary goals of delinquency prosecutions in the federal system.

197. Since crime was not originally thought of as a federal issue, states had the administrative responsibility to deal with the criminal problems within their borders.

198. *See* Geraghty, *supra* note 149, at 198-201.

199. *See* ABA Report, *supra* note 4, at 11 n.17.

200. *See id.*

201. *See id.* While it is true that state officials may not be specifically trained, the value of experience in working with children cannot be overstated.

As in *Gutierrez de Martinez*, important policy reasons exist to permit judicial review that will ensure the accuracy of the prosecutor's certification. In juvenile cases, society's concern with the upbringing of children provides such a basis for judicial review. Although it is widely understood that there is no easy answer to juvenile delinquency and the problems of juvenile crime, states have the procedural and substantive experience to address the complexities of the problem. As noted by the American Bar Association, the increasing federalization of juvenile crime has "no obvious benefit"²⁰² and may, in fact, have the effect of frustrating one of the original reasons for the passage of the JJDPa — to encourage and enable the states to experiment with different types of programs that work with juveniles.²⁰³ The federal government, and specifically the federal district court, has less of a chance to accomplish the specific goals of the juvenile delinquency system. By providing for review over the jurisdictional provision of the JJDPa, Congress recognized that the adverse consequences that come with federal prosecution of children militate against increasing federal prosecutions. Accordingly, there are persuasive reasons for courts to review the prosecutor's certification to ensure that only truly significant federal interests will outweigh these important policy rationales.

CONCLUSION

While the grounds for federal jurisdiction are present and continuously expanding, Congress has reiterated its position that in these matters, the federal government should defer to the states. A court has a responsibility to ensure that its jurisdiction has been properly invoked. Under the procedure established in *Gutierrez de Martinez*, a court can review a prosecutor's certification to ensure substantive compliance with the jurisdictional requirements. Congress, through the legislative history of the JJDPa, has provided the courts with manageable and workable standards, and it is the role of the judicial system to ensure that this deference is upheld.

As long as the judicial system continues to apply different procedural rules to children, the state, given its unique interest in the rearing and proper treatment of children, should ensure that the most appropriate forum for addressing children's needs is found. The overwhelming evidence is that in the arena of law enforcement generally and juvenile crime specifically, the state system is the appropriate venue. Because the treatment of a child will differ significantly based upon the certification decision, courts must ensure that there is in fact

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202. *Id.* at 11 n.17.

203. *See supra* Section I.B; *supra* note 3 and accompanying text.

a “substantial federal interest,” thus justifying the creation of a poor substitute for the juvenile court at the federal level.