Vanderbilt Law Review

Volume 58
Issue 4 *Issue 4 - May 2005*

Article 15

5-2000

There's No Place Like Home: The Availability of Judicial Review Over Certification Decisions Invoking Federal Jurisdiction under the Juvenile Justice and Delinquency Prevention Act

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NOTES

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I. INTRODUCTION

During the latter half of the twentieth century, society's perception of juvenile delinquents changed dramatically.[1] Once fairly

1. *See* Barry C. Feld, *The Transformation of the Juvenile Court – Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 327 (1999) (noting that "[t]he public . . . perceive[s] a significant and frightening increase in youth crime and violence"); *see also* S. REP. NO. 93-1011, at 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5285 (describing the mid-century increase in juvenile arrests for violent crimes, including murder, rape, and robbery).

characterized as "immature kids who might get arrested for truancy, shoplifting or joy riding," juvenile offenders have recently earned reputations as vicious criminals regularly committing such serious offenses as robbery, rape, and murder.[2] This apparent trend toward increased violence has resulted in a "get tough" approach to federal juvenile justice policies.[3] Accordingly, Congress has expanded the federal government's ability to prosecute certain juvenile offenders by broadening the scope of federal jurisdiction.[4]

The Comprehensive Crime Control Act of 1984, for example, authorizes federal prosecution of juveniles for certain violent crimes and serious drug offenses.[5] Most of these juvenile offenders had previously fallen under the exclusive jurisdiction of state authorities.[6] The Crime Control Act, however, permits federal prosecution whenever the Attorney General issues a certification that the case holds "a substantial [f]ederal interest."[7] This gateway provision enables federal prosecutors to deny juvenile offenders participation in state juvenile justice systems. The certification option thus gives federal officials the power to strip federal juvenile offenders of the potential benefits of participating in the states' comprehensive systems of rehabilitative programs.[8]

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2. SUSAN GUARINO-GHEZZI & EDWARD J. LOUGHRAN, BALANCING JUVENILE JUSTICE vii (1996) (quoting *Review & Outlook: Bad Boys*, WALL ST. J., Sept. 28, 1993, at A18, *available in* 1993 WL-WSJ 677809).

3. *See* Feld, *supra* note 1, at 327.

4. *See* United States v. Juvenile Male #1, 86 F.3d 1314, 1320-21 & n.8 (4th Cir. 1996); *see also* 18 U.S.C. § 5032 (1994 & Supp. IV 1998).

5. Comprehensive Crime Control Act of 1984, Pub. L. No 98-473, § 1201, 98 Stat. 1976, 2149-50. Before these amendments, federal jurisdiction turned only on the state's ability or desire to rehabilitate the juvenile offender. *See Juvenile Male #1*, 86 F.3d at 1320.

6. *See* discussion *infra* Part IV (regarding JJDPA's presumption of state jurisdiction).

7. 18 U.S.C. § 5032; *see also* United States v. Juvenile K.J.C., 976 F. Supp. 1219, 1222-23 (N.D. Iowa 1997). This certification authority has been delegated to the Deputy Assistant Attorneys General and the United States Attorneys. *See* 28 C.F.R. § 0.57 (1999).

8. State juvenile justice systems generally offer unique benefits and advantages for juvenile offenders. These benefits include an appearance before a state court judge specializing in juvenile cases rather than a federal district court judge unfamiliar with the special needs of juveniles. *See* Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 754-55 (finding "juvenile court judges are far more experienced in juvenile justice and [possess] a greater understanding of the unique developmental and mental needs and deficits of juveniles" than judges who normally handle adult offenders); *see also* Cox v. United States, 473 F.2d 334, 335 (4th Cir. 1973) (noting that "the federal system [has] no separate juvenile courts"). These judges have access to a wide array of state rehabilitation programs with which they are familiar, including, for example, boot camps, drug rehabilitation programs, group home environments, wilderness programs, job training and other educational programs. *See, e.g.*, 42 U.S.C. § 5667f (1994) (boot camps); DEAN CHAMPION, THE JUVENILE JUSTICE SYSTEM: DELINQUENCY, PROCESSING, AND THE LAW 482-83, 486-95 (2d ed. 1998) (group homes, wilderness programs, and educational programs); Julianne P.

Despite the potentially serious consequences for juveniles, many circuit courts of appeals have held that the substantive aspects of certification decisions remain within the discretion of the Attorney General and are therefore judicially unreviewable.[9] A few circuits, however, allow varying degrees of judicial review over federal prosecutors' substantive decisions regarding certification.[10] This Note considers the merits of these decisions and proposes an alternative analysis emphasizing the necessity of judicial review. Part II discusses the historical development of the federal government's relationship with the juvenile justice system, a relationship culminating in the presumption in favor of state jurisdiction established in the Juvenile Justice and Delinquency Prevention Act.[11] Part III analyzes the various circuit court decisions addressing whether the judiciary should review the Attorney General's certification that certain juvenile cases meet the criteria necessary to overcome this presumption. Part IV discusses juveniles' statutory interest in participating in state juvenile justice systems, an interest given inadequate consideration by the circuit courts. Finally, Part V addresses the due process issues arising in this context and concludes that the Constitution requires judicial review of Attorney General certification decisions that result in federal prosecution of certain juvenile offenders.

II. THE FEDERAL RELATIONSHIP WITH THE JUVENILE JUSTICE SYSTEM

Before the advent of a separate juvenile justice system a century ago, children committing criminal offenses faced the same procedures and punishments as adult criminals.[12] During this period, the

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Sheffer, Note, *Reconciling Punishment and Rehabilitation within the Juvenile Justice System*, 48 VAND. L. REV. 479, 499 n.100, 506 (1995) (noting specialized programs in Ohio including job training and substance abuse counseling and generally referring to the importance of such state programs). Throughout this Note, references to the "benefits" of participating in state systoms describe these unique aspects of the state programs. A detailed exploration of these rehabilitative programs available in various states, however, is beyond the scope of this Note.

9. *See, e.g.*, United States v. Smith, 178 F.3d 22, 25-26 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 257 (1999).

10. *See, e.g.*, United States v. Juvenile Male #1, 86 F.3d 1314, 1320-21 (4th Cir. 1996).

11. Juvenile Justice and Delinquency Prevention Act (JJDPA), Pub. L. No. 93-415, § 502, 88 Stat. 1109, 1134-35 (1974).

12. "Our common criminal law did not differentiate between the adult and the minor .... The child was arrested, put into prison, indicted by the grand jury, tried by a petit jury, under all the forms and technicalities of our criminal law ...." Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909). Age was irrelevant except in the application of legal presumptions. *See* United States v. Smith, 675 F. Supp. 307, 310 (E.D.N.C. 1987); Robert Bienstock, *The Federal Juvenile Delinquency Act*, 14 ST. JOHN'S L. REV. 214, 215 (1939). For example, at common law, persons under the age of seven were irrebuttably presumed incapable of entertaining a

federal government possessed extremely limited criminal authority.[13] Federal criminal law rarely dealt with crimes traditionally punishable by the states, instead reaching only conduct affecting the operations of the national government.[14] Since minors rarely violated these federal laws, the paths of federal prosecutors and children seldom crossed.[15] In the rare instances when juveniles did violate federal law, however, federal prosecutors treated them in the same manner as adults.[16]

The first independent juvenile justice system appeared in 1899 when the Illinois legislature established the Juvenile Court of Cook County.[17] Over the next ten years, more than thirty states adopted similar systems to handle the punishment and rehabilitation of juveniles.[18] Most of these states prohibited criminal prosecution of children except by special permission of juvenile court judges.[19] Such policies resulted when Progressive reformers successfully convinced state legislatures that young people should not face long-term incarceration because prison would transform them into hardened criminals.[20] The reformers believed that an alternative juvenile justice system would transform young troublemakers into productive members of society.[21]

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criminal intent. *See* Allen v. United States, 150 U.S. 551, 558-59 (1893); Bienstock, *supra*, at 215. The same presumption applied to those between the ages of seven and fourteen, though this presumption was rebuttable. *See Allen*, 150 U.S. at 558-59; Bienstock, *supra*, at 215.

13. *See, e.g.*, United States v. DeWitt, 76 U.S. (9 Wall.) 41, 45 (1869) (holding that the federal government does not possess any general police power); *see also* L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 64-65 (1948) (chronicling the development of federal criminal law); Stephen Chippendale, Note, *More Harm than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 458 (1994) (stating "the federal government possessed extremely limited criminal authority prior to the Civil War").

14. *See* Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117, 120 (1987); Chippendale, *supra* note 13, at 458. While certain congressional acts expanded federal criminal law, *see* Miner, *supra*, at 120, 122-23, the Supreme Court prevented any significant expansion until the twentieth century, *see id.* at 122-23.

15. Children rarely threatened the operations of the government and normally committed petty crimes like shoplifting and truancy. *See* WALTER C. RECKLESS & MAPHEUS SMITH, JUVENILE DELINQUENCY 1-6 (1932) (describing juvenile crimes like vandalism, truancy, and larceny).

16. *See* United States v. Borders, 154 F. Supp. 214, 215 (N.D. Ala. 1957) (noting that, traditionally, "[t]he juvenile offender against the laws of the United States was treated and prosecuted in the same manner as an adult"); *supra* note 12.

17. *See* Mack, *supra* note 12, at 107. For more detail regarding the establishment of this court, see JOHN C. WATKINS, JR., THE JUVENILE JUSTICE CENTURY 43-46 (1998).

18. *See* Mack, *supra* note 12, at 107.

19. *See id.* at 109.

20. *See* Biensteck, *supra* note 12, at 215-16. For more detail regarding the general origins and beliefs of the Progressive movement and its intersection with juvenile justice, see Feld, *supra* note 1, at 334-40.

21. *See* Mack, *supra* note 12, at 107 (discussing the need to turn juveniles into "worthy citizen[s]" rather than criminals).

By 1925, juvenile courts existed in all but two states.[22] Twenty years later, an independent system designed to handle all juvenile offenders existed in every state.[23] The first half of the twentieth century thus witnessed the establishment of a tradition of placing juvenile offenders into rehabilitative state juvenile justice systems.

As the states developed these juvenile court systems, Congress reconsidered how the federal government should treat juveniles violating federal law. Realizing that federal juvenile offenders would also benefit from the rehabilitative programs available in state systems,[24] Congress in 1932 authorized United States attorneys to forego federal prosecution of juvenile offenders.[25] This power arose if the Department of Justice found that the juvenile's actions violated both federal and state law and that the surrender of federal jurisdiction served the best interests of the United States as well as the juvenile.[26] The 1932 legislation thus constituted Congress's first attempt to further the best interests of federal juvenile offenders by affording them access to the rehabilitative programs available in recently developed state systems.[27] Significantly, though, the Act failed to establish separate treatment of juveniles remaining in the federal system[28] and lacked any general, comprehensive provisions on juvenile delinquency.[29]

Congress provided a degree of separate treatment when it passed the Federal Juvenile Delinquency Act ("FJDA") in 1938.[30] An important aim of this groundbreaking effort was to recreate some of the beneficial features of state juvenile justice systems within the federal system.[31] Traditionally, juvenile offenders remaining in the federal system had been prosecuted and detained like adult offenders,[32] thus acquiring the lifelong stigma of being branded crimi-

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22. Only Maine and Wyoming did not have juvenile courts by 1925. *See* Charles W. Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 451 (1985).

23. *See id.*

24. *See infra* note 27 and accompanying text.

25. *See* Act of June 11, 1932, Ch. 243, 47 Stat. 301 (allowing the Attorney General to surrender to the appropriate state authorities prosecution of juveniles under federal law).

26. *See id.*

27. *See id.* (displaying Congress's purpose to cooperato with the states "in the care and treatment of juvenile offenders").

28. *Id.*; *see also* United States v. Smith, 675 F. Supp. 307, 311 & n.2 (E.D.N.C. 1987).

29. *See* United States v. Borders, 154 F. Supp. 214, 215 (N.D. Ala. 1957).

30. Federal Juvenile Delinquency Act (FJDA), ch. 486, 52 Stat. 764 (1938).

31. *See Borders*, 154 F. Supp. at 215 (quoting legislative history to show FJDA's intent to emulate some beueficial state procedures).

32. *See id.*; *supra* notes 12-16 and accompanying text (discussing the traditional treatment of federal juvenile offenders).

nals.[33] In passing FJDA, however, Congress recognized that minors, lacking maturity and judgment, often failed to comprehend the nature of their actions.[34] What juvenile offenders most needed, therefore, was the opportunity to reform themselves away from a criminal environment.[35]

The FJDA provided such an alternative by allowing the Attorney General to prosecute juvenile offenders remaining in the federal system using methods differing from those traditionally available.[36] Those juveniles[37] not surrendered to state jurisdiction under the 1932 Act could be prosecuted for "juvenile delinquency" with the consent of both the Attorney General and the accused.[38] In effect, FJDA's broad definition of "juvenile delinquency" gave the Attorney General the option to treat juveniles differently than adults.[39]

Significantly, though, the decisions to select this alternative method of prosecution or surrender federal jurisdiction remained entirely within the prosecutorial discretion of the Attorney General.[40] The Attorney General also had complete discretion over the availabil-

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33. *See Borders*, 154 F. Supp. at 215 (noting the legislative history's discussion of this harmful treatment).

34. *See id.* at 215-16; United States v. Fotto, 103 F. Supp. 430, 431 (S.D.N.Y. 1952).

35. *See* Barkman v. Sanford, 162 F.2d 592, 594 (5th Cir. 1947) ("The baneful effect of keeping young, first offenders in the common jail in company with case-hardened criminals has long since had legislative attention, noticeably in the Federal Juvenile Delinquency Act . . . ."); United States *ex rel.* Stinnett v. Hegstrom, 178 F. Supp. 17, 19 (D. Conn. 1959) (quoting letter of the Attorney General regarding need to "reclaim[]" juveniles and make them "useful citizens"). Though "the federal system [had] no separate juvenile courts[,]" the separate treatment occurred procedurally as the federal district courts under the FJDA could try juveniles for "juvenile delinquency." Cox v. United States, 473 F.2d 334, 335 (4th Cir. 1973).

36. *See* United States v. Smith, 675 F. Supp. 307, 311 (E.D.N.C. 1987). For example, those charged with juvenile delinquency could not be sentonced to a term beyond the age of twenty-one. *See id.*

37. The Act defined "juvenile" as an individual "seventeen years of age or under." Federal Juvenile Delinquency Act (FJDA), ch. 486, § 1, 52 Stat. 764, 764 (1938). The statute applied only to juveniles whose underlying criminal offenses were not punishable by life imprisonment or death. *See* § 2.

38. *See id.* The Act defined "juvenile delinquency" as "an offense against the laws of the United States committed by a juvenile and not punishable by death or life imprisonment." § 1. This charge of juvenile delinquency would supercede the specific offense allegedly committed by the accused. *See* § 2.

39. *See supra* note 35-36; *infra* note 41.

40. *See* § 2. (retaining the discretion allowed in the 1932 Act for surrendering jurisdiction and allowing prosecution for "juvenile delinquen[cy] if the Attorney General *in his discretion* so directs . . . .") (emphasis added); *see also Cox*, 473 F.2d at 336; *Smith*, 675 F. Supp. at 311; Barnes v. Pescor, 68 F. Supp. 127, 128 (W.D. Mo. 1946). The FJDA thereby allowed the Attorney Geueral to prosecute juveniles remaining in the federal system in the most desirable way depending on the iuterests involved. *See Stinnett*, 178 F. Supp. at 19 ("[The FJDA] . . . makes it possible, if it appears desirable, to prosecute the more serious juveuile offenders in the same manner as adults.").

ity of rehabilitative programs.[41] With federal prosecutors retaining such complete discretion over their fate, juvenile offenders could not expect to receive the enhanced, specialized treatment available in the state juvenile systems designed specifically to meet the needs of juveniles. Thus, FJDA failed to provide the full benefit of participating in the state systems. These circumstances clearly demanded a legislative response. If Congress intended to extend the availability of the benefits of juvenile justice programs, it needed to significantly revise the framework of federal juvenile justice legislation.

Congress eventually implemented these sweeping changes in the Juvenile Justice and Delinquency Prevention Act ("JJDPA") of 1974.[42] The JJDPA created agencies, authorized funding, and furnished other federal assistance in order to provide a "comprehensive, coordinated approach" to improving juvenile justice in the states.[43] The Act also created the current statutory framework for determining whether accused juveniles should face federal or state prosecution.[44] Specifically, JJDPA provides for automatic state jurisdiction over the broadly defined charge of "juvenile delinquency."[45] By removing federal prosecutors' discretionary control over jurisdiction, this provision effectively established the current presumption in favor of state jurisdiction over juveniles committing federal offenses.[46] This presumption

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41. The Act provided the Attorney General complete control over the provision of any public or private rehabilitative programs, § 4, 52 Stat. 764, in contrast to the parallel authority of experienced state juvenile judges, *see supra* note 8. For other reasons why this discretionary power over the rehabilitation programs did not amount to the full benefit of participating in the state systems, see *infra* note 186.

42. Juvenile Justice and Delinquency Prevention Act (JJDPA), Pub. L. No. 93-415, § 502, 88 Stat. 1109, 1134 (1974). Modern courts also refer to the existing legislation by its original title, the Federal Juvenile Delinquency Act. *See* United States v. Chambers, 944 F.2d 1253, 1257 (6th Cir. 1991). Congress amended the FJDA in 1948, though these changes were not substantial. *See Smith*, 675 F. Supp. at 311; *see also* S. REP. NO. 93-1011, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5284 ("[T]he Federal Juvenile Delinquency Act . . . [was] virtually unchanged for . . . thirty-five years.").

43. 88 Stat. at 1109 (describing JJDPA as an act "[t]o provide a comprehensive, coordinated approach to the problems of juvenile delinquency").

44. JJPDA, § 502. The definition of "juvenile" remained someone "who has not attained his [or her] eighteenth birthday." § 501.

In addition to the changes to this statutory framework, further procedural change included, for example, providing juveniles the rights to counsel, to confinement in a facility near the juvenile's home, and to a speedy trial. *See* §§ 504-06.

45. § 502. The Act redefined "juvenile delinquency" as "the violation of a [federal] law . . . committed by a person prior to his [or her] eighteenth birthday," and the amendment clarified that for the "purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency," the definition of "juvenile" would include those "who ha[d] not attained [their] twenty-first birthday[s]." § 501.

46. *See* § 502; *see also* Robert E. Shepherd, Jr., *Trying Juveniles in Federal Court*, 9 CRIM. JUST., at 45 (Fall 1994) (referring to the current statutory framework). The Attorney General

can be overcome only by the Attorney General's proper certification.[47] Accordingly, under JJDPA as originally enacted, any juvenile accused of committing a federal offense was subject to state jurisdiction unless the Attorney General, after an investigation, certified to a federal district court that the state either (1) refused or lacked jurisdiction over the juvenile or (2) lacked programs sufficient to meet the needs of juveniles.[48]

Following certification, juvenile offenders enter the federal juvenile system to appear before a federal district court.[49] Under JJDPA, the Attorney General currently retains the option of either charging an offender with "juvenile delinquency" or seeking a transfer of the offender to adult status.[50] If the Attorney General pursues a transfer, however, JJDPA imposes certain procedural requirements that must be met before juveniles remaining in the federal system may be criminally prosecuted as adults.[51] Criminal prosecution may occur only after a proper motion by the Attorney General and a finding by the district court, after a hearing, that a transfer to adult status is in the "interest of justice."[52] JJDPA lists six factors for the district court to consider in determining the appropriateness of allowing criminal prosecution of the juvenile.[53] Thus, the statute explicitly provides for judicial review

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retained discretion over the availability of rehabilitative programs for juvenile offenders remaining in the federal system. *See* JJDPA § 510.

47. The relevant part of the section read:

> A juvenile alleged to have committed an act of juvenile delinquency shall not be proceeded against in any court of the United States *unless* the Attorney General, after investigation, certifies to an appropriate district court of the United States that the juvenile court or other appropriate court of a State (1) does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, or (2) does not have available programs and services adequate for the needs of juveniles.
>
> *If the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such State.*

§ 502 (emphasis added).

48. *Id.*

49. *See id.*

50. *Id.* For the current statute regarding federal juvenile transfers, which has changed little since JJDPA, see 18 U.S.C. § 5032 (1994 & Supp. IV 1998).

51. § 502, 88 Stat. at 1134; *see also* United States v. Smith, 675 F. Supp. 307, 311 (E.D.N.C. 1987).

52. JJDPA § 502. This option of criminal prosecution, however, was only available for juveniles who, at the age of sixteen or older, committed felonies which were traditionally punishable by a maximum of ten years or more imprisonment, life imprisonment, or death. *See id.*

53. *Id.* These factors included

> the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior juvenile 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; [and] the availability of programs designed to treat the juvenile's behavioral problems. *Id.*

of the merits of a prosecutor's motion to transfer a juvenile to adult status.[54] Considered together, the procedural requirements of JJDPA increase the probability that juvenile offenders will avoid criminal prosecution by facing a lesser charge of juvenile delinquency, even if they remain in the federal system.[55]

Congress did not revise this legislation again until the Comprehensive Crime Control Act of 1984.[56] Procedural amendments in this Act subtly, yet significantly, altered the assessment of whether federal or state courts should handle a juvenile offender.[57] In addition to the two potential justifications for Attorney General certification originally articulated in JJDPA,[58] Congress added a third: certification that "the offense charged is a crime of violence that is a felony . . . and that there is a substantial [f]ederal interest in the case or the offense to warrant exercise of [f]ederal jurisdiction."[59] This amendment effectively completed the current framework governing delinquency proceedings for juveniles committing federal crimes.[60]

The structure of this statute, currently codified at 18 U.S.C. § 5032,[61] has changed little since this 1984 legislation[62] and remains

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54. *See id.* (requiring a "hearing" by the federal district court to determine whether the "transfer would be in the interests of justice").

55. *Id.* This increased possibility was available regardless of the nature of the crime. *See Smith*, 675 F. Supp. at 311 (stating that, for the first time, "juveniles who were alleged to have committed offenses punishable by death or life imprisonment were . . . not excluded from the protections of the Act").

56. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1201, 98 Stat. 1976, 2149-50.

57. *Id.*

58. *See supra* text accompanying note 48.

59. § 1201, 98 Stat. at 2149-50. Additionally, in place of "a [felony] crime of violence," the statute enumerated certain offenses that could give rise to a certification, *id.*, which currently includes "section 401 of the Controlled Substances Act . . . or [certain sections] of the Controlled Substances Import and Export Act." 18 U.S.C. § 5032 (1994 & Supp. IV 1998).

Though this amendment could be read to require "a substantial [f]ederal interest" to accompany all three methods of certification, courts generally find that this phrase only applies to the third method of certification. *See, e.g.*, United States v. Male Juvenile, 148 F.3d 468, 470 n.2 (5th Cir. 1998) (agreeing with the majority of cases which find that the "substantial federal interest" requirement applies only to the crime-of-violence method of certification).

60. Less significant amendments adjusting statutory language and adding to the enumerated acts allowing certification occurred in, for example, 1988, 1990, 1994 and 1996. *See* 18 U.S.C. § 5032 (1994 & Supp. IV 1998) (describing these amendments).

61. The relevant portion of the statute currently reads:

> A juvenile alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that (1) the juvenile court or other appropriato court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the Stato does not have available programs and

divisible into two main portions. First, as described above, the statute creates a presumption in favor of state jurisdiction and outlines the three routes through which a federal prosecutor can overcome this presumption.[63] Second, if able to overcome this presumption through the certification process, the Attorney General may move in federal district court to transfer the juvenile to adult status.[64]

Federal juvenile justice legislation has remained silent with respect to the possibility of judicial review of the Attorney General's certification decisions since its inception.[65] The statutes do not suggest any potential procedural requirements that might help to ensure an accurate determination of the enumerated criteria for denying juveniles' participation in state juvenile justice systems.[66] Faced with this statutory silence, juvenile offenders disputing Attorney General certification decisions have naturally sought clarification of the availability of judicial review.

III. APPELLATE DECISIONS REGARDING JUDICIAL REVIEW OF CERTIFICATION

Absent congressional direction regarding the appropriate extent of judicial review, the issue inevitably arose in the federal courts. Juvenile offenders have recently appeared before several circuit courts, asking for review of prosecutors' decisions denying them participation in state juvenile justice systems. Of the circuits that have faced this issue,[67] a majority has held that certification results in vir-

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services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony or an [enumerated] offense . . . and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

Id.

62. *Compare* Juvenile Justice and Delinquency Prevention Act (JJDPA), Pub. L. No. 93-415, § 502, 88 Stat. 1109, 1134 (1974), *with supra* noto 61 (quoting 18 U.S.C. § 5032 as currently enacted).

63. *See* 18 U.S.C. § 5032; *supra* notes 44-48, 57-59 and accompanying text.

64. *See* § 5032; *supra* notes 49-54 and accompanying text.

65. *See* § 5032; *see also* United States v. Juvenile No. 1, 118 F.3d 298, 304 (5th Cir. 1997).

66. *See* § 5032.

67. These circuits include the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Eleventh and D.C. Circuits, leaving the remaining circuits silent on the issue. *See, e.g.*, United States v. Smith, 178 F.3d 22, 25 (1st Cir. 1999) (listing some of these circuits), *cert. denied*, 120 S. Ct. 257 (1999). Though the Ninth Circuit is not generally regarded as part of either side of the issue, *see, e.g., id.* (not listing the Ninth Circuit); United States v. Jarrett, 133 F.3d 519, 538 (7th Cir. 1998) (not listing the Ninth Circuit), this circuit stated before the 1984 amendments that the trial judge had "no duty [to] independently ... investigate and determine if the certificate refers to the proper state court." United States v. Gonzalez-Cervantes, 668 F.2d 1073, 1077 (9th Cir. 1981).

tually automatic federal jurisdiction, with no opportunity for judicial review of prosecutors' substantive judgments regarding the decision to certify.[68] Generally, though, these courts have allowed review for bad faith[69] or lack of technical compliance with the statute.[70] Standing alone on the other end of the spectrum, the Fourth Circuit allows full judicial review of the Attorney General's certification decisions.[71] A few circuits fall somewhere in between these two contrasting positions and ambiguously allow varying degrees of judicial review.[72]

This circuit, however, provided little useful analysis, relied on factors not relevant to this Note, and never fully addressed the issue like the other circuits. *See id.* at 1077-78 & n.6.

68. *See Smith*, 178 F.3d at 25; *Jarrett*, 133 F.3d at 541; *In re* Sealed Case, 131 F.3d 208, 216 (D.C. Cir. 1997); United States v. Juvenile No. 1, 118 F.3d 298, 304 (5th Cir. 1997); United States v. I.D.P., 102 F.3d 507, 513 (11th Cir. 1996). Some circuit decisions disallowing judicial review occurred before the 1984 amendment. *See* United States v. C.G., 736 F.2d 1474, 1477-78 (11th Cir. 1984); United States v. Vancier, 515 F.2d 1378, 1381 (2d Cir. 1975).

69. *See, e.g., I.D.P.*, 102 F.3d at 511. For an example of "bad faith" in the context of such executive determinations, see the Second Circuit decisions cited in *C.G.*, 736 F.2d at 1478.

70. "Technical compliance" includes, for instance, whether "the verifying party is . . . a proper delegate of the Attorney General" or whether "the certification [was] filed in a timely fashion." *I.D.P.*, 102 F.3d at 511 & n.4 (quoting *C.G.*, 736 F.2d at 1477); *see also Jarrett*, 133 F.3d at 541. Such superficial review fails to reach the substance of the prosecutor's judgment. *See, e.g., I.D.P.*, 102 F.3d at 512 (finding the prosecutor's "subjective" assessment unreviewable).

A few courts in the majority have noted the pliant nature of the proper extent of this "technical" review. For example, the Fifth Circuit noticed that "technical" review could be extended to include more substantive aspects of prosecutor decisions, e.g., whether the felony at issue was one of violence, while remaining silent on the overall acceptability of these decisions. *See Juvenile No. 1*, 118 F.3d at 304 n.10. While it erroneously insisted that such review "did not . . . consider whether the government's certification was substantively reviewable," *id.*; *see also infra* Part III.C (displaying why such a characterization is erroneous), the *Juvenile No. 1* court nevertheless declined to "consider the propriety of review under these circumstances." *Juvenile No. 1*, 118 F.3d at 304 n.10. Another decision, *Sealed Case*, 131 F.3d at 213 (review of whether the crime was one of violence), casually lumped these higher degrees of review with other "facial" determinations when acknowledging the availability of review to determine "facial adequacy" of federal jurisdiction, *id.* These courts can be grouped with the majority that only allows review for "technical compliance" because their casualness or silence is outweighed by their substantial reliance on the analysis of the preceding majority circuits. *See Sealed Case*, 131 F.3d at 212-13 (setting forth the majority's analysis without objection before rejecting the Fourth Circuit's minority stance); *Juvenile No. 1*, 118 F.3d at 304 (explicitly following the Eleventh Circuit); *see also infra* text accompanying note 140 (contrasting these courts with the much more vague and tortured Third Circuit analysis).

71. *See* United States v. Juvenile Male #1, 86 F.3d 1314, 1320-21 (4th Cir. 1996). Despite the building opposition of the majority of the other circuits, the Fourth Circuit remains firm in requiring review. *See* United States v. T.E.S., No. 98-4423, 1998 WL 774144, at *3 (4th Cir. Nov. 6, 1998) (unpublished table decision); United States v. NJB, 104 F.3d 630, 632 (4th Cir. 1997).

72. *See* United States v. Juvenile Male J.A.J., 134 F.3d 905 (8th Cir. 1998); *Impounded*, 117 F.3d 730 (3d Cir. 1997); United States v. Juvenile Male, 923 F.2d 614 (8th Cir. 1991).

A. The Majority

The majority analysis traces its roots to the Second Circuit's decision in *United States v. Vancier*.[73] In a decision preceding the Crime Control Act of 1984 amendments, the *Vancier* court based its holding against judicial review on two general analytic foundations.[74] First, the *Vancier* court examined the language of JJDPA and concluded that Congress did not intend to allow judicial review of certification decisions.[75] The court initially noted the absence of any explicit provision authorizing judicial review.[76] It also emphasized the lack of any "standards" that might guide judicial determination of whether the Attorney General had correctly certified that state jurisdiction was inappropriate or that state juvenile justice programs were inadequate.[77] The court concluded that the absence of such express provisions indicated Congress's intentional disapproval of judicial review.[78]

The Second Circuit's second analytical foundation relied on the principle that the executive branch normally possesses the authority to make unreviewable decisions in connection with law enforcement.[79] Specifically, the court cited several prior decisions allowing the Attorney General to make various unreviewable determinations regarding the prosecutorial process.[80] After defining this category of "unreviewable determinations," the court determined that JJDPA certification fell squarely within this category.[81] In effect, the *Vancier* court charac-

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73. United States v. Vancier, 515 F.2d 1378 (2d Cir. 1975); *see also Impounded*, 117 F.3d at 733 ("The seminal case is *United States v. Vancier*.") Before the 1984 Amendments, the Eleventh Circuit was "persuaded by the analysis" of the *Vancier* court and quoted the decision's relevant analysis in full. *See C.G.*, 736 F.2d at 1478 (quoting *Vancier*, 515 F.2d at 1380-81).

74. *Vancier*, 515 F.2d at 1380-81.

75. *Id.*

76. *See id.* at 1380.

77. *See id.*

78. *See id.* at 1380-81. In the court's own words, it determined that Congress did not intend to "grant the power to the courts to make the final *decision*." *Id.* at 1381 (emphasis added).

79. *See id.*

80. *See id.* The Second Circuit cited its decision in *United States v. Carter*, 493 F.2d 704 (2d Cir. 1974), and listed several other cases denying review of prosecutorial decisions. *See Vancier*, 515 F.2d at 1381 (citing Ullmann v. United States, 350 U.S. 422, 431-34 (1956) (involving the determination by a United States Attorney that the public interest required that a witness be compelled to testify under a grant of immunity); United States v. Singleton, 460 F.2d 1148, 1154-55 (2d Cir. 1972) (discussing certification by the Attorney General that the proceeding involved a person believed to have participated in organized crime); United States v. Comiskey, 460 F.2d 1293, 1297-98 (7th Cir. 1972) (assessing certification by a United States Attorney that an interlocutory appeal is not being taken for the purposes of delay)).

81. *Id.*

terized certification as a traditional exercise of exclusive prosecutorial discretion.[82]

Significantly, though, both *Vancier* and its subsequent Eleventh Circuit companion, *United States v. C.G.*,[83] were decided before Congress amended JJDPA with the Comprehensive Crime Control Act of 1984. The introduction of a third possible criterion for overcoming the presumption of state jurisdiction—certification that the crime involved both a violent felony and a "substantial federal interest"—presented a radically different justification for the imposition of federal jurisdiction.[84] After the 1984 amendments, therefore, *Vancier* and its progeny were no longer entirely relevant for situations involving this new basis for certification under § 5032.[85] Nevertheless, the majority of courts addressing this issue after 1984 sustained the vitality of the *Vancier* decision.[86] Though some courts did not cite *Vancier* directly, the circuits in the majority clearly adopted and expanded upon its two-part analytical framework.[87]

Like the Second Circuit in *Vancier*, courts considering appeals arising under the post-1984 statute consistently emphasized the absence of explicit language authorizing judicial review.[88] These courts

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82. *Id.* (equating certification with the jurisprudence upholding traditional prosecutorial discretion). *See generally* Wayte v. United States, 470 U.S. 598, 607-08 (1985) (explaining traditional prosecutorial discretion).

83. United States v. C.G., 736 F.2d 1474, 1478 (11th Cir. 1984).

84. *Compare* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1201, 98 Stat. 1976, 2149-50, *with* Juvenile Justice and Delinquency Prevention Act (JJDPA), Pub. L. No. 93-415, § 502, 88 Stat. 1109, 1134-35 (1974).

85. *See* United States v. I.D.P., 102 F.3d 507, 511 (11th Cir. 1996) ("[O]ur decision in *United States v. C.G.* . . . does not resolve entirely the matter before us . . . [since] the statutory language at issue here . . . was added to § 5032 in 1984 subsequent to our decision in *United States v. C.G.*").

The current status of the Second Circuit's position is unclear after its decision in *United States v. Doe*, 49 F.3d 859 (2d Cir. 1995). The court actually looked for the quality of violence in the offense, while iguoring its decision in *Vancier* and citing a minority-leaning Eighth Circuit decision in the process. *See Doe*, 49 F.3d at 866-67 (citing United States v. Juvenile Male, 923 F.2d 614, 620 (8th Cir. 1991)); *see also infra* notes 126-29 and accompanying text (evaluating the Eight Circuit decision). But without any analysis or recognition of its inconsistency, *see, e.g., Doe*, 49 F.3d at 866-67 (citing the Eighth Circuit only for the outcome of its review rather than for its decision allowing review), the Second Circuit's position on the matter remains entirely unresolved after the 1984 amendments.

86. *See, e.g.*, United States v. Juvenile No. 1, 118 F.3d 298, 304 n.9 (5th Cir. 1997); *I.D.P.*, 102 F.3d at 510-11 (adopting the analysis of *Vancier* and *C.G.* in the post-1984 jurisprudence).

87. *See, e.g., Juvenile No. 1*, 118 F.3d at 306-07 (looking to legislative history to show statutery intent); *I.D.P.*, 102 F.3d at 510-11.

88. *See* United States v. Smith, 178 F.3d 22, 26 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 257 (1999); United States v. Jarrett, 133 F.3d 519, 539 (7th Cir. 1998) ("There is no congressional invitation for the courts to make . . . [such an] assessment."); *In re* Sealed Case, 131 F.3d 208, 212-13 (D.C. Cir. 1997) (citing, *inter alia*, *Vancier*, 515 F.2d at 1380); *Juvenile No. 1*, 118 F.3d at

further observed, however, that § 5032 specifically required judicial review of Attorney General decisions to pursue the transfer of juvenile offenders to adult status.[89] By contrasting this requirement with the statute's silence regarding judicial review of certification decisions, courts adopting the majority position determined that this exclusion revealed Congress's intent to disallow review of certifications.[90] Similarly, these courts compared the lack of suggested standards for judicial review of certification with the six standards Congress had included in § 5032 to assist in judicial review of the Attorney General's transfer recommendations.[91] The absence of explicit standards for judicial review of certification decisions, contrasted with the provision of such explicit standards for reviewing transfer recommendations, convinced the majority of circuits that Congress did not intend to allow judicial review of certification.[92]

Some majority courts expanded on the statutory intent analysis by looking to the legislative history preceding the Crime Control Act. The Fifth and Eleventh Circuits, for example, examined a passage from a Senate report regarding the addition of the third certification category.[93] A passage in this report indicated legislative intent to "afford" the Attorney General the authority to determine whether a certain crime posed a special federal interest.[94] The Fifth and Eleventh Circuits interpreted this language to mean that Congress intended to give federal prosecutors sole authority to certify juveniles for federal prosecution.[95]

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304 (citing, *inter alia*, *Vancier*, 515 F.2d at 1380); *I.D.P.*, 102 F.3d at 511 (citing *Vancier*, 515 F.2d at 1380-81).

89. *See Smith*, 178 F.3d at 25; *Jarrett*, 133 F.3d at 539; *Sealed Case*, 131 F.3d at 212; *Juvenile No. 1*, 118 F.3d at 304; *I.D.P.*, 102 F.3d at 511; *see also* 18 U.S.C. § 5032 (1994 & Supp. IV 1998) ("[C]riminal prosecution . . . may be begun by motion to transfer of the Attorney General in the appropriate district court . . . , *if such court finds, after hearing*, such transfer would be in the interest of justice.") (emphasis added).

90. *See Jarrett*, 133 F.3d at 539 ("[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.") (alteration in original) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)); *see also Smith*, 178 F.3d at 25; *Sealed Case*, 131 F.3d at 212; *Juvenile No. 1*, 118 F.3d at 304-05; *I.D.P.*, 102 F.3d at 511.

91. *See Smith*, 178 F.3d at 25; *Jarrett*, 133 F.3d at 539; *Sealed Case*, 131 F.3d at 212-13; *Juvenile No. 1*, 118 F.3d at 304; *I.D.P.*, 102 F.3d at 511, 513; *see also* 18 U.S.C. § 5032 (listing these six standards).

92. *See Smith*, 178 F.3d at 25; *Jarrett*, 133 F.3d at 539; *Sealed Case*, 131 F.3d at 212; *Juvenile No. 1*, 118 F.3d at 305; *I.D.P.*, 102 F.3d at 511, 513; *see also supra* note 90 (*Russello* quotation).

93 *See Juvenile No. 1*, 118 F.3d at 306-07; *I.D.P.*, 102 F.3d at 512.

94. *See Juvenile No. 1*, 118 F.3d at 306-07; *I.D.P.*, 102 F.3d at 512.

95. *See Juvenile No. 1*, 118 F.3d at 306-07; *I.D.P.*, 102 F.3d at 512.

A more recent circuit court decision denying judicial review of certification expanded upon the statutory intent analysis by examining the syntax of the certification language. In *United States v. Jarrett*, the Seventh Circuit held that the language of § 5032 unambiguously vested complete discretion in the Attorney General.[96] By characterizing the statutory language as conditioning federal jurisdiction upon the mere existence of any technically compliant certification, the court concluded that § 5032 required complete deference to the subjective findings of the Attorney General.[97] This interpretation thus precluded objective review of whether a substantial federal interest actually existed.[98] In effect, the *Jarrett* court found that the Attorney General's act of certification constituted the only criterion required to overcome the initial presumption in favor of state jurisdiction.[99]

Adhering to the analytical framework established in *Vancier*, courts in the post-1984 majority have also emphasized the traditional assumption that any exercise of prosecutorial discretion is unreviewable.[100] In addition, these courts have expanded upon this general premise, specifically focusing on the traditional prosecutorial discretion of *federal* prosecutors.[101] For example, courts in the majority have repeatedly compared the certification determination to the federal prosecutor's decision to prosecute any case in the federal forum.[102] Finding that both decisions draw on executive considerations such as enforcement priorities and deterrence value, the majority of circuits have determined that certification merely constitutes another exercise

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96. *Jarrett*, 133 F.3d at 538.

97. *See id.* at 538-39.

98. *See id.*

99. *Id.*

100. *See Juvenile No. 1*, 118 F.3d at 306 (referring to the description of general prosecutorial discretion in *Wayte v. United States*, 470 U.S. 598, 607 (1985)); *see also supra* notes 79-82 and accompanying text (discussing the second part of *Vancier*'s analytical framework).

101. *See Jarrett*, 133 F.3d at 539-40 (looking to the United States Attorneys' Manual); *In re* Sealed Case, 131 F.3d 208, 214, 215 (D.C. Cir. 1997) (referring to the decision to "invoke the power of the federal government"); *Juvenile No. 1*, 118 F.3d at 305-06 (looking to the United States Attorney's Manual); United States v. I.D.P., 102 F.3d 507, 510-11 (11th Cir. 1996) (comparing the certification power to the federal "authority to decide whether to prosecute a case in a federal fornm").

Though the cases cited in *Vancier* regarding prosecutorial discretion solely address federal prosecutors, the category in which the court placed the certification process was situations where executive branches generally have this unreviewable authority. *See United States v. Vancier*, 515 F.2d 1378, 1381 (2nd Cir. 1975) ("[This] falls into the category of unreviewable determinations to be made, *in this instance*, by the Attorney General.") (emphasis added). The court never distinguishes any specific authority held by federal prosecutors. *Compare id.*, *with Sealed Case*, 131 F.3d at 214.

102. *See Sealed Case*, 131 F.3d at 214; *Juvenile No. 1*, 118 F.3d at 306; *I.D.P.*, 102 F.3d at 512-13; *see also Jarrett*, 133 F.3d at 539 ("Obviously, first and foremost among this genre is the ultimate decision to prosecute someone in federal court . . . .").

of a prosecutor's unreviewable power to invoke the federal government's judicial authority.[103]

Some circuits also looked to the United States Attorneys' Manual for support in sustaining the exclusive discretion of federal prosecutors.[104] Again emphasizing the omission of clear statutory standards, these courts pointed to the Manual's repeated use of the term "substantial federal interest" as a guideline for the appropriate exercise of general prosecutorial discretion.[105] Describing the "substantial federal interest" inquiry as vital to federal prosecutors in any decision invoking federal jurisdiction, these circuits characterized the certification process as a regular and appropriate exercise of federal prosecutors' discretionary powers.[106]

B. The Minority

The Fourth Circuit's opinion in *United States v. Juvenile Male #1* stands alone in explicitly allowing full judicial review of the entire certification process.[107] In *Juvenile Male #1*, the court initially conceded that the Attorney General's decision regarding the presence of "a substantial federal interest" deserves at least some deference due to its similarity with the forms of prosecutorial discretion traditionally free from judicial review.[108] Unlike the courts in the majority, however, the Fourth Circuit also required an objective review of whether a substantial federal interest actually existed.[109] The court thus required judicial review of the substantive determinations of federal prosecutors.

The Fourth Circuit used the Supreme Court's Decision in *Gutierrez de Martinez v. Lamagno*[110] as the focus of its analysis.[111] The *Lamagno* Court upheld judicial review of an Attorney General certifi-

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103. *See, e.g., Sealed Case*, 131 F.3d at 214. The District of Columbia Circuit also found that § 5032 certification enabled federal prosecutors to interpret statutes in accordance with their constitutional duty to "faithfully execute[]" laws invoking federal jurisdiction. *Id.* at 215 (quoting U.S. CONST. art. II, § 3). Characterized in this manner, executive branch certification comports with the three-part constitutional structure of the federal government. *See id.*

104. *See Jarrett*, 133 F.3d at 539-40; *Juvenile No. 1*, 118 F.3d at 305-06.

105. *See Jarrett*, 133 F.3d at 539-40; *Juvenile No. 1*, 118 F.3d at 305-06.

106. *See Jarrett*, 133 F.3d at 539-40; *Juvenile No. 1*, 118 F.3d at 305-06. The Seventh Circuit went so far as to characterize the Attorney General's certification as "essentially a perfunctory corollary to the decision to prosecute itself." *Jarrett*, 133 F.3d at 540.

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

108. *Id.* at 1319.

109. *See id.* (stating that "a court must first satisfy itself that there is indeed a substantial federal interest before jurisdiction can be assumed over the juvenile").

110. Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995).

111. *See Juvenile Male #1*, 86 F.3d at 1319-21.

cation, under the Westfall Act,[112] that certain federal employees being sued for negligence had acted within the "scope of employment."[113] The *Juvenile Male #1* court claimed that the *Lamagno* decision established a presumption that Congress intended to allow judicial review of executive determinations whenever the relevant statute is ambiguous regarding the availability of judicial review.[114] The Fourth Circuit further suggested that "weightier considerations of a different sort" than those present in *Lamagno* mandated judicial review in the juvenile justice arena.[115] Given the statutory focus on rehabilitation of juveniles within state systems, the court reasoned that congressional intent to authorize judicial review of certification decisions should be presumed.[116]

To overcome this presumption, the Fourth Circuit required persuasive evidence indicating specific congressional intent to deny judicial review in § 5032 certification cases.[117] After examining both the statutory language and legislative history of § 5032, however, the court found no such evidence.[118] In fact, the court determined that the legislation indicated the contrary.[119] Looking at the post-JJDPA development of the federal juvenile justice statute, the *Juvenile Male #1*

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112. The Supreme Court's explanation of the Westfall Act states:

> When a federal employee is sued . . . [in tort], the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act) empowers the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose. Upon certification, the employee is dismissed from the action and the United States is substituted as defendant.

Lamagno, 515 U.S. at 419-20 (internal quotation marks and citation omitted). For more detail regarding the Westfall Act, see generally *id.* at 419-23.

113. *Id.* at 419-20, 434.

114. *Juvenile Male #1*, 86 F.3d at 1319 (articulating "[the] basic principle[] . . . that executive determinations generally are subject to judicial review and that mechanical judgments are not the kind federal courts are set up te render") (quoting *Lamagno*, 515 U.S. at 434); *see also id.* at 1320 (finding a "presumption of judicial review"). Despite its claims regarding *Lamagno*, the Eighth Circuit court should have turned to other Supreme Court decisions to find the presumption it sought. *See infra* note 269.

115. *Juvenile Male #1*, 86 F.3d at 1319-20. The Fourth Circuit claimed that the *Lamagno* Court had relied heavily upon two considerations in upholding congressionally authorized judicial review: the Westfall Act certification involved financial incentives for the Attorney General; and the certification was dispositive of a court controversy. *See id.* at 1319. Although neither of these factors applied in *Juvenile Male #1*, the Fourth Circuit found "weightier considerations of a different sort" in the juvenile justice arena. *Id.* at 1319-20.

116. *See id.* at 1319, 1320. Although the Fourth Circuit never explicitly defines these "weightier considerations", *id.* at 1319, they apparently relate to the "juvenile justice arena," *id.* Examining the remainder of the decision, the only juvenile justice consideration mentioned was the federal statute's emphasis upon the rehabilitation occurring in state systems. *See id.* at 1320 & n.9.

117. *See id.* at 1319-20 (quoting *Lamagno*, 515 U.S. at 423).

118. *See id.*

119. *See id.* at 1320.

court characterized the 1984 amendments as mere blips in the larger development of the legislation.[120] Conceding that the amendments vastly expanded the availability of federal jurisdiction as a response to the growing national problem of juvenile crime,[121] the Fourth Circuit nonetheless concluded that the amendments did not alter the legislation's focus on rehabilitation in the state systems.[122] The court determined that the evidence of a statutory focus on state rehabilitation defeated any claim that Congress had at the same time intended to create—through unreviewable executive certification—automatic federal jurisdiction over juvenile offenders.[123] In stark contrast to the majority, the Fourth Circuit took the opposite position that Congress intended to allow full judicial review of federal prosecutors' certification decisions.

C. Between the Extremes

Some circuits fall closer to the majority's position while hinting at the possibility of some level of judicial review of the substantive decisions supporting certification. Generally, while not absolutely rejecting review in certification cases, the decisions of these circuits seem to form an analytical coalition with the majority against review.[124] To the extent that they deviate from the majority view, these intermediate decisions constitute attempts to achieve consistency with the Eighth Circuit's decision in *United States v. Juvenile Male*.[125]

In *Juvenile Male*, the Eighth Circuit initially appeared to reject the extreme majority position. Unconvinced by the Second Circuit's analysis in *Vancier*, the *Juvenile Male* court reviewed the substantive conclusions reached by the federal prosecutor.[126] Finding a "clear mandate" in § 5032 for a presumption in favor of state jurisdiction, the court required the federal prosecutor's full compliance with the statute's criteria for overcoming this presumption.[127] Accordingly, the court investigated—through an examination of the definition of violence employed in other statutes—the federal prosecutor's certification that

120. *Id.*

121. *See id.* (finding that the third prong, which focused on the offense rather than the offender, greatly expanded the possibility for invoking federal jurisdiction).

122. *See id.*

123. *See id.* at 1319-20.

124. *See* United States v. Jarrett, 133 F.3d 519, 538 (7th Cir. 1998) (listing these groups of decisions together as supporting the majority position).

125. United States v. Juvenile Male, 923 F.2d 614, 618-20 (8th Cir. 1991).

126. *Id.* at 617.

127. *Id.* at 618.

a "crime of violence" had in fact occurred.[128] In so assessing the prosecutor's compliance with the statute, the Eighth Circuit apparently engaged in a substantial review of the merits of the certification decision.[129]

A convoluted attempt to reconcile *Juvenile Male* with the prevailing majority view appeared in the Third Circuit's opinion in *Impounded*.[130] Rejecting the minority stance on judicial review, the Third Circuit instead largely adopted the majority analysis.[131] Accordingly,

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128. *See id.*

129. *See id.* at 617. The extent of the court's decision in *Juvenile Male* is itself uncertain. First, the court characterized its review as consistent with the Eleventh Circuit's *C.G.* decision. *See id.* In *C.G.*, however, the Eleventh Circuit allowed review only of technical requirements and did not allow "inquir[y] into the correctness of the [federal prosecuter's] statements made in the certification." United States v. C.G., 736 F.2d 1474, 1477-78 (11th Cir. 1984), *quoted in Juvenile Male*, 923 F.2d at 617; *see also supra* note 70 (explaining the majority's stance on review for "technical compliance"). In contrast, *Juvenile Male* reviewed the federal prosecutor's decision that the offense in the certification constituted a crime of violence. *Juvenile Male*, 923 F.2d at 617 (allowing the determination of "whether the United States Attorney certified that one of the crimes specified by Congress had been alleged"). Nonetheless, the Eighth Circuit characterized its inquiry as consistent with the *C.G.* decision. *See id.* Since its decision was not actually consistent with this precedent, its alleged compliance with *C.G.* casts some doubt on the extent of review the court would allow or how the decision should be viewed. *See id. Compare In re* Sealed Case, 131 F.3d 208, 212 (D.C. Cir. 1997), *with* United States v. I.D.P., 102 F.3d 507, 512 n.5 (11th Cir. 1996) (illustrating that the courts in the majority have disagreed on how to classify *Juvenile Male*).

Moreover, *Juvenile Male* does not reveal whether the Eighth Circuit would allow the full substantive review supported by the Fourth Circuit. The court did not need to address the issue of whether "a substantial federal interest" existed because the federal prosecutor failed to make such a claim. *Juvenile Male*, 923 F.2d at 620. Some courts, including the minority court, have plausibly interpreted this inaction as requiring only a statement of a federal interest to avoid judicial review. *See, e.g.*, United States v. Juvenile Male #1, 86 F.3d 1314, 1318 (4th Cir. 1996). Regardless, since the court broadly stated that review would be allowed in order to establish with certainty that the Attorney General had properly certified a crime specified by Congress (which would presumably include a crime raising a federal interest) at least when statutory standards are available, this Eighth Circuit decision at least approaches the minority position in its result. *See Juvenile Male*, 923 F.2d at 618-19; *see also I.D.P.*, 102 F.3d at 512 n.5 ("[W]e recognize that the Fourth and Eighth Circuits have interpreted section 5032 to require judicial review of certifications . . . .").

130. Impounded, 117 F.3d 730 (3d Cir. 1997). The other circuits addressing the Eighth Circuit decision before *Impounded* had explicitly found that the *Juvenile Male* decision allowed for some degree of substantive judicial review. *See I.D.P.*, 102 F.3d at 512 n.5 ("[W]e recognize that the Fourth and Eighth Circuit have interpreted section 5032 to *require judicial review of certifications* . . . .") (emphasis added); *Juvenile Male #1*, 86 F.3d at 1317-18 ("[The Eight Circuit] has held that the courts have the authority *to review more than the mere form* of the government's certification.") (emphasis added).

131. This included adopting the analysis of the Fourth Circuit's dissenting judge. *See Impounded*, 117 F.3d at 732-33, 736. The court also addressed federalism concerns by finding that, although determinations regarding the proper relationship between the states and the federal government may be best left to the courts, the lack of any judicially useful standards in the statute combined with the prosecutorial character of the decision leaves the decision ill-suited for the judiciary. *See id.* at 736.

the *Impounded* court held that the certification decision involved in the case should be insulated from review since the prosecutor fulfilled the statutory requirements by demonstrating that no state would accept jurisdiction.[132] In this light, *Impounded* represents an apparent endorsement of the analysis employed by the majority.

Simultaneously, however, the *Impounded* court endorsed the decision in *Juvenile Male*, finding the Eighth Circuit's analysis consistent with both the majority view and its own decision.[133] Focusing on the *Juvenile Male* court's use of existing statutory standards in its review of the determination that a crime of violence had been committed, the Third Circuit found that this constituted an acceptable degree of review since it did not disturb decisions traditionally left to prosecutorial discretion.[134] In contrast to the majority's strict opposition to judicial review, therefore, the Third Circuit apparently would allow at least some substantive review of certification decisions.[135]

The effort to co-opt *Juvenile Male* may account for the Third Circuit's conclusion that, because the Attorney General had also certified that state courts had refused jurisdiction, "[the court] need not . . . discuss whether the challenged crime is one of violence or whether a substantial federal interest is present."[136] While a court completely aligned with the majority would presumably disallow a discussion of *any* certification decision,[137] the Third Circuit seemed to emphasize that the existence of a legitimate alternative basis for certification precluded substantive review. Thus, while the Third Circuit's approach closely resembles that of the prevailing majority,[138] the court's failure to specifically prohibit substantive review casts some doubt on its position. The implied acceptance of the *Juvenile Male* decision suggests that the Third Circuit would allow some level

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132. *Id.* at 737.

133. *Id.* at 734.

134. *See id.*

135. *See id.* at 734 n.4. (endorsing the possibility of reviewing "some aspects of a § 5032 certification, but not others"). At the very least, the Third Circuit would allow use of statutory standards defining violence to review whether the charged crime was one of violence. *See id.* at 736.

Thus, the majority's subsequent hasty acceptance of the Third Circuit's position, *see, e.g.*, United States v. Jarrett, 133 F.3d 519, 538 (7th Cir. 1998), is problematic, *see Impounded*, 117 F.3d at 735-36, 737; *I.D.P.*, 102 F.3d at 512 n.5 (expressly disagreeing with the review allowed in both the Fourth and Eighth Circuits).

136. *See Impounded*, 117 F.3d at 737.

137. *See, e.g., In re* Sealed Case, 131 F.3d 208, 215 (D.C. Cir. 1997).

138. *See Impounded*, 117 F.3d at 732-33, 736.

of substantive review, especially regarding those aspects of the certification open to interpretation using existing statutory standards.[139]

The Eighth Circuit itself later attempted to conform to both the majority position and its own previous decision in *Juvenile Male*.[140] Reversing course in *United States v. Juvenile Male J.A.J.*, the Eighth Circuit employed the majority analysis and concluded that it could not review the prosecutor's decision of whether a substantial federal interest existed.[141] Rather than overruling its previous decision in *Juvenile Male*, however, the court attempted to reconcile the two decisions.[142] Citing its earlier opinion for support, the court behaved like the Third Circuit by remaining receptive to substantive review of those aspects of certification that did not suffer from a lack of clear statutory standards.[143] Thus, the Eighth Circuit has realigned itself closer to the majority position but apparently allows at least some review of the Attorney General's certification decisions.[144]

IV. JUVENILES' STATUTORY INTEREST IN PARTICIPATING IN STATE SYSTEMS

The decisions of courts on both sides of the judicial review issue share common themes. Regardless of their position, the circuits generally base their analysis on the intent of Congress and the character of

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139. *See id.* at 730, 734 & n.4, 736.

140. After *Impounded*, other majority courts struggled with the Eighth Circuit's decision, usually by mischaracterizing *Juvenile Male* as a mere assessment of the certification's technical compliance to § 5032. *See supra* note 70 (discussing the pliant nature of review for "technical compliance"); *see also Jarrett*, 133 F.3d at 537 (reducing *Juvenile Male* to a decision regarding the Government's failure to submit certain records and a full statement of certification). By labeling *Juvenile Male* as a case assessing technical compliance, these courts remained true to the majority's position and did not approach the vague conformity of the Third Circuit. *Compare Jarret*, 133 F.3d at 537 (ignoring the substance of the Eighth Circuit's analysis and decision allowing review), *with Impounded*, 117 F.3d at 734, 736 (attempting to reconcile its position with *Juvenile Male*).

141. United States v. Juvenile Male J.A.J., 134 F.3d 905, 906-09 (8th Cir. 1998).

142. *See id.* at 908 (citing United States v. Juvenile Male, 923 F.2d 614, 617 (8th Cir. 1991)).

143. *See id.* (citing *Juvenile Male*, 923 F.2d at 617). In fact, the *J.A.J.* court encapsulated the tortured attempts of the Third Circuit to remain consistent with *Juvenile Male* in a parenthetical. *Id.* (citing *Juvenile Male*, 923 F.2d at 617). In a section referring to the need for statutory standards, the *J.A.J.* court noted that its previous decision held "that judicial review was available for § 5032 certification that [the] offense was a crime of violence." *Id.* (citing *Juvenile Male*, 923 F.2d at 617). However, the court subtly stepped toward conformity with *Juvenile Male* by succinctly finding that the existence of statutory standards anywhere was sufficient to allow substantive review. *See id.* (mentioning only *Juvenile Male's* observation regarding the existence of statutory standards and ignoring the analysis supporting substantive review).

144. *See id.*

the entity making the certification decision.[145] Each side's analysis interprets the statutory text and legislative history as evidence that Congress intended to support its particular view.[146] In addition, each side characterizes the nature of the certification decision to suit its own ends. While the majority of courts characterize the certification decision as an exercise of traditional, unreviewable prosecutorial discretion, the minority treats this same decision like an administrative function subject to a presumption of judicial review.[147]

More significantly, the legal analysis employed by both sides shares a common major flaw: neither side has examined the potential due process concerns surrounding certification.[148] These concerns arise whenever the government attempts to deprive an individual of a statutorily provided interest.[149] For example, if the Attorney General's certification decisions strip juveniles of an interest created by Congress, the Constitution requires a certain level of procedural accuracy in determining whether a particular juvenile meets the statutory criteria triggering denial of the entitlement.[150] This section of the Note argues that JJDPA establishes a significant statutory interest to which the constitutional protections of procedural due process must apply.

The creation of a statutory interest for federal juvenile offenders to participate in state juvenile justice systems depends upon the existence of two conditions in the federal legislation. First, Congress must provide the opportunity for federal juvenile offenders to participate in state systems while restraining federal prosecutors' discretion to deny such participation. Without this restraint, federal jurisdiction would be presumed, and the Attorney General's discretion would automatically trump juvenile offenders' potential interest in participation in state systems.[151] Second, federal legislation must establish new statutory benefits that do not substantially copy the benefits inhering

145. *See generally supra* Part III.

146. *See, e.g., In re* Sealed Case, 131 F.3d 208, 212-13 (D.C. Cir. 1997) (majority); United States v. Juvenile Male #1, 86 F.3d 1314, 1320 (4th Cir. 1996) (minority).

147. *Compare Sealed Case*, 131 F.3d at 214, *with Juvenile Male #1*, 86 F.3d at 1319.

148. *See, e.g., Sealed Case*, 131 F.3d at 214. For a discussion on the possibility of such an investigation hiding in the Fourth Circuit's rhetoric, see *infra* notes 264-70 and accompanying text.

149. *See infra* Part V.

150. *See, e.g.*, Kent v. United States, 383 U.S. 541, 551, 556-57 (1966); *see also infra* Part V.

151. *See* discussion *supra* Part II (describing the effects of the Attorney General's discretionary control over jurisdiction under the legislative regime preceding JJDPA). This proposition assumes, of course, that the federal legislation is not an improper use of federal authority in an area constitutionally reserved for the states. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561 (1995) (declaring a congressional statute criminalizing gun possession near schools unconstitutional for overstepping federal authority).

in state jurisdiction. A replication would not create a protected statutory interest in participating in state systems since juveniles remaining under federal jurisdiction would effectively receive the same entitlements available in state programs.[152] Thus, an examination of JJDPA is necessary to determine whether the statute in fact established a significant statutory interest for federal juvenile offenders in participating in state systems.

The JJDPA's groundbreaking alteration of previous federal juvenile justice legislation satisfied the conditions necessary to create a new statutory interest. The history, language, and effects of the Act combined to establish a clear interest for federal juvenile offenders in participating in state programs.[153] By redefining the role of federal prosecutors, JJDPA constituted a significant statutory shift which established federal juvenile offenders' protected interest in participating in state juvenile justice systems.[154] Further, the Act reinforced the statutory interest in participating in the state systems through new policies designed to improve and enhance existing state programs rather than replicating the benefit of participating in state programs on a federal level.[155]

A. Federal Legislation Before JJDPA

Legislation regarding the appropriate federal role in juvenile justice has consistently recognized that state systems offer important opportunities for rehabilitating juvenile delinquents.[156] The congressional acts of the 1930s provided the first opportunity for federal juvenile offenders to participate in these state systems.[157] Notably, however, the early federal legislation did not create a statutory interest in participation in state systems but instead gave the Attorney General full discretion to decide whether to surrender jurisdiction to the

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152. *See* Goss v. Lopez, 419 U.S. 565, 571 (1975) (stating that the Constitution only forbids the government te "*deprive*," not *replicate*, interests created by "state statutes or rules entitling the citizen to certain benefits") (emphasis added).

153. The JJDPA is

> "structured on the premise that it is important 'to channel juvenile offenders out of the adult criminal system and to provide for their treatment and rehabilitation.' . . . State juvenile justice systems are better equipped to carry out these goals given the lack of meaningful federal programs, and the [requirement] for certification [for federal jurisdiction over a juvenile] reflects this fact." Shepherd, *supra* note 46, at 46 (quoting United States v. J.D., 525 F. Supp. 101, 103 (S.D.N.Y. 1981)).

154. Juvenile Justice and Delinquency Prevention Act (JJDPA), Pub. L. No. 93-415, 88 Stat. 1109 (1974).§ 502.

155. *See generally id.*

156. *See supra* notes 24-27 and accompanying text (describing the Act of 1932)

157. *See supra* notes 24-27, 38 and accompanying text.

states.[158] Under these initial statutes, federal juvenile offenders' ability to participate in the state system was merely a collateral effect of the traditional federal prosecutors' authority over federal jurisdiction.[159]

B. Recasting the Federal Prosecutorial Role

By sufficiently restraining federal prosecutors' authority, JJDPA provided juvenile offenders with a significant statutory interest in participation in state systems. JJDPA for the first time established automatic state jurisdiction for all juvenile offenders. Though not the first legislative limitation of prosecutorial discretion,[160] JJDPA limited this discretion to an extent sufficient to block the federal prosecutor's automatic control over jurisdiction and to establish juveniles' statutory interest in participation in state systems.[161] While prior legislation left juvenile offenders' enjoyment of the benefits of state systems dependent upon the discretion of federal prosecutors, JJDPA mandated that all juvenile offenders would automatically enter state systems unless the Attorney General certified that certain conditions existed.[162] Thus, JJDPA provided a strong presumption in favor of state jurisdiction and its accompanying benefits.[163] Participation in state systems became a freestanding interest removable with the finding of certain criteria, rather than an incidental effect of the prosecutors' discretion.

The creation of a freestanding interest by the statutory presumption favoring participation in state systems transformed the role of the Attorney General. After JJDPA, a federal statute, rather than the Attorney General, determined which federal juvenile offenders participated in state systems. The Attorney General's role after

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158. *See supra* notes 26, 40 and accompanying text.

159. *Compare supra* notes 26, 40 and accompanying text (discussing the 1930s Acts' allowance of prosecutorial discretion), *with* United States v. Alexander, 333 F. Supp. 1213, 1216-17 (D.D.C. 1971) (noting "the [universally recognized] wide discretion vested in the [federal] prosecutor to bring changes or not . . . , to defer to a state or to select a federal forum" when analyzing a District of Columbia act allowing similar prosecutorial discretion over the fate of juveniles in a certain age group).

160. The FJDA had limited prosecutorial discretion by preventing the prosecutor from surrendering federal jurisdiction if the offense was punishable by death or life imprisonment. *See supra* notes 37-38.

161. *See* United States v. Chambers, 944 F.2d 1253, 1258-59 (6th Cir. 1991) (showing how the Act "impliedly *revoked* the district courts' preexisting, largely unrestricted subject-matter jurisdiction over criminal prosecutions against juveniles") (emphasis added).

162. *Compare, e.g.*, Federal Juvenile Delinquency Act (FJDA), ch. 486, § 2, 52 Stat. 764, 765 (1938), *with* Juvenile Justice and Delinquency Prevention Act (JJDPA), Pub. L. No. 93-415, § 502, 88 Stat. 1109, 1134 (1974).

163. *See* Shepherd, *supra* note 46, at 45.

JJDPA thus became that of an executive officer charged with determining whether, in any given case, a juvenile offender should be stripped of the statutory entitlement to participation in state programs.[164] Rather than acting as a federal prosecutor selecting criminal charges or forums, the Attorney General's certification authority amounts to an investigation of the circumstances surrounding a juvenile's situation in order to determine whether they trigger the criteria allowing the removal of state jurisdictions. Thus, while access to the benefits of state systems became a defined statutory interest independent from prosecutorial whims, the Attorney General was selected to determine the availability of the congressionally mandated interest.

Facially, the changes could be characterized as mere adjustments to the discretion of federal prosecutors to impose federal jurisdiction in juvenile cases.[165] In passing JJDPA, however, Congress actually intended the greater effect of *removing* federal prosecutorial discretion in order to make the benefits of state programs readily available to federal juvenile offenders.[166] Examining the larger historical context surrounding passage of JJDPA reveals that § 5032 was part of a general legislative scheme designed to improve the existing juvenile justice system for the benefit of young offenders. This intention is embodied in JJDPA's definition of "juvenile delinquency program[s]," which breaks down the components of such programs into three broad types: (1) any activity targeted at treating or controlling current delinquency; (2) any improvements of the juvenile justice system; and (3) any activity designed to assist potential delinquents.[167] Aimed at improving these "juvenile delinquency program[s],"[168] JJDPA broadly attempted to enhance *any* activity designed to control or prevent juvenile delinquency.[169] Further, the catch-all provision including any "improvement of the juvenile justice system" within the statutory definition of "juvenile delinquency programs" reveals a broad intent to

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164. JJPDA § 502, 88 Stat. at 1134; *see also* Shepherd, *supra* note 46, at 45.

165. *See, e.g.*, United States v. Juvenile No. 1, 118 F.3d 298, 305-07 (5th Cir. 1997) (focusing on federal prosecutor discretion for much of its examination of the certification process).

166. *See* Shepherd, *supra* note 46, at 46 (finding that "[s]tate juvenile justice systems are better equipped to carry out [the rehabilitative] goals [of the federal legislation] given the lack of meaningful federal programs" and that "the [requirement] for certification reflects this fact").

167. JJDPA defines a "juvenile delinquency program" as:

> any program or activity related to juvenile delinquency prevention, control, diversion, treatment, rehabilitation, planning, education, training, and research, including any drug and alcohol abuse programs; the improvement of the juvenile justice system; and any youth program . . . for neglected, abandoned, or dependant youth and other youth who are in danger of becoming delinquent.

88 Stat. at § 103(3).

168. *See* discussion *infra* Part IV.C.

169. § 103(3).

cover any activity not falling within the other two listed categories but which nonetheless could be characterized as an effort to improve the system.[170]

JJDPA's adjustments to prosecutorial discretion certainly fall under the broad umbrella of this definition. The new presumption in favor of state jurisdiction enabled juvenile delinquents committing federal offenses to enjoy the benefits of state programs.[171] This significant statutory shift may be fairly characterized as a "program . . . related to juvenile delinquency control" or an "improvement to the juvenile justice system."[172] Thus, rather than mere adjustments to prosecutorial discretion, the changes engendered by JJDPA instead qualified as significant components of the Act's "comprehensive coordinated approach" to juvenile justice.[173]

In addition, the congressional findings and purposes articulated in JJDPA, as well as the Act's legislative history, indicate that the objectives of the Act were focused not upon federal prosecutors' authority but rather upon juveniles themselves.[174] Congress set forth

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170. *Id.*

171. *See* § 502. With rehabilitation occurring only within state systems, the Act's "channel[ing]" of these juveniles "to those agencies . . . mandated . . . to deal with substantive human and social issues" necessarily implies the presumption for state jurisdiction of federal offenders. S. REP. NO. 93-1011, at 4-5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5287-88.

172. *Compare* JJDPA § 103(3), *with* JJDPA § 502. Further, since Congress attempted to improve the relationship between court officials elsewhere in JJDPA, the addition of a presumption of which court officials should have these relationships must be viewed as connected to these other changes. *See* §§ 204(b)(7), 241(f), 244(2)-(3); *see also* S. REP. NO. 93-1011, at 5, *reprinted in* 1974 U.S.C.C.A.N. 5283, 5287 (referring to the need for "[a]ssistance to . . . courts . . . in their efforts to control and reduce crimes committed by juveniles, to improve the quality of justice for juveniles, and to deal effectively and humanely with offenders"); *infra* note 173.

173. 88 Stat. at 1109. Regarding the judicial process itself, the Act's legislative history stated:

> Juvenile delinquency efforts of necessity involve[, among other things,] the courts and corrections and require cooperation from all agencies furnishing these services." [This] statement [displays] the need to view the juvenile justice system as an entity which offers a wide range of approaches and alternatives for coping with the juvenile crime problem. The juvenile justice system must be viewed as a continuum of responses (including the utilization of resources outside the formal system of police, courts, and corrections) which are made to juvenile crime in an attempt to prevent and reduce its occurrence, the larger aim of which is to assist youth in becoming productive members of society.

S. REP. NO. 93-1011, at 4, *reprinted in* 1974 U.S.C.C.A.N. 5283, 5286 (quoting *The Juvenile Justice and Delinquency Prevention Act—S. 3148 and S. 821 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 92d Cong. 668 (1973)) (emphasis added). This statement in the legislative history reveals Congress's intent to include the court system, including adjustments to juveniles' access to courts, as part of the "comprehensive and coordinated focus to the issues surrounding juvenile delinquency." *Id.*

174. JJPDA §§ 101-02; *see also* S. REP. NO. 93-1011, at 3, *reprinted in* 1974 U.S.C.C.A.N. 5283, 5285 ("The highest attention must be given to preventing juvenile delinquency, to minimizing the involvement of young offenders in the juvenile and criminal justice system and to reintegrating delinquents and young offenders into the community.") (quoting NATIONAL

several findings at the beginning of the Act highlighting its concerns about juveniles.[175] The Act noted, for example, that juveniles accounted for half of the arrests in the United States but did not receive individualized justice or effective help.[176] Moreover, rehabilitation programs failed to meet the needs of children addicted to illegal drugs or to address the concerns of countless other potential delinquents.[177] In light of these findings, the Act explicitly sought to improve the quality of juvenile justice programs in order to benefit juvenile offenders.[178] Congress asserted no other important objectives as justification for the adjustment to federal prosecutors' discretion. Clearly, the new restrictions governing the Attorney General through the certification process reflected a broad legislative intent to improve the plight of juvenile offenders by affording them access to state systems.[179] To achieve this objective, Congress's intentional removal of federal prosecutorial discretion thereby transformed the role of the federal prosecutors in order to provide what amounted to a statutory interest for federal juvenile offenders.

C. Reinforcing the New Statutory Benefit

The JJDPA did not, however, provide federal assistance directly to juvenile delinquents. Instead, the Act's purposes and policies were explicitly aimed at assisting state and local efforts to prevent and respond to juvenile delinquency.[180] Rather than a mere replication of the benefits traditionally available to juveniles in state systems that would make a jurisdictional change of no consequence to juveniles,[181] JJDPA must be viewed as reflecting Congress's intent to reinforce the benefits available in state programs. By supporting and strengthening

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175. JJPDA § 101.

176. *Id.*

177. *See id.*

178. §§ 101-02.

179. *See id.*; *see also* S. REP. NO. 93-1011, at 4, *reprinted in* 1974 U.S.C.C.A.N. 5283, 5286 (arguing that juvenile delinquency efforts should include, in addition to the courts and corrections, "education, recreation, employment, [and] health services"); *supra* note 173 (noting the "larger aim" of helping juveniles).

180. Section 102 lists the purposes and policies of the Act, which includes evaluations, *see* § 102(a)(1), technical assistance for the development of programs, *see* § 102(a)(2), research efforts, *see* § 102(a)(3), national standards, *see* § 102(a)(4), assistance to state and local programs, *see* § 102(a)(5), and resources, leadership and coordination for the improvement of the existing juvenile system, *see* § 102(b). No direct involvement with juveniles is mentioned.

181. *See supra* note 152 (citing Goss v. Lopez, 419 U.S. 565, 571 (1975)).

existing state programs, Congress solidified federal juvenile offenders' statutory interest in participation in state juvenile justice systems.

Though JJDPA discussed a "[f]ederal juvenile delinquency program," this program broadly referred to any efforts related to juvenile delinquency conducted or funded by the federal government.[182] In practice, this "federal program" fulfilled the Act's stated purposes primarily through the provision of assistance and leadership to the states. This involvement included conducting studies, disseminating information, creating national standards, and providing training and funding.[183] None of this federal assistance, however, directly benefited juvenile delinquents.[184] Similarly, JJDPA never gave federal administrative agencies any authority to engage in direct relationships with juvenile offenders.[185] Thus, rather than replicating the benefits of participation in state systems, the "federal juvenile delinquency program" simply enhanced the benefits of that participation, thereby reinforcing the newly created statutory interest of juveniles committing federal offenses.[186]

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182. JJPDA § 103. The Act created an Office of Juvenile Justice and Delinquency Prevention within the Department of Justice which serves to implement and develop objectives for the "[f]ederal juvenile delinquency program." § 201; *see also* § 204 (referring generally to the development of "[f]ederal juvenile delinquency programs").

183. *See* §§ 201-09, 241-62.

184. *See id.*; *see also* § 204(a) (authorizing the Administrator to implement policy goals for "Federal juvenile delinquency programs" only "*relating*" to general efforts to improve "the juvenile justice system in the United States" rather than programs actually attempting direct relationships with juveniles) (emphasis added).

185. *See generally* Juvenile Justice and Delinquency Prevention Act (JJDPA), Pub. L. No. 93-415, 88 Stat. 1109 (1974).

186. One aspect of federal juvenile policy deserves particular attention: the Act permitted the federal government to form contracts with other government agencies to carry out the purposes of the Act. *e.g.*, JJPDA § 204(j). The statute currently expands on this authority. *See, e.g.*, 42 U.S.C. § 5665 (Supp. III 1997). For example, the federal government could lease the availability of space in the state juvenile justice system for juveniles in the federal system. *See* Shepherd, *supra* note 46, at 46. Attempting to afford at least some rehabilitative programs to juveniles in the federal system, Congress prudently established a means of funneling some benefits of the state systems to federal juveniles as well. Such provisions, however, do not contradict the conclusion that the federal government has provided juveniles a statutory interest in actual participation in state systems. Notably, federal legislation has never explicitly required federal agencies to enter into contracts for the benefit of federal juveniles offenders. *See, e.g.*, 42 U.S.C. § 5665. Rather, the executive branch retains the discretion to "establish" or "develop" state programs exclusively for juveniles in the state system, *id.*, leaving federal juvenile offenders without the full panoply of state rehabilitative programs, *see* Shepherd, *supra* note 46, at 46 (observing "[a] lack of meaningful federal programs"). Juveniles remaining in the federal system, therefore, cannot expect to receive the same level of benefits available in state systems. *See id.* Further, the mere picking and choosing of some of these benefits does not amount to federal recreation of the benefit available on the state level. *See* United States v. Chambers, 944 F.2d 1253, 1258 (6th Cir. 1991) ("Congress recognized that the federal court system is at best ill equipped te meet the needs of juvenile offenders.") (internal quotation marks omitted); *see also* John Scalia, *Juvenile*

For example, JJDPA created a Juvenile Justice and Delinquency Prevention Office in the Department of Justice.[187] The stated responsibilities of this office included developing federal objectives, priorities, and coordinated strategies to assist states in their efforts to help troubled juveniles and prevent delinquency.[188] Significantly, though, the Act did not authorize the office to provide any direct assistance to juveniles.[189] Instead, the Act empowered the office to "assist operating agencies which have direct responsibilit[y]" for helping juveniles.[190]

The JJDPA also created the National Institute for Juvenile Justice and Delinquency Prevention.[191] Among other powers, the JJDPA explicitly authorized this agency to gather information regarding the treatment and control of juvenile offenders and to train those directly assisting juvenile delinquents.[192] Under JJDPA, Congress charged another federal agency, the Coordinating Council on Juvenile Justice and Delinquency Prevention, with coordinating all

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Delinquents in the Federal Criminal System (last modified Dec. 15, 1997) <http://www.ojp.usdoj.gov /bjs/pub/ascii/jdfcjs.txt> ("Unlike State-level criminal justice systems, the Federal system does not have a separate juvenile justice component."); Thomas & Bilchik, *supra* note 22, at 442-51 (describing the extensive history and development of independent state juvenile justice systems and noting the absence of federal equivalents); *supra* note 8.

187. JJDPA § 201.

188. *See* § 204(a).

189. § 204(b) (authorizing, for example, the office to advise the executive branch and to conduct studies and compile evaluations regarding the results of the concentrated federal effort).

190. § 204(b)(2). Since no such organizations existed on the federal level, and since none were created, the "operating agencies" referred to were presumably those existing in the states. *See id.*; *see also* §§ 201-09, 241-62.

Congress further authorized the office to "provide technical assistance to Federal, State and local governments, courts, and [other institutions] in the planning, establishment, funding, operation, or evaluation of juvenile delinquency programs." § 204(b)(7). By not giving federal agencies direct responsibility over juveniles, Congress intended this "assistance to [the] Federal . . . government[]" to include only "planning, establishment, funding" and other indirect roles and left opportunities for direct involvement remaining with the states. *Id.*; *see also* §§ 201-09, 241-62. Though § 204 describes the federal and state governments as having similar authority, § 204(b)(7), the breadth of the phrase "juvenile delinquency programs" allowed Congress to group all government activities together without distinguishing these activities based on their varying degrees of direct involvement with juveniles. *See* § 103(3); *supra* notes 168-73 and accompanying text.

191. § 241.

192. § 241(f). Congress intended for this Institute to "provide training for representatives of *Federal*, State, and local law enforcement officers, teachers, and other educational personnel, juvenile welfare workers, juvenile judges and judicial personnel, probation personnel, correctional personnel and other persons . . . connected with the treatment and control of juvenile offenders." *Id.* (emphasis added). Though the Act mentions "Federal" personnel, *id.*, it does not establish any new federal positions connected with juveniles. Thus, the term "Federal" necessarily applies to federal employees either *indirectly* connected te juvenile treatment and control or previously involved directly with juveniles including law enforcement officers, judges, and correctional officers in federal incarceration facilities. *See id.*; *see also* § 244(2).

federal juvenile justice programs.[193] Congress, however, envisioned these federal programs under the Council's control as nothing more than indirect efforts to support state systems.[194] Considered together, the federal programs established under JJDPA, rather than replicating the benefits of state systems, reflected Congress's intent to organize state programs into a more effective and standardized set of rehabilitative programs for juveniles committing state and federal crimes.[195]

The legislative history surrounding the enactment of JJDPA also presents persuasive evidence of Congress's desire to enhance existing state juvenile justice programs. For example, the opening statement of the Senate report accompanying the Act reveals that JJDPA "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."[196] The report further reveals that the Act deliberately focused on state rehabilitative benefits because juvenile delinquency is essentially a local problem to be dealt with by the states, and accordingly the federal government's role should only be one of assistance and leadership rather than one of direct involvement.[197] With its state-level focus, the legislative history indicates that

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193. § 206(c). The Act also formed an advisory committee to make recommendations regarding federal juvenile delinquency programs. *See* §§ 207-08.

194. The Act indicated that the federal role consisted only of the indirect efforts of agencies, redefining the framework of the federal juvenile court system, and providing funding for state programs. *See generally* Juvenile Justice and Delinquency Prevention Act (JJDPA), Pub. L. No. 93-415, 88 Stat. 1109 (1974). Accordingly, federal agencies merely assisted or reformed existing state systems by promulgating standards, *see* §§ 204(b)(2), 247, conducting studies and surveys, *see* §§ 204(b)(3), 241(f), 242-43, providing employee training, *see* §§ 241(f), 249-51, and allocating funds, *see* §§ 221-28, 311.

The Act does state that most of its actions are provided to assist all government employees working in juvenile justice, including federal workers. *See, e.g.*, § 241(f). Beyond existing federal prosecutors and district court judges, however, JJDPA never creates new positions for employees working *directly* with juvenile offenders. *See supra* note 192 and accompanying text. Further, the federal government has not subsequently established any such opportunities for organized, direct involvement on the federal level. *See* 42 U.S.C. §§ 5601-5711 (1994 & Supp. III 1997).

195. *See* S. REP. NO. 93-1011, at 4 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5286 (describing the deficiencies that the federal legislation needed to address as the lack of central responsibility and leadership, accepted national priorities, bureaucratic accountability, and definition of objectives and focus); *see also* Robert E. Shepherd, Jr., *The "Child" Grows Up: The Juvenile Justice System Enters Its Second Century*, 33 FAM. L.Q. 589, 593 (1999) (listing JJDPA's seven general effects without noting the existence of any direct federal relationship with juveniles on the state level).

196. S. REP. NO. 93-1011, at 1, *reprinted in* 1974 U.S.C.C.A.N. 5283, 5283.

197. *See id.* at 4, *reprinted in* 1974 U.S.C.C.A.N. 5283, 5286; *see also* United States v. Chambers, 944 F.2d 1253, 1258 (6th Cir. 1991) ("Congress recognized that the federal court system is at best ill equipped to meet the needs of juvenile offenders.") (internal quotation marks omitted).

the presumption in favor of state jurisdiction was necessary to fulfill JJDPA's purpose because this presumption channeled juvenile offenders into the arena providing direct social rehabilitation.[198]

D. The Effects of Subsequent Legislation

Despite the numerous revisions and amendments to JJDPA in recent decades,[199] these changes did not diminish the extent of juveniles' substantial interest in participating in state programs. Many significant parts of JJDPA, in fact, remained the same. The definition of "juvenile delinquency program," for instance, remained virtually unchanged, indicating that Congress intended to continue to suppress federal prosecutorial authority.[200] Similarly, federal agencies remain committed to providing only indirect support of state juvenile justice programs.[201] Overall, most of the recent changes have had little effect because they have neither renewed federal prosecutors' authority over jurisdiction[202] nor created any direct relationships between juveniles and the federal government.[203]

Other changes, by more clearly avoiding replication of state benefits on the federal level, reveal the continued vitality of the juveniles' statutory interest in participating in state systems. For example, the declared purposes of the federal legislation include explicit statements directing the federal government to assist state and local juvenile justice programs in achieving policy goals even broader than those initially envisioned.[204] Conditions on federal funding now require more specific and elaborate juvenile programs and provide additional opportunities for state innovation and initiatives.[205] In addition, newly created state advisory groups provide states with a means of influencing

198. *See* S. REP. NO. 93-1011, at 5-6, *reprinted in* 1974 U.S.C.C.A.N. 5283, 5287-88.

199. *See, e.g.*, 42 U.S.C. §§ 5601-75.

200. *See* § 5603 (noting that subsequent amendments only made minor changes to § 5063(3) defining "juvenile delinquency program"). For a discussion of how the inclusion of § 5032 certification as a vital part of the comprehensive federal scheme to improve state systems indicated such congressional intent regarding the removal of prosecutorial authority, see the discussion *supra* Part V.B regarding the facial characterization of § 5032 as merely affecting jurisdiction or discretion.

201. *See* 42 U.S.C. §§ 5614(b)(1)-(4); 5651(d); 5652; 5656(a)(1), (2), (8), (9); 5654(2)-(4); 5659-61.

202. *See* 18 U.S.C. § 5032 (1994 & Supp. IV 1998); *infra* notes 209-14 and accompanying text.

203. *See, e.g.*, Juvenile Justice Amendments of 1980, Pub. L. 96-509, § 9, 94 Stat. 2750, 2753-55 (1980) (requiring an extensive annual report to Congress and the President and eliminating the National Advisory Committee for Juvenile Justice and Delinquency Prevention).

204. *See* 42 U.S.C. § 5602.

205. *See* §§ 5633, 5667c.

the nature of federal assistance.[206] The National Institute for Juvenile Justice and Delinquency Prevention also offers new suggestions for improving existing programs and services directly helping juveniles.[207] These changes clearly indicate the federal government's continuing attempts to provide juvenile offenders committing state or federal crimes with more effective state rehabilitative systems.[208]

The most significant legislative change occurred in the Crime Control Act's addition of the third method of Attorney General certification.[209] This change greatly expanded the instances in which federal prosecutors could prevent juveniles from enjoying the benefits of participation in state systems.[210] Congress, however, never meant for this change to alter the essential concepts of the 1974 legislation.[211] Instead, Congress intended the Crime Control Act to remain faithful to the spirit of the JJDPA.[212] More importantly, the addition of the "substantial [f]ederal interest" basis for certification into the framework establishing the presumption for state jurisdiction merely established a new statutory criterion that could potentially justify denial of state jurisdiction to an additional group of applicable juvenile offenders.[213] These adjustments to § 5032 did not change the ability to participate in states systems back into an incidental effect of traditional prosecutorial discretion, so federal juvenile offenders still possess a vital statutory interest in participating in state systems.[214]

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206. *See* § 5651.

207. *See* § 5653.

208. *See* § 5662 (establishing special studies and reports of the juvenile justice system); § 5667f (providing for funding of boot camps available *exclusively* for the state systems).

209. *See* United States v. Juvenile Male #1, 86 F.3d 1314, 1320 (4th Cir. 1996) (describing this change as injecting "a new element into the certification calculus").

210. *See* 18 U.S.C. § 5032 (1994 & Supp. IV. 1998).

211. *See* S. REP. NO. 98-225, at 386 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3526 ("[One] essential concept[] of the 1974 Act . . . [is] that juvenile delinquency matters should generally be handled by the States . . . . The Committee continues to endorse th[is] concept[]."); *id.* at 389, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3529 (finding that most prosecutions of juveniles should remain in the state courts).

212. *See id.* at 389.

213. *See supra* Part IV.A-B; *see also* S. REP. NO. 98-225, at 389 n.10, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3529 n.10 ("Only if the *criteria* for retaining Federal jurisdiction over a juvenile in the first instance . . . are met, may there then be consideration of whether Federal [criminal] prosecution . . . is appropriate.") (emphasis added).

214. *See supra* Part IV.A-B. The Attorney General's certification authority continued to amount to an investigation of the circumstances in order to determine whether they triggered the removal of state jurisdictions as the investigation now includes the characteristics of the criminal offense already selected for the juvenile. *See infra* text accompanying note 257.

The notion that the juvenile justice systems across the country have lost their rehabilitative goals deserves mention. Certainly, a punishing, "get tough" mentality has significantly affected, and perhaps restructured, juvenile justice purposes and policies. *See* Shepherd, *supra* note 195, at 593-99. However, the relevant rehabilitative purposes underlying JJDPA remain intact and

V. DUE PROCESS: THE SOURCE FOR THE REQUIREMENT OF JUDICIAL REVIEW

Courts considering claims for substantive review of Attorney General certification decisions have largely ignored the historical context surrounding § 5032's enactment.[215] Consequently, they have failed to consider the important due process concerns arising in certification cases.[216] Since certification can strip federal juvenile offenders of a significant statutory interest in participating in state systems, any certification determination must satisfy constitutional procedural due process requirements.[217]

The first step in procedural due process analysis requires a determination of whether the government has interfered with a liberty or property interest.[218] The Constitution does not explicitly establish an entitlement to most types of government benefits.[219] Once Congress grants these statutory benefits, however, the federal government cannot revoke them without abiding by the requirements of procedural due process.[220]

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committed to funneling juveniles to the state systems, *see supra* note 211, which provide far greater rehabilitation than available in the federal system, *see* Shepherd, *supra* note 46, at 46; *supra* note 186.

215. *See supra* Parts III-IV.

216. *See supra* Parts III-IV.

217. *See* Kent v. United States, 383 U.S. 541, 556-57 (1966) ("It is clear beyond dispute that the waiver of jurisdiction . . . determin[es] vitally important *statutory rights* of the juvenile . . . . The Juvenile Court is vested with original and exclusive jurisdiction of the child. *This jurisdiction confers special rights and immunities.*") (emphasis added) (internal quotation marks omitted); *see also infra* note 222 and accompanying text; *cf.* Goss v. Lopez, 419 U.S. 565, 572-74 (1975) (analogous situation of public education).

This Note focuses on the due process concerns arising from the government's attempt to rescind its *statutory* offerings. Any concerns regarding criminal due process are beyond the scope of this Note. *See Kent*, 383 U.S. at 562 (contrasting the "requirements of a criminal trial" with the requirements of general "due process"). Similarly, the notion that juveniles in the juvenile justice system receive less due process than adults in the criminal justice system refers only to these criminal due process concerns and is irrelevant to the topic of this Note. *See id.*; *In re* Gault, 387 U.S. 1, 14 (1967) (referring specifically to issues affecting criminality like the entitlement of bail, the indictment by grand jury, and trial by jury); *id.* at 17 (contrasting the adult's right to "liberty" to the juvenile's right to "custedy").

218. *See* Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989) (describing the two part test for due process questions).

219. *See* Maher v. Roe, 432 U.S. 464, 481 (1977) (Burger, J., concurring) ("The decision to provide any one of these [benefits] or not to provide them is not required by the . . . Constitution."); *see also Goss*, 419 U.S. at 574 (referring to the lack of a "constitutional[] obligat[ion]" to provide for public education); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not . . . afforded explicit protection under our . . . Constitution.").

220. *See Goss*, 419 U.S. at 572-73 (showing that interests requiring due process protection are normally "created and their dimensions defined by an independent source such as . . . statutes or rules entitling the citizen to certain benefits") (internal quotation marks omitted); *see also id.* at 573 ("Here, *on the basis of state law*, [these students] . . . plainly had legitimate claims

The JJDPA clearly establishes a significant interest to which due process requirements must attach. Through the Act, Congress granted juvenile offenders a statutory entitlement to participation in rehabilitative state juvenile justice systems reinforced by federal support.[221] Furthermore, the Supreme Court has held that the government's attempt to rescind statutory rights and benefits created through the juvenile justice system must meet the requirements of constitutional due process.[222] JJDPA's statutory entitlements satisfy the first step in the Supreme Court's procedural due process analysis.

If a constitutionally protected interest exists, the Court's due process analysis next focuses on procedural accuracy.[223] Initially, courts must determine the statutory criteria necessary to trigger the deprivation of the established interest.[224] Then courts must consider the sufficiency of existing procedures in accurately determining whether such criteria apply.[225] If existing procedures are inadequate, courts must then consider the level of additional procedures necessary to ensure a sufficient degree of accuracy.[225] In making these assess-

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of entitlement to a public education.") (emphasis added); Wolff v. McDonnell, 418 U.S. 539, 557 (1974).

221. *See supra* Part IV; *see also Kent*, 383 U.S. at 556-57; *cf. Goss*, 419 U.S. at 573 (analogous situation regarding entitlement to a public education).

222. *See Kent*, 383 U.S. at 556-57, 562 ("[W]e do hold that the[se] [procedures] . . . *must measure up to the essentials of due process and fair treatment.*") (emphasis added); *supra* note 217 (quoting *Kent*, 383 U.S. at 556-57); *cf. Goss*, 419 U.S. at 574 (analogous situation regarding entitlement to public education); *Wolff*, 418 U.S. at 557 (analogous situation regarding removal of prisoners' good-time credits).

Though the Court in *Kent* only focused on statutory benefits that are common to federal and state juvenile jurisdictions, *see Kent*, 383 U.S. at 556-67, other statutory benefits certainly accrue through juvenile status which are unique to the state system, *see* discussion *supra* Part III. Further, the Court soon described the "features of the juvenile system which . . . are of *unique* benefit" in more depth to include "the processing and *treatment* of juveniles separately from adults." *In re* Gault, 387 U.S. 1, 22 (1967) (emphasis added). Such "treatment" includes a statutory benefit provided for federal juvenile offenders through the state systems rather than through the federal system. *See* discussion *supra* Part IV; *see also supra* notes 8, 186. The mere existence of this statutory benefit establishes the need for due process, regardless of the weight of the interest. *See Goss*, 419 U.S. at 575-76.

223. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also Thompson*, 490 U.S. at 460 ("[T]he second [step] examines whether the procedures attendant upon that deprivation were constitutionally sufficient."); *Goss*, 419 U.S. at 577 ("Once it is determined that due process applies, the question remains what process is due.") (internal quotation marks omitted).

224. *See Mathews*, 424 U.S. at 335-36 (identifying first the criteria allowing removal of disability benefits).

225. *See id.* at 337-47 (examining the adequacy of the procedures used to determine whether the criteria needed to remove disability benefits was met); *Goss*, 419 U.S. at 577 (looking at the "remain[ing]" question of "what process is due").

226. *See* Goldberg v. Kelly, 397 U.S. 254, 263-64, 269-70 (1970) (deciding the extent of additional procedures required after finding current procedures inadequate). A court may also use an assessment of the value of additional procedures to help determine the adequacy of current

ments regarding both existing and potential procedures, courts must balance the significance of the private interest at stake, and the risk of its loss due to inadequate procedures, against the potential burden upon the state if it implements heightened procedural protections.[227] Here the Constitution requires only the level of procedural protection necessary to ensure an accurate determinative process; it does require accuracy in the outcome itself.[228]

Applying this analysis to JJDPA, courts must assess the procedural accuracy of the process through which the federal government deprives juvenile offenders of the opportunity to participate in state justice systems. Prior to the certification decision, JJDPA explicitly mentions only an initial investigation by the Attorney General.[229] Until passage of the Crime Control Act, these investigations appeared to afford a sufficient degree of procedural accuracy in determining whether a particular juvenile offender met the statutory criteria justifying certification.[230] A simple investigation could quickly and accurately determine whether a particular state lacked or refused jurisdiction, or whether the state lacked sufficient programs or services.[231] Though the Attorney General could certainly err in making these determinations (e.g., by failing to account for certain state programs,) the investigation itself would satisfy the Supreme Court's requirement of adequate procedures. The objective nature of the Attorney General's

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procedures. *See Mathews*, 424 U.S. at 337-47 (finding that the lack of value in alternative procedures justified the existing procedures).

227. *See Mathews*, 424 U.S. at 347-49.

228. *See id.* at 344 ("[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied te the generality of cases, not the rare exceptions.").

229. *See* 18 U.S.C. § 5032 (1994 & Supp. IV 1998).

230. *See* Juvenile Justice and Delinquency Prevention Act (JJDPA), Pub. L. No. 93-415, § 502, 88 Stat. 1109, 1134 (1974).

231. *See id.* One could argue that the only criterion necessary for overcoming the presumption for state jurisdiction is the certification decision itself. *Cf.* United States v. Jarrett, 133 F.3d 519, 538-39 (7th Cir. 1998) (characterizing the statutory text in this manner by stating that "the only jurisdictional requirement is that the Attorney General certify that such an interest exists"). The Attorney General's certification of the existence of certain criteria, e.g., the existence of a substantial federal interest, would then be the only requirement for invoking federal jurisdiction. *See id.* Thus, the due process required to determine this criterion—the existence of a certification—would not need heightened procedural safeguards. This argument assumes, however, that the statutory interests in JJDPA were created subject to the investigation of the Attorney General. Such an argument, though initially successful before the Supreme Court, *see, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974), was expressly rejected by the Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1980). The Court in *Loudermill*, 470 U.S. at 541, determined that government-created interests cannot exist subject to inaccurate procedures because the requirements of due process flow from the Constitution rather than the actual legislation. Instead of allowing the government to create such defective interests, the Supreme Court held that any statutory right required the protections of *constitutional* due process. *See id.* Thus, such an argument fails in the face of *Loudermill*.

investigations obviated the need for additional procedures because the low risk of an erroneous deprivation rendered additional procedural safeguards of little value.[232]

The Crime Control Act's introduction of a third basis for certification—crimes of violence involving a substantial federal interest—raises more serious due process concerns. In contrast to the objective determination of whether certain tangible conditions exist within a particular state jurisdiction,[233] the Attorney General's determinations regarding "violent" crimes and "substantial" federal interests necessarily focus on vague, subjective criteria.[234] The substantial risk of error in the evaluation of these indeterminate factors by a single prosecutorial entity, especially with the need to take into account many different factors in combination makes it difficult to achieve procedural accuracy with simply a prosecutorial investigation.[235] Considering the significance of the private interests involved,[236] the high risk of inaccuracy introduced by the new criteria for certification renders JJDPA's current level of procedural protection constitutionally inadequate.[237] Without additional procedural safeguards, the statute in

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232. *See* JJDPA § 502; *see also Mathews*, 424 U.S. at 335, 343 ("An additional factor . . . is the fairness and reliability of the existing . . . procedures, and the probable value . . . of additional safeguards.").

233. *See supra* notes 229-32 and accompanying text.

234. *See* 18 U.S.C. § 5032. While the vagueness surrounding the subjective search for a "substantial federal interest" is clear, *see, e.g., Jarrett*, 133 F.3d at 538-39 (realizing that the Attorney General's assessment is entirely subjective), the determination of violence becomes deceptively more difficult with certain crimes, *see* United States v. Juvenile Male, 923 F.2d 614, 618-20 (8th Cir. 1991) (evaluating the presence of "violence" in a criminal conspiracy charge).

235. *See* United States v. Juvenile No. 1, 118 F.3d 298, 307 (5th Cir. 1997) (listing some of the factors that the Attorney General must consider such as the gravity of the Federal offense compared to the state offense, the relationship of the offense to other Federal offenses committed by the accused, and the likelihood of effective investigation and prosecution by the possible jurisdictions) (citing S. REP. NO. 97-307, at 5 (1981)).

236. *See supra* note 8.

237. *See* Kent v. United States, 383 U.S. 541, 556-57, 561-62; *see also Mathews*, 424 U.S. at 335; *cf. id.* at 337-40 (finding more accurate procedures than those available in § 5032 in determining the criteria for the social security benefits).

Many courts have found adult transfers in various juvenile systems across the United States, which would similarly remove these statutorily created interest, to be constitutional, despite a conspicuous lack of procedures determining any accuracy. *See, e.g.*, Brown v. United States, 343 A.2d 48, 49-50 (D.C. 1975). However, these decisions do not affect the requirement of due process regarding the certification of § 5032. These courts uphold adult transfer proceedings based on statutes with far less vague criteria. *See, e.g.*, United States v. Bland, 472 F.2d 1329, 1336-37 & n.26 (D.C. Cir. 1972) (regarding statute with clear automatic transfers); United States *ex rel.* Pedrosa v. Sielaf, 434 F. Supp. 493, 496-97 & n.7 (N.D. Ill. 1977) (finding due process problems in vague state statute and listing contrasting cases evaluating vague and clear statutes). JJDPA's certification, in contrast, turns on more vague characteristics of the crime charged by the prosecutor rather than on the simple existence of a charge itself. *See* 18 U.S.C. § 5032.

its current form does not ensure a sufficient degree of procedural accuracy.[238]

Upon recognizing procedural inadequacy, courts determine the need for additional procedural safeguards by balancing the substantial risk of "grievous loss" against the potential burden of additional procedures on the federal government.[239] The "grievous loss" juveniles would suffer in losing these state programs and services that assist their social reintegration—thereby potentially ensuring a life of criminal behavior and isolating social stigmatization[240]—justifies some

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Some courts have identified these "waiver" proceedings as coming in three flavors: legislative offense exclusion; judicial; and prosecutorial. *See* State v. Butler, 977 P.2d 1000, 1005 (Mont. 1999). Legislative offense exclusion waivers, where the legislature omits certain categories of offenses from juvenile court jurisdiction, *see id.*, implicate no procedural due process concern in regards to the class of offenders statuterily excluded from receiving the beneflts of the juvenile system, *see, e.g.*, Goss v. Lepez, 419 U.S. 565, 572-73 (1975) (finding that due process requirements attach when "statutes or rules [are] entitling the citizen te certain beneflts"). Judicial waiver proceedings, which "provide that a judge may transfer a juvenile to adult court, at the judge's discretion, if certain statutory criteria are met," State *ex rel.* A.L., 638 A.2d 814, 817 (N.J. Super. Ct. 1994), clearly require procedural due process. *See Kent*, 383 U.S. at 556-57, 561-62. Finally, under prosecutorial waivers, a statute provides for concurrent jurisdiction between juvenile and criminal courts, leaving the prosecuters with the discretion to determine the applicable forum. *See Butler*, 977 P.2d at 1005. Regardless of whether this prosecutorial discretion requires due process, § 5032 is not analogous to these waivers. Rather than provide concurrent jurisdiction, § 5032 instead provides exclusive jurisdiction in the state forum. *See* discussion *supra* Part IV. B. Also, rather than provide the prosecutor discretionary control over forum selection, Congress blocked the Attorney General's discretion and conditioned the removal of this exclusive jurisdiction on the existence of certain conditions. *See generally* discussion *supra* Part IV.

Further, though some courts focus on the "non-adjudicatory" nature of the adult transfer process, this distinction is irrelevant to the certification. *See, e.g.*, State v. Flying Horse, 455 N.W.2d 605, 608 (S.D. 1990) ("The salient feature of the transfer proceeding is that it is not adjudicatory in nature."). The non-adjudication distinction refers to the adult transfer's non-adjudication of the *criminal* charges at hand, thereby implicating criminal due process concerns. *See, e.g., id.* In contrast, the § 5032 certification implicates an adjudication of a *statutory* right, *see Kent*, 383 U.S. at 556-57, 561-62; *supra* Part IV, and thus requires due procedures, *Mathews*, 424 U.S. at 335; *see also, e.g.*, Corder v. Rogerson, 192 F.3d 1165, 1168 (8th Cir. 1999) (finding criminal due process concerns like the "opportunity to confront and cross-examine" irrelevant to the concerns presented in *Kent*). Due process would still be required in any adjudication that threatens the *statutory benefit* of the juvenile justice system and does not affect criminal liability, i.e., "non-adjudicatory" proceedings, like the certification process of § 5032. *See Mathews*, 424 U.S. at 335; *Kent*, 383 U.S. at 556-57, 561-62. Though § 5032 may not adjudicate criminal liability, it does determine the availability of a statutery benefit. *See supra* Part IV.

238. *See Kent*, 383 U.S. at 556-57, 561-62; *see also supra* note 222 (discussing the relevance of the Court's analysis in *Kent*).

239. *See Mathews*, 424 U.S. at 335. "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he [or she] may be condemned to suffer *grievous loss*." Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (internal quotation marks omitted) (emphasis added). For a brief discussion regarding the loss juveniles would suffer, see *supra* note 8.

240. *See supra* notes 8, 20-21 and accompanying text (discussing the Progressives' goals for juvenile justice); *see also Kent*, 383 U.S. at 556 (finding "clear beyond dispute" that the proce-

degree of objective review by district courts.[241] Furthermore, such review would not result in either administrative or financial burdens. Even without independent, district court review, juvenile offenders already face proceedings in federal courts if a prosecutor issues a § 5032 certification.[242] Adding a hearing on the certification issue at the outset of the already scheduled proceedings does not seem overly burdensome on the federal courts. Such proceeding could be tailored to minimize the burden on the federal government by merely inquiring into the federal prosecutor's decision and providing some opportunity for rebuttal by the juvenile.[243] Since some of the determining factors involved do relate to issues normally decided by federal prosecutors,[244] the district court judge could give some deference to prosecutorial determinations on these issues. Considering the importance of the private interests at stake, as well as the high risk of error inherent in certification decisions, the adoption of some degree of objective judicial review would not place an undue burden on the government.[245]

In the absence of meaningful procedural opportunities to ensure an accurate determination,[246] circuit courts considering the issue should read judicial review into § 5032 in order to rescue the statute from unconstitutionality.[247] Judicial review would immediately im-

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dures determining the status of benefits provided by the juvenile justice system were "a *critically important* action determining *vitally important* statutory rights of the juvenile") (internal quotation marks omitted) (emphasis added).

241. *See Kent*, 383 U.S. at 560-62; *see also* Goss v. Lopez, 419 U.S. 565, 576, 579 (1975).

242. 18 U.S.C. § 5032.

243. *See Mathews*, 424 U.S. at 349 ("All that is necessary is that the procedures be tailored . . . to 'the capacities and circumstances of those who are to be heard' to ensure that they are given a *meaningful opportunity* to present their case.") (citation omitted and emphasis added) (quoting *Goldberg*, 397 U.S. at 268-69). The determination of the relevant factors does not require evidence or witnesses beyond information about the state jurisdiction and the relevant crimes involved. *See supra* note 234 and accompanying text.

244. *See, e.g.*, United States v. Jarrett, 133 F.3d 519, 539-40 (7th Cir. 1998) (noting "substantial federal intorest" is a term of art to executive officials).

245. Besides the brief discussion above regarding the feasibility of tailoring review proceedings to minimize the burden on the government, the nature and scope of the procedures actually required is beyond the scope of this Noto. Resolving this question would require determining, among other things, the precise issues to be analyzed, the appropriato degree of deference to federal prosecutors, the appropriate party upon whom to place the burden of proof, and the standard required to determine this burden.

246. *See, e.g., Mathews*, 424 U.S. at 349 (expressing the need to ensure those facing loss "a meaningful opportunity to present their case").

247. The courts' ability to read judicial review into statutory silence is well recognized. *See* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 436-37 (1995) (reading judicial review into Congress's "silence"); *see also* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670-71 (1986) ("We begin with the strong presumption that Congress intends judicial review of administrative action."). If such an intorpretation clears the statute's "serious doubt of constitutionality[,]" a court must follow the "cardinal principle" of accepting "a construction of the statute

prove procedural accuracy since the judiciary could ensure that the prosecutor has more than far-fetched theories regarding the alleged substantial federal interests or other criteria justifying the third method of certification.[248] A review hearing would also provide juvenile offenders a valuable opportunity to voice their opposition to decisions denying them participation in state systems.[249] Since judicial review would rectify JJDPA's problems with constitutional due process, this judicial response is required to sustain the statute's constitutionality.[250]

The analysis employed by the majority of circuits appears persuasive only if one ignores the statute's historical context.[251] Interpreting JJDPA's language literally, the majority characterizes the statute as merely addressing jurisdictional concerns.[252] Without viewing the historical background, § 5032 certification indeed seems akin to prosecutors' traditional power to impose federal jurisdiction over any offender simply by charging that person with a federal crime.[253] Under this view, any certification decision should fall under the prosecutor's exclusive discretion, thereby precluding judicial review.[254] From the majority perspective, forbidding review of certification decisions appears entirely consistent with the traditional relationship between the judiciary and federal prosecutors.[255]

Unfortunately, this position overlooks the impact of the prosecutor's decision on juvenile offenders. With the introduction of a statutorily recognized interest in the applicability of state jurisdiction, Congress transformed the prosecutor's relationship with juveniles. Certification essentially amounts to an administrative assessment of whether a statutory interest is available to certain federal juvenile offenders.[256] Thus, instead of acting merely as a traditional prosecutor *who selects the criminal charges*, the Attorney General under § 5032 takes on the role of an administrative agent authorized to *investigate the characteristics of the already selected offense* in order to determine

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. . . by which the question may be avoided." *See* Ullmann v. United States, 350 U.S. 422, 433 (1956).

248. At the very least, the judge can ensure that the federal prosecuter has contemplated the existence of some federal interest.

249. *See Mathews*, 424 U.S. at 349.

250. *See Ullmann*, 350 U.S. at 433.

251. *See, e.g.*, United States v. Juvenile No. 1, 118 F.3d 298, 302-07 (5th Cir. 1997).

252. *See, e.g., id.* at 305.

253. *See, e.g.*, United States v. Jarrett, 133 F.3d 519, 539-40 (7th Cir. 1998).

254. *See, e.g., Juvenile No. 1*, 118 F.3d at 305 ("[A] 'substantial federal interest' inquiry is integral to every decision whether to prosecute.") (footnote omitted).

255. *See* Wayte v. United States, 470 U.S. 598, 607-08 (1985).

256. *See* discussion *supra* Part IV.B.

the availability of a constitutionally protected interest.[257] The flaw in the majority's analysis lies in its failure to appreciate the historical transformation in the role of federal prosecutors.[258] A more careful analysis suggests that certification decisions, as products of a new and different role for federal prosecutors, do not fall within the realm of unreviewable prosecutorial discretion as the majority asserts.[259]

Based upon the majority's characterization of JJDPA, arguments that Congress did not intend to authorize judicial review of certification decisions appear persuasive. Legislative intent becomes irrelevant, however, when a statute suffers from a lack of constitutional due process.[260] If doing so will rescue a statute from unconstitutionality, courts should adopt even a strained interpretation of the legislation without considering congressional intent.[261] In the case of § 5032 certifications, therefore, courts should read judicial review into the statute's silence in order to satisfy the requirements of procedural due process.[262] Despite allegations of contrary congressional intent, courts should interpret the statute in a way that saves it from unconstitutionality.[260]

The lone minority circuit appears close to just such an interpretation.[264] In *Juvenile Male #1*, the Fourth Circuit implied that the certification determination was similar to other executive decisions falling outside of the realm of prosecutorial discretion.[265] The court also closely scrutinized the historical context of the statute, finding that Congress enacted JJDPA primarily to provide rehabilitative state assistance for juvenile offenders.[266] Although the court may have implicitly recognized that the certification decision resembles other administrative decisions not exempt from judicial review,[267] it neither stated such a finding nor engaged in an evaluation of constitutional due process requirements.[268] Instead, the court based its holding on a

257. *See* discussion *supra* Part IV.A-B; *supra* text accompanying notes 213-14.

258. *See* discussion *supra* Part IV.B.; *see also supra* text accompanying notes 213.

259. *See* Mathews v. Eldridge, 424 U.S. 319, 332-41 (1976); *see also* Kent v. United States, 383 U.S. 541, 556-57 (1966).

260. *See* Ullmann v. United States, 350 U.S. 422, 433 (1956).

261. *See id.*

262. *See id.*

263. *See id.*

264. *See* United States v. Juvenile Male #1, 86 F.3d 1314, 1319-20 (4th Cir. 1996).

265. *Id.* (noting that "executive determinations" are generally subject to review and comparing the certification to the reviewable scope-of-employment certification of the Westfall Act).

266. *See id.* at 1320 & n.9.

267. *See id.* at 1319-20 & n.9.

268. *See id.* at 1319-20.

judicial canon emphasizing legislative intent.[269] Such presumptions regarding the intent of Congress, however, are irrelevant when the Constitution requires judicial review.[270] Despite its appropriate inquiry into historical context, and although the spirit of the court's language leans towards the correct analysis, the Fourth Circuit failed to recognize the federal prosecutor's new role and to assess the requirements of due process.

VI. CONCLUSION

If minors do not "shed their constitutional rights" to due process "at the schoolhouse door,"[271] they certainly do not lose these rights when entering the justice system.[272] In passing JJDPA, Congress allowed automatic participation by federal juvenile offenders in rehabilitative state programs supplemented with federal assistance. Specifically, § 5032 reflected a legislative policy designed to ensure that the benefits of state juvenile justice systems reached as many federal juvenile offenders as possible. After the Act, juvenile offenders could legitimately expect to participate in state rehabilitative programs and services standardized and supported by the federal government. Under modern constitutional jurisprudence, such statutorily created entitlements may be revoked only through procedures satisfying the requirements of due process.

Unfortunately, most circuit courts neglected the historical context surrounding passage of JJDPA. Consequently, these circuits considered only the superficial aspects of the statute, characterizing

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269. *See id.* In fact, the *Lamagno* decision does not reveal the presumption that the Fourth Circuit in *Juvenile Male* is apparently seeking. The Supreme Court stated that a presumption for judicial review of executive action existed when the administrative judgment was determinative of a controversy. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 424 (1995). The presumption sought by the Fourth Circuit comes from a line of cases cited in *Lamagno*. *See id.* (citing, *inter alia*, Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986)). Such a presumption remains irrelevant since the Constitution requires judicial review of the certification of a substantial federal interest. *See* Ullmann v. United States, 350 U.S. 422, 433 (1956). However, since the prosecutor here acts like other executive entities subject to "the strong presumption that Congress intends judicial review of administrative action," *Bowen*, 476 U.S. at 670, the presumption of the judicial canon could be relevant for juveniles seeking review of the other methods of certification not affected by constitutional due process concerns, *see id.* at 670-71. These possibilities, however, were not entertained by the Fourth Circuit, *Juvenile Male #1*, 86 F.3d at 1317-21, and are beyond the scope of this Note.

270. *See Ullmann*, 350 U.S. at 433.

271. Goss v. Lopez, 419 U.S. 565, 574 (1975) (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).

272. *See* Kent v. United States, 383 U.S. 541, 561-62 (1966); *see also In re* Gault, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

federal prosecutors' relationship with juveniles as virtually unchanged from its traditional status. Ignoring the effects of certification decisions, with their potential to strip juvenile offenders of the statutory interests established in JJDPA, the majority of circuits currently allow federal prosecutors to make certification determinations with final, unreviewable discretion.

Section 5032 certification decisions based on the existence of a substantial federal interest require judicial review. Under established constitutional precedent, due process demands sufficient procedural accuracy.[273] Since a certain category of juvenile offenders could potentially lose a constitutionally protected interest, all juveniles are entitled to due process in the determination of whether they fall into this category. In the absence of additional procedural safeguards, courts must read judicial review into JJDPA to save the statute from unconstitutionality.

Though the majority of juvenile offenders do not fall within the reach of § 5032, a considerable number of juveniles do face certification decisions each year.[274] Meanwhile, society is continuously bombarded with images of juveniles committing violent crimes with national repercussions.[275] In response, federal criminal legislation annually increases in scope.[276] Thus, an ever-increasing number of juveniles face potential unconstitutional denial of the significant rehabilitative benefits provided under JJDPA. Despite the rehabilitative focus of the juvenile justice system, future juvenile offenders may lose an important opportunity to reform in state systems. Without the assistance of state programs and services, these juvenile offenders face a bleak future of persistent criminality.

An examination of any statute should not ignore the historical context in which it was passed. Unfortunately, the purposes and underlying effects of JJDPA have repeatedly received inadequate judicial consideration. Courts have also misinterpreted § 5032's place in the span of federal juvenile delinquency legislation throughout the twentieth century. The recent jurisprudence regarding § 5032 certification serves as a reminder of the importance of historical context in statu-

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273. *See Goss*, 419 U.S. at 573-74.

274. Though "[f]ew cases involving juvenile delinquents are processed in [federal courts]" on a yearly basis, over 1,100 juveniles saw their delinquency proceedings terminate in federal court over a seven year period. *See* John Scalia, *Juvenile Delinquent in the Federal Criminal System* (last modified Dec. 15, 1997) <http://www.ojp.usdoj.gov/bjs/pub/ascii/jdfcjs.txt>. The annual number of such potential cases is also considerable. For example, close to 500 juveniles were referred to federal prosecutors for investigation in 1995. *See id.*

275. *See* Feld, *supra* note 1, at 327.

276. *See id.*

tory interpretation. Regardless of the buildup of legislation and jurisprudence over the decades, a critical constitutional protection like due process should never fade into judicial oblivion.

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* I would like to thank Professors Thomas McCoy, Don Hall, and Andy Shookhoff for their advice, Omar Kilany for his edits, and David Lamb and Rohert Hess for their tireless assistance. Go Hoos!