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# Oversight Hearing on Juvenile Justice in Indian Country: Challenges and Promising Strategies

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**TESTIMONY OF ADDIE C. ROLNICK, ASSOCIATE PROFESSOR  
WILLIAM S. BOYD SCHOOL OF LAW, UNIVERSITY OF NEVADA, LAS VEGAS**

**BEFORE THE  
UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS**

**OVERSIGHT HEARING ON JUVENILE JUSTICE IN INDIAN COUNTRY: CHALLENGES AND PROMISING  
STRATEGIES**

JULY 15, 2015

Good afternoon, Chairman Barrasso, Vice Chairman Tester, and Members of the Committee. Thank you for providing me the opportunity to testify today about the challenges to improving juvenile justice in Indian country and promising strategies for doing so. My name is Addie Rolnick. I am a law professor at the University of Nevada, Las Vegas. I have been engaged in research, advocacy, and institution building to improve juvenile justice in Indian country, and for Native youth elsewhere, for over a decade.

My testimony today is based primarily on a 2008 policy paper that I co-authored with Neelum Arya of the Campaign for Youth Justice, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Juvenile Justice Systems*, and a forthcoming article I have written which will be published in the N.Y.U. Journal of Legislation and Public Policy in 2016, *Untangling the Web: Juvenile Justice in Indian Country*. I also draw on the findings and recommendations outlined in two recent special reports: the Indian Law and Order Commission's 2013 report, *A Roadmap for Making Native America Safer*, and the 2014 report of the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence so Children Can Thrive*.

Today I would like to share with you my perspectives on ways to improve juvenile justice in Indian country. From my research, I believe there is broad agreement on three over-arching themes, and I will address each one. First, American Indian and Alaska Native youth are vulnerable and over-punished under the current system. Second, juvenile justice policy experts largely agree that incarceration should be the intervention of last resort. Third, the overlapping authority of tribal, federal, and state governments makes it difficult to establish a consistent approach, which tends to undermine the authority of tribal governments and does not serve youth. I would like to spend my time describing each of these themes in more detail and providing specific recommendations for how Congress can act to improve juvenile justice in Indian country.

## I. Native Youth Are Vulnerable and Over-Punished

Compared to other groups and compared to the general youth population, American Indian and Alaska Native youth<sup>1</sup> are at great risk in almost every area identified as a risk factor for involvement in the juvenile justice system. They are poorer.<sup>2</sup> Many live in communities with few social safety net services.<sup>3</sup> They are likely to face physical<sup>4</sup> and mental<sup>5</sup> health problems. They are more likely to drop out of school<sup>6</sup> and less likely to attain higher education.<sup>7</sup> They are likely to struggle with drug and alcohol use.<sup>8</sup> They are likely to contemplate and commit suicide.<sup>9</sup> They are likely to be abused<sup>10</sup> or to be victims of violent crime.<sup>11</sup>

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<sup>1</sup> The data sources relied upon in this testimony may vary in who is included in the population of Native youth. Where census data is used, some counts include only people who identify as American Indian or Alaska Native only, while others also include those who identify as American Indian or Alaska Native in combination with another race. Statistics on Native people as a racial group (including most that compare Native outcomes with those of other groups) include people who live on and off reservations. This population is much larger than the India country population; according to the 2010 census, only about one third of American Indian and Alaska Native people on reservations. Nationwide data may also obscure important differences between youth from different tribes, reservations, and states, and youth under the jurisdiction of tribal, federal, and state governments. As described in my testimony, further research on specific sub-populations is an important piece of improvement efforts.

<sup>2</sup> In 2007-2011, the AIAN-only poverty rate was 27%, compared to 14.3% of the total population and 11.6% of whites. Suzanne Macartney, Alemayehu Bishaw, and Kayla Fontenot, *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007–2011* (February 2013): ACSBR/11-17.

<sup>3</sup> Neelum Arya & Addie C. Rolnick, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems* (Campaign for Youth Justice 2008), 14.

<sup>4</sup> *A Tangled Web*, 4.

<sup>5</sup> *A Tangled Web*, 5; Indian Law and Order Commission, *A Roadmap for Making Native American Safer: Report to the President & Congress of the United States* (2013), 151.

<sup>6</sup> In the 2011-12 school year, 68% of AIAN students graduated, compared to 81% of the total population. U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), *NCES Common Core of Data State Dropout and Graduation Rate Data File*, School Year 2011–12, Preliminary Version 1a: <http://nces.ed.gov/ccd/tables/AFGR0812.asp>. In 2012, 21.2% of AI/AN-only people over the age of 25 lacked a high school diploma/GED, compared with 13.6% of the total over-25 population. U.S. Census Bureau, *2012 American Community Survey*: [http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/12\\_1YR/S0201//popgroup~006](http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/12_1YR/S0201//popgroup~006).

<sup>7</sup> In 2012, 13.5% of AI/AN-only people over the age of 25 had a bachelor's degree, compared to 29.1% of the general population. U.S. Census Bureau, *2012 American Community Survey*: [http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/12\\_1YR/S0201//popgroup~006](http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/12_1YR/S0201//popgroup~006).

<sup>8</sup> In 2012, AI/AN-only people over the age of 12 experienced the highest rate of substance abuse, at 21.8%.

SAMHSA, Center for Behavioral Health Statistics and Quality, National Survey on Drug Use and Health, 2012. Table 5.5B.

<sup>9</sup> Compared to the general population, those served by the Indian Health Service are 60% more likely to die of suicide. <http://www.ihs.gov/newsroom/factsheets/disparities/>. Using 2011 statistics for people younger than 25 years, the AI/AN suicide rate was 13.06/100k, which was more than double the white rate (6.11/100k), almost quadruple the black rate (3.31/100k), and more than quadruple the Asian rate (2.85/100k). Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, WISQARS dataset.

<sup>10</sup> In 2012, the rate of child abuse among AIAN-only victims was 12.4/k, compared to 8.0/k for white victims. This document is based on reports from state child protective services, and does not include child abuse cases handled

Both the Commission report and the Attorney General's Advisory Committee Report emphasize the alarming rates at which Native youth are exposed to violence (including being victims of abuse, witnessing domestic violence, and being exposed to violence in their communities), placing them at a greater risk of involvement in the juvenile justice system.<sup>12</sup> The reports link the present trauma with the impact of historical traumas experienced by Native communities, which included forced removal from homelands, targeted killing, wars, disease outbreaks, brutal boarding schools designed to forcibly disconnect Native children from their cultures, and family ties broken or damaged through adoption and relocation.<sup>13</sup> While more research is clearly needed on Native youth, especially research that identifies differences in sub-populations, the picture based on the available data is clear: Native youth are extremely vulnerable.

The flip side of their high risk factors is that Native youth disproportionately experience the harshest sanctions for their misbehavior. They are over-represented in foster care,<sup>14</sup> in arrests for alcohol and drug offenses,<sup>15</sup> in out of home delinquency placements,<sup>16</sup> in secure detention,<sup>17</sup> and among youth prosecuted in the adult criminal system.<sup>18</sup> Both reports highlight this contrast between the incredible vulnerability of Native youth and the overly harsh sanctions they are subjected to once they enter the legal system.<sup>19</sup> As the Advisory Committee found, the widespread use of incarceration for children with such high rates of trauma is "another of infliction of violence on these children."<sup>20</sup>

## II. Incarceration Should Be a Last Resort

The Law and Order Commission and the Attorney General's Advisory Committee each recommended that incarceration should be used only as a last resort.<sup>21</sup> These recommendations reflect the widespread recognition among juvenile justice policymakers that "a growing body of research

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exclusively by tribal child protective services, so it is understated. United States Children's Bureau, Child Maltreatment 2012 (2013), available at <http://www.acf.hhs.gov/programs/cb/resource/child-maltreatment-2012>.

<sup>11</sup> In 2012, the violent victimization rate for American Indians and Alaska Natives was 46.9/k. This was 1.37 times the black rate (34.2/k), 1.86 times the white rate (25.2/k), and 2.86 times the API rate (16.4/k). Criminal Victimization, 2012, by Jennifer Truman, Ph.D., Lynn Langton, Ph.D., and Michael Planty, Ph.D., Bureau of Justice Statistics. October 2013, NCJ 243389. Table 7 (excluding those who identify as mixed race).

<sup>12</sup> *Roadmap*, 151-153; Attorney General's Advisory Committee on American Indian/Alaska Native Youth Exposed to Violence, *Ending Violence So Children Can Thrive* (2014), 37-39.

<sup>13</sup> *Roadmap*, 149; *Ending Violence*, 39-40, 111.

<sup>14</sup> National Indian Child Welfare Association and The Pew Charitable Trusts, *Time for Reform: A Matter of Justice for American Indian and Alaskan Native Children* (2007), 5.

<sup>15</sup> *A Tangled Web*, 8.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Roadmap*, 166; *Ending Violence*, 110-113.

<sup>20</sup> *Ending Violence*, 112.

<sup>21</sup> *Roadmap*, 149.

demonstrates that the current system of intensive oversight and placement of youth in large prison-like facilities has, at best, only a modest positive effect on recidivism, and can actually have negative effects, while therapeutic programs focused on youth development have very positive effects, even for youth who commit serious offenses.”<sup>22</sup> Juvenile justice policymakers have presented the State of Missouri, which replaced all of its training schools and large incarceration facilities with smaller, regional therapeutic facilities, as a model for improving juvenile justice.<sup>23</sup> Other states have reduced their populations of incarcerated youth by diverting non-dangerous offenders out of the system entirely.<sup>24</sup> Of the ten guiding principles identified by the Youth Transition Funders Group, six refer directly to the idea that youth should be diverted out of the legal system where possible and, for those in the system, smaller, community-based rehabilitation and treatment programs are preferable to massive, faraway institutions.<sup>25</sup> A 2011 report by the Annie E. Casey Foundation presents a compelling case that incarceration is a bad policy for juvenile offenders because it is ineffective, unnecessary, and dangerous. According to the report, incarceration has little or no public safety benefit, wastes money, harms youth, and does not reduce recidivism.<sup>26</sup>

While incarceration should be a last resort for all youth, it is an especially bad fit for Native youth. Incarceration should not be used as a remedy for delinquency caused by trauma. The Commission Report describes the current incarceration-based juvenile justice system in Indian country as “compromis[ing] traumatized, vulnerable young lives, ruptur[ing] Native families, and weaken[ing] Tribal communities.”<sup>27</sup> Instead of a focus on incarceration, the juvenile justice system in Indian country should focus on meeting the needs of offenders with trauma, mental health, and substance abuse issues. It should incorporate trauma and mental health screening and services, as well as alcohol and drug treatment services. Acknowledging historical trauma and its impact on family and child well being, it should strive to keep youth connected to their families and communities wherever possible, rather than sending youth to faraway states or non-Native systems. It should avoid the military-style discipline that was a hallmark of assimilative boarding schools and is especially damaging to youth who have experienced abuse and trauma. It should employ incarceration as the last possible option and only when it is required for public safety. Given the infrequent occurrence of serious violent crimes among Native youth, some tribal communities may not need to use it at all.

### **III. The Tangled Web of Jurisdiction Hurts Native Youth**

Many Native youth who commit offenses within Indian country are prosecuted by outside governments, without regard to the preferences of the tribal government. As the Law and Order

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<sup>22</sup> MacArthur Foundation, *Models for Change, Because Kids Are Different: Five Opportunities for Reforming the Juvenile Justice System* (2014).

<sup>23</sup> Richard A. Mendel, *The Missouri Model* (Annie E. Casey Foundation 2010)

<sup>24</sup> *Id.* at 5.

<sup>25</sup> Youth Transition Funders Group, *Juvenile Justice Reform: A Blueprint* (2012), at 15.

<sup>26</sup> Annie E. Casey Foundation, *No Place for Kids: The Case for Reducing Juvenile Incarceration* (2011).

<sup>27</sup> *Roadmap*, 159.

Commission found, “[d]ata show that Federal and State juvenile justice systems take Indian children, who are the least well, and make them the most incarcerated. When they do incarcerate them, it is often far from their homes, diminishing prospects for positive contacts with their communities. Furthermore, conditions of detention often contribute to the very trauma that American Indian and Alaska Native children experience.”<sup>28</sup>

Youth prosecuted federally encounter a system that was not designed for Native people or for juveniles. The federal government exercises jurisdiction under the Federal Juvenile Delinquency Act.<sup>29</sup> This jurisdiction extends to juveniles whose acts would have been covered by either the Major Crimes Act<sup>30</sup> or the Indian Country Crimes Act<sup>31</sup> if they were adults. Tribes have concurrent jurisdiction over the same juveniles, but federal law does not require prosecutors to defer to tribes. Non-Native youth are rarely prosecuted in the federal system because federal juvenile jurisdiction is an option of last resort for when juveniles who violate federal laws cannot be turned over to state juvenile justice systems. Indian country juveniles, on the other hand, are prosecuted federally for offenses that would be handled by state juvenile courts if they occurred elsewhere.

The federal system, however, does not have separate juvenile court as states and tribes do.<sup>32</sup> When young offenders face federal prosecution, they are pulled into a criminal justice system that is staffed by personnel who do not specialize in juvenile justice and processed under laws written with adult criminals in mind. Youth in the federal system are prosecuted by U.S. Attorneys and placed in the custody of the Bureau of Prisons. Because most of the offenders handled by these two agencies are adults, the agency-level policy is focused primarily on adult offenders, and the officials are more likely to have expertise in adult crime and adult detention. The Office of the U.S. Attorney does not have a juvenile division; juvenile prosecutions are supervised by the Organized Crime and Gang Section of the Criminal Division.<sup>33</sup> The Bureau of Prisons does not have a juvenile division, nor does it have any designated juvenile facilities; juveniles are instead housed in rented beds in state, local, and private facilities through corrections contracts.<sup>34</sup> Youth prosecuted in the federal system spend more time

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<sup>28</sup> *Roadmap*, 166-167.

<sup>29</sup> 18 U.S.C. §§ 5031-5042.

<sup>30</sup> 18 U.S.C. § 1152.

<sup>31</sup> 18 U.S.C. § 1153.

<sup>32</sup> See, e.g., William Adams and Julie Samuels, *Tribal Youth in the Federal Justice System* (Urban Institute: Justice Policy Center, 2011), vi (“There is no federal juvenile justice system, and juveniles account for a very small proportion of all federal prosecutions handled by U.S. Attorneys across the country.”); U.S. Dep’t of Justice, Bureau of Justice Statistics, *Juvenile Delinquents in the Federal Criminal Justice System* (1997) (“Unlike State-level criminal justice systems, the Federal system does not have a separate juvenile justice component.”).

<sup>33</sup> U.S. Attorney’s Manual, Title 9, Section 8.001.

<sup>34</sup> *Tribal Youth in the Federal System*, 8-9; see [http://www.bop.gov/business/ccc\\_contracting.jsp](http://www.bop.gov/business/ccc_contracting.jsp). Although the Bureau of Prisons website contemplates contracts with tribal facilities as well, no tribal facilities are listed in the agency’s list of contract facilities. Contract facilities are often far from a young person’s home community. See *Roadmap*, 155, 160; *Ending Violence*, 120.

locked up because federal sentences are longer and the federal system does not include diversion, parole, and other services.<sup>35</sup>

Native youth come under state jurisdiction for two reasons. First, some state governments have jurisdiction over Indian country under Public Law 280 and similar laws.<sup>36</sup> These states are not required to consult with tribal governments on any matter related to Indian country law enforcement, even though the tribes generally have concurrent jurisdiction over juvenile offenders. Although some states voluntarily communicate with tribes today, they have historically chosen not to do so. Tribes in these states are not usually invited to the table when the states make large-scale juvenile justice policy decisions or determine how the state's financial resources will be allocated. Moreover, tribal officials who wish to be involved in particular cases may not be permitted to intervene.

Second, Native youth who commit offenses outside Indian country are prosecuted in state court. While this hearing is concerning with juvenile justice in Indian country, it is important to note that more than half of all American Indian and Alaska Native youth live outside Indian country and are subject to state jurisdiction for offenses committed there. Unlike in the child welfare context, where states are required to involve tribes when a tribal child comes into state court, no federal law requires states to consult with tribes at all in delinquency cases involving Native youth.<sup>37</sup> With very few exceptions, state laws do not include special procedures or interventions for American Indian and Alaska Native youth. This means that tribes have little control over or input into what happens to Native youth under state jurisdiction.

Where Native youth are subject to state jurisdiction, they are at least part of a system designed specifically for juveniles, as all states administer a separate juvenile system. However, the experiences of Native youth are determined by state policy, which is not usually formulated with Native youth in mind. This approach has not led to positive outcomes for Native youth. In many states, including Alaska, Minnesota, Montana, Oklahoma, North Dakota, South Dakota, Washington, and Wisconsin, there is evidence that American Indian and Alaska Native youth are less likely than other youth to be diverted out of the system, more likely to be incarcerated, and more likely to be transferred to adult court.<sup>38</sup>

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<sup>35</sup> *A Tangled Web*, 24-26; *Roadmap*, 155, 160; *Ending Violence*, 120.

<sup>36</sup> Act of Aug. 15, 1963, 67 Stat. 588, codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326. Although Public Law 280 is the major statute granting states juvenile delinquency jurisdiction over Indian country, some tribes are subject to state jurisdiction as a result of specific legislation, such as the laws implementing land claims settlements for many tribes in New England.

<sup>37</sup> The Indian Child Welfare Act does not apply to delinquency proceedings, but it does apply to juveniles charged with status offenses in state courts who are facing placement outside the home. This requirement, however, is under-enforced. See Coalition for Juvenile Justice & Tribal Law and Policy Institute, *American Indian/Alaska Native Youth & Status Offense Disparities: A Call for Tribal Initiatives, Coordination & Federal Funding* (2015), 5.

<sup>38</sup> See *A Tangled Web*, 21-24.

For these reasons, the Indian Law and Order Commission recommended removing Native children from federal and state jurisdiction whenever possible with the goal of “releasing Tribes from dysfunctional Federal and State controls and empowering them to provide locally accountable, culturally informed self-government.”<sup>39</sup>

#### IV. Recommendations

There are many factors that influence a government’s choices about how to address juvenile delinquency in a community. Juvenile justice systems serve the twin needs of community protection/accountability and treatment/rehabilitation of youth. The first factor to consider, then, is what kinds of offenses the youth in that community are committing, and what experiences contribute to their delinquency. While this answer will vary among communities, available data suggests that most Native youth come into contact with the system after committing non-violent offenses and drug- and alcohol-related offenses.<sup>40</sup> Likewise, the pervasive influence of personal and historical trauma in the lives of Native youth highlights the importance of a system built around trauma-informed care.

Another important factor is the traditional beliefs of that community regarding justice and childrearing. Tribal justice systems that incorporate tribal culture and tradition tend to be more focused on restorative justice, community well being and treatment and healing, and less focused on adversarial process and individualized punishment.<sup>41</sup> In addition to culturally specific beliefs about justice, a tribal system might also be guided by culturally specific beliefs about youth. For many tribes, these include beliefs about the importance of respect and guidance for youth who have gotten into trouble.<sup>42</sup> All of these factors suggest that, given the freedom to design a juvenile justice system appropriate for their community, many tribal governments would choose one that emphasized treatment, traditional approaches, and community-based intervention over incarceration and punishment.

A third factor that may influence community choices is the resources that are already available and the existence of other policy priorities. Tribal communities will differ widely in this regard, but many rural reservations lack access to the kind of extensive community-based services that non-tribal jurisdictions may rely on for early intervention and diversion programming, such as Boys and Girls Clubs, scouting organizations, and church groups. Similarly, many tribal communities are under-served by mental health professionals, so they may not have counselors, psychologists, psychiatrists, outpatient treatment programs, or hospitals equipped to serve young people. Because these ancillary

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<sup>39</sup> *Roadmap*, 159.

<sup>40</sup> In 2013, only about a quarter of the youth held in tribal or BIA facilities were being held for violent offenses. U.S. Dep’t of Justice, Bureau of Justice Statistics, *Jails in Indian Country, 2013*. From 2000-2006 the top five offenses for which Native youth were arrested nationally were larceny, liquor law violations, disorderly conduct, running away, and drug abuse violation. *A Tangled Web*, 8-9.

<sup>41</sup> Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society* (American Indian Development Associates YEAR): [http://www.aidainc.net/Publications/ij\\_systems.htm](http://www.aidainc.net/Publications/ij_systems.htm)

<sup>42</sup> Addie C. Rolnick, *Developing a Juvenile Justice System in the Native Village of Barrow, Alaska* (unpublished M.A. thesis, 2007).



services may not exist in tribal communities, it is especially important for tribes to be able to invest in youth development, mental health, and treatment programs as part of their effort to create a responsive juvenile justice system. Similarly, tribal governments with a wide range of financial needs may wish to avoid overly expensive measures for addressing delinquency, such as building secure detention facilities. For tribes, jurisdictional realities present an additional complication. Whether a tribe's efforts to address delinquency are respected by federal and/or state authorities and whether the tribe believes those authorities are providing effective services will likely influence how the tribe chooses to invest its resources.

While the outcome of this calculus will be different for each tribal community, a tribally driven process is important. A tribe should be able to assess the needs of its youth, the risk to community members, available resources, and areas of need, and design a system to meet those needs. A system designed with Native youth in mind and reflective of tribal traditions would likely focus less on expensive incarceration facilities and more on early intervention, treatment and care than the current system does. However, tribal control is important regardless of whether the tribe's policy choices reflect the current trend away from incarceration and toward treatment: policy choices that come from inside are more easily changed than policy choices imposed from outside, and the tribal government is accountable to the community (including the youth), who can help ensure that an ineffective system will be changed.

Once the tribal government has set the direction for its system, it should be able to partner with other governments to supplement these efforts. Most Native youth should be prosecuted in tribal systems, with federal and state jurisdiction supplementing, rather than supplanting, tribal authority. Grant and formula funding should be plentiful and flexible enough to assist tribes in building a system that meets community needs.

The current system works very differently. Federal and state authority may take primacy over tribal authority. Many youth end up under federal or state jurisdiction even though they would be better served by remaining in the tribal system. Tribes' decisions about what how to address juvenile delinquency are cabined by limited funding and overly restrictive rules on how that money can be used, rules that often reflect non-Native policy choices. As a result, the juvenile justice system in Indian country is heavily skewed toward incarceration. There are more than 30 tribal or BIA juvenile facilities, but there were less than 200 young people incarcerated in those facilities in 2013; that is *one facility for every seven youth*.<sup>43</sup> By contrast, tribes struggle to find funding to create and sustain early intervention programs and detention alternatives. Some of the young people locked in these facilities probably do not need to be there, but they are incarcerated because of a lack of alternatives and the pressure to fill the facilities once they are opened.

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<sup>43</sup> It is difficult to obtain an exact count for the number of facilities or the number of youth incarcerated in them. This estimate is based on the Department of Justice's *Jails in Indian Country* data with additional information obtained from the Association on American Indian Affairs.

Congress can help repair this broken system by (1) increasing tribal authority over American Indian and Alaska Native youth who commit delinquent offenses and (2) supporting tribes' efforts to build systems that reflect community needs, paying special attention to the need to invest in treatment and alternatives to incarceration. The following are specific recommendations for how to do this.

**A. Reserve Federal Prosecution for Exceptional Circumstances by Amending the Federal Juvenile Delinquency Act to Treat Tribes Like States**

Amending federal law to recalibrate the balance of power between tribes and outside authorities is an important part of any reform effort. While it may be impracticable to remove federal and state jurisdiction from the equation entirely, federal law should include a legal requirement of deference to tribal jurisdiction, giving each tribe maximum freedom to design and control a juvenile justice system that meets the needs of its youth.

For tribes subject to federal jurisdiction, the solution is remarkably simple: the Federal Juvenile Delinquency Act ("FJDA") should be amended to require federal prosecutors to obtain a waiver of tribal jurisdiction before prosecuting a juvenile for an Indian country offense. Under the procedure set forth under current law, a juvenile may not be proceeded against in federal court until the Attorney General certifies that the *state* lacks or is unwilling to take jurisdiction over the case, the state does not have adequate programs or services for the juvenile in question, the juvenile has committed a serious violent offense or a drug offense, or there is a substantial federal interest involved.<sup>44</sup> Despite the strong preference for state jurisdiction, the law does not require the Attorney General to defer to *tribal* jurisdiction.<sup>45</sup> Instead, the certification requirement is met in Indian country cases by a certification that the state lacks jurisdiction over the offender because the offenses occurred in Indian country.

Amending the FJDA to require a waiver of tribal jurisdiction is the simplest way to ensure that Native youth are prosecuted in federal court only when the tribe consents. The Law and Order Commission report recommended more far-reaching changes, such as allowing tribes to opt out of federal jurisdiction entirely.<sup>46</sup> Amending the FJDA would accomplish the same result, but it would preserve federal jurisdiction in cases where a tribe wished to waive its jurisdiction in favor of federal prosecution. It would also bring the FJDA in line with many other legal regimes in which tribes are treated the same as states.

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<sup>44</sup> 18 U.S.C. § 5032. There is an exception for offenses that carry a maximum term of six months or less when committed with the special maritime or territorial jurisdiction of the United States.

<sup>45</sup> *A Tangled Web*, 27.

<sup>46</sup> *Roadmap*, 159-161, 170-171.

## **B. Require States with Jurisdiction Over Indian Country to Defer to Tribal Prosecution**

For tribes subject to state jurisdiction, a clean legislative solution is harder to identify. Tribes in Public Law 280 states are now able request that the federal government reassume jurisdiction.<sup>47</sup> However, many tribes remain under state jurisdiction pursuant to Public Law 280 and pursuant to other laws. In order to ensure state/tribal cooperation in those areas where state/tribal concurrent jurisdiction continues, state governments with jurisdiction over Indian country should be required to defer to tribal prosecution unless the tribe waives jurisdiction and asks the state to proceed. Congress should consider amending Public Law 280 and/or passing independent legislation to require deference to tribal juvenile jurisdiction for all cases arising in Indian country (further discussed in Recommendation D).

## **C. Improve the Treatment of Native Youth in the Federal System**

For those youth who do remain in the custody of the Bureau of Prisons, policy changes should be made to encourage transparency and to better meet the unique needs of Native youth. The Bureau should be required to consult with Tribes to formulate policies specific to Native youth, to adhere to those policies, and to make information on offenses, outcomes, and policies available to the public. For example, the Bureau might consider contracting with tribal or BIA-run juvenile facilities to house Native youth whenever possible. Existing policies that require youth to be housed as close as possible to their home communities could be more strongly enforced, and additional changes may be considered to support continued contact between the young person and his or her tribal community. Improving community-based options and alternatives to incarceration for all juveniles in the federal system would also benefit Native youth.

One important aspect of this improvement includes review of how Native juveniles are affected by the Federal Sentencing Guidelines. In general, juvenile sentences differ from adult sentences because the decision to incarcerate may be based on a need for rehabilitation or treatment, as opposed to a term-of-years punishment. Juvenile jurisdiction typically ends at age 18 or age 21, so young offenders cannot necessarily be sentenced to long terms of incarceration. Confidentiality rules may also affect how prior juvenile adjudications are counted in terms of criminal history. Careful attention should be paid to how the Federal Sentencing Guidelines are applied to Native juveniles and whether their application leads to negative outcomes (for example, longer incarceration terms). The U.S. Sentencing Commission's Tribal Issues Advisory Group has appointed a subcommittee to study juvenile issues. The recommendations of this subcommittee should inform potential changes to federal law and policy.

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<sup>47</sup> 18 U.S.C. § 1162(d).

#### **D. Require States to Consult with Tribes Regarding Funding Priorities and Specific Cases Involving Tribal Youth**

For Native youth who remain under state jurisdiction, including tribes who remain subject to jurisdictional laws like Public Law 280 and all youth who reside or commit offenses off-reservation, it is critical to ensure that states consider tribes and Native youth at the level of both policy and individual cases. States with jurisdiction over Indian country should be required to create a formal avenue for tribal input and consultation on funding and policy decisions affecting Native youth. This could be accomplished through amendments to the Juvenile Justice and Delinquency Prevention Act (“JJDP A”). The JJDP A authorizes federal funding for state juvenile justice systems. Through the Act, Congress has long required states to adhere to certain requirements in order to receive funding. Congress could add a requirement that states with Indian country jurisdiction consult with affected tribes.

State juvenile justice officials should also be required to notify, consult with, and defer to tribal officials in individual cases involving youth from that tribe. At minimum, this should apply to cases arising in Indian country. Congress should consider, however, extending the notification requirement to all tribal youth whether or not the cases arises in Indian country. I support the recommendation of the Law and Order Commission and the Attorney General’s Advisory Committee that Congress extend the Indian Child Welfare Act to require notification and transfer of juvenile delinquency cases to the child’s tribe.<sup>48</sup> I am aware of only one state, New Mexico, with a state law requiring tribal notification in delinquency proceedings. The National Indian Child Welfare Association and the Association on American Indian Affairs are currently studying the implementation of that law, and their finding should inform any federal notification law.<sup>49</sup>

#### **E. Amend the Juvenile Justice and Delinquency Prevention Act to Permanently Authorize Tribal Juvenile Justice Funding**

As the role of tribal juvenile justice systems is strengthened, the resources that now follow Native youth into federal and state systems must be redirected to tribal governments. The JJDP A authorizes federal funding for state juvenile justice systems, including the Juvenile Accountability Block Grant. Current law does not authorize direct funding to tribes. As described earlier, it also does not require states to consult with tribes in determining how to allocate state funding. The JJDP A should be amended to authorize a tribal set-aside, allowing tribes to receive direct block grant funding under the law. While it is unlikely that a tribal set-aside at current funding levels would increase funding to tribes over what is now provided through the Tribal Youth Program, amending the JJDP A

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<sup>48</sup> *Roadmap*, 173 (recommending tribal notice, intervention, and transfer rights for cases arising in Indian country and tribal notice and intervention rights for cases arising elsewhere); *Ending Violence*, 122-124 (same).

<sup>49</sup> See National Indian Child Welfare Association, *Tribal Notification Research Findings Shared with NM Partners and Constituents* (Spring 2015), available at: <http://www.nicwa.org/newsletter/Tribal-Notification-Research-Findings-Shared-with-NM-Partners.asp>.

would permanently authorize this funding. Like the amendment to the FJDA outlined earlier, adding tribes to the JJDDPA would bring this legislation in line with other laws and ensure that tribes are treated as sovereigns.

**F. Appoint an Advisory Committee Composed of Individuals with Expertise in Juvenile Justice to Provide Input into BIA, DOJ, and IHS Funding and Policy Guidance**

Building effective juvenile justice systems requires resources and expertise in law enforcement, education, rehabilitation, detention, and mental health treatment. Under the current system, funding designated for each of these areas comes from a different federal agency. Within each agency, funding is further divided into accounts to fund different activities. For example, courts and detention are funded through separate accounts within the Bureau of Indian Affairs budget. Funding is not easily reprogrammed between accounts. Moreover, some activities receive recurring funding, but funding for other activities is available only through competitive grants that must be renewed periodically. As a result, a tribe seeking to improve its juvenile justice system must navigate multiple accounts, several federal agencies, and targeted grant opportunities that may change according to shifting agency policy.

This funding structure is a primary reason why incarceration is such a key feature in tribal juvenile justice systems; detention facility funding has been prioritized over funding for alternatives, and it is difficult to reprogram unused detention funding to a non-detention activity. This funding structure must be refashioned so that tribes receive as much funding as possible in the form of flexible block grants.<sup>50</sup> The Long Term Plan to Build and Enhance Tribal Justice Systems issued in 2011 by the Department of the Interior and the Department of Justice was an important step in the direction of inter-agency collaboration, but more drastic reform is needed. In addition, any plan that does not also incorporate health, mental health and education services will be of limited help in improving tribal juvenile justice systems. Accomplishing the necessary flexibility across agencies will likely be difficult, and an advisory committee with knowledge of juvenile justice issues could assist in reforming the structure. The advisory committee could also make recommendations regarding technical assistance providers who might be able to better support tribes in their efforts to reduce incarceration.

**G. Fund Research to Collect Data on Native Youth in Tribal, Federal, and State Systems**

The recommendations here reflect a review of available data on Native youth under tribal, federal, and state jurisdiction, but much remains unknown. There are at least three primary areas of inquiry that require further study.

**Facilities and Services.** There are approximately 30 juvenile facilities run by tribes or the BIA, but a comprehensive assessment of these facilities, including how they are funded, who is

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<sup>50</sup> The Commission and Advisory Committee reports each recommend similar changes to the funding structure for juvenile justice. *Roadmap*, 165; *Ending Violence*, 114-117.

housed in them, and how the facility is run, is lacking. Because little is known about tribal and BIA facilities, it is impossible to test the assumption that Native youth fare better in tribal systems, or to recommend improvements to those systems. Delinquent youth with substance abuse or mental health issues may also be referred to health facilities, and little information is available regarding the kinds of services offered and how effective they are. With regard to youth in federal and state facilities, research is needed to determine where tribal youth are housed and what services they receive.

**Youth and offenses characteristics.** Building on the research that has been done regarding risk factors and trauma, more research is needed to examine the experiences and backgrounds of Native youth who enter the juvenile justice system, to track the offenses they are charged with and to examine the characteristics of the offenses. Such research could help answer questions about the role of mental health and substance abuse in Native juvenile delinquency, gender differences in offense patterns, and whether Native youth are charged with more severe offenses for behavior that could have been charged less severely. Research that focuses on specific sub-populations, such as Indian country youth or youth charged in the federal system, is especially important.

**Best Practices for Native Youth.** A primary goal of this hearing is to uncover “promising approaches” for addressing juvenile delinquency among Native youth. Unfortunately, it is nearly impossible to give an evidence-based recommendation about whether any particular program works well for Native youth because these programs have been largely unstudied. Some programs seem promising, such as the Annie E. Casey Foundation’s pilot Tribal Juvenile Detention Alternatives project with the Mississippi Band of Choctaw, the SouthEast Alaska Regional Health Corporation’s Raven’s Way drug and alcohol treatment program, and New Mexico’s tribal notification law. These and other promising programs should be studied to see whether and how they work for Native youth and in Native communities.

## V. Conclusion

I thank you again for the opportunity to provide testimony on this important matter. Much remains to be done, but most stakeholders agree on the core ideas: Native youth who become involved in the juvenile justice system are vulnerable. Any system that encounters them should assume they have experienced trauma and strive to give them the protection and treatment they deserve. Tribal governments are trying to create humane and effective juvenile justice systems in which their children will be treated better than they have been at the hands of federal and state governments. Congress should do everything in its power to help tribes do this.