

RECOMMENDED ACTION MEMO

Agency: Department of Justice, Bureau of Justice Assistance
Topic: Use of Byrne JAG Funds for Community Violence Intervention Programs
Date: November 2020

Recommendation: Encourage states and local governments to use Byrne JAG funding to implement community violence intervention programs and provide training and technical assistance for these programs.

I. Summary

Description of recommended executive action:

The [Edward Byrne Memorial Justice Assistance Grant \(JAG\) program](#) (Byrne JAG) is the primary provider of federal criminal justice funding to states and local governments. Byrne JAG is administered by the Bureau of Justice Assistance (BJA) within the Office of Justice Programs inside the Department of Justice (DOJ). While JAG funding has historically been used mainly for law enforcement, JAG funding has occasionally been used for evidence-based violence prevention and intervention programs like group violence intervention, focused deterrence, street outreach, and hospital-based violence intervention programs. These evidence-based programs are extremely effective. Under the next administration, BJA should encourage the use of JAG funds for these programs through: (1) a letter to JAG grantees highlighting these programs as a cost-effective use for this funding and calling on states to consider these programs in the Byrne JAG strategic planning process, (2) labeling these programs as an “area of emphasis” in its [state and local formula grant solicitations](#), and (3) ensuring that Byrne JAG applicants and grantees have access to training and technical assistance regarding these programs.

Overview of process and time to enactment

A letter from BJA to Byrne JAG grantees may be viewed as a formal guidance document. Publication of formal guidance documents is a common practice of federal agencies seeking to clarify or interpret the laws to which they are subject. It is an expedient process that the next administration should take immediately. This process involves the internal development of the guidance’s substance in accordance with the DOJ’s written procedures. To comply with best practices for agency guidance, the document should acknowledge that such guidance is not binding.

The exact procedures and timeline that the DOJ should follow will depend on whether the guidance is determined to be “significant” in accordance with DOJ regulations. Once finalized, the document should be published on BJA’s website. BJA should then update other documents regarding Byrne JAG to reflect the substance of this guidance. The guidance should be reflected in BJA’s solicitations for Byrne JAG applications, where community violence

intervention programs should be labeled as an area of emphasis, and throughout the grantmaking process. The guidance should also be reflected in the provision of training and technical assistance to grantees.

II. Current state

The Byrne JAG Program is the primary provider of federal criminal justice funding to states and local governments. Byrne JAG was created by the Violence Against Women and Department of Justice Reauthorization Act of 2005 (the act), which combined the Edward Byrne Memorial Formula (Byrne Formula) Grant and the Local Law Enforcement Block Grant (LLEBG) into a single program.¹ As created through that act, the basic purpose of Byrne JAG is “to provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice.” Under the act, Byrne JAG may be used for seven kinds of programs:

- law enforcement
- prosecution and courts
- prevention and education
- corrections and community corrections
- drug treatment
- planning, evaluation, and technology improvement
- crime victim and witness assistance (other than compensation)²

In 2016, the Byrne JAG authorizing statute was amended to add an additional authorized program area for “mental health and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams.”³

Each state’s allocation of funding from Byrne JAG is based on a formula that depends on the state’s proportion of the country’s population and the state’s proportion of the total number of reported violent crimes (homicide, rape, robbery, and aggravated assault).⁴ Sixty percent of each state’s Byrne JAG allocation is awarded to the state criminal justice planning agency (known as the State Administering Agency, or SAA), which, in turn, awards the funding to local governments and non-profit service providers; the remaining 40% goes directly from the BJA to local communities based on population and crime data.⁵

¹ P.L. 109-162, 119 Stat. 2960 (2006).

² 34 U.S.C. § 10152 (a)(1).

³ 21st Century Cures Act, Pub. L. 114–255, div. B, title XIV, § 14001(a), December 13, 2016, 130 Stat. 1287.

⁴ 34 U.S.C. § 10156.

⁵ *Id.*

Obama administration

The BJA has typically listed and explained “areas of emphasis” in its solicitations for Byrne JAG grant applications. Under the Obama administration, from 2010 to 2016, the top areas of emphasis in these solicitations were: justice system reform, reentry assistance, and recidivism reduction; public defense, particularly for indigent populations; evidence-based “smart” programs (these programs were prioritized more often in early years); and gun violence reduction.⁶

In 2016, the National Criminal Justice Association conducted a study to determine how Byrne JAG funds were used. The study found that 58% of JAG funds were used to support law enforcement and corrections functions, and more than one-quarter of all JAG funds were used to operate drug task forces. Only 6% of JAG funds went to crime prevention.⁷ According to an analysis by the Center for American Progress, in 14 states, “more than \$9 out of every \$10 in JAG funds went to police departments and prosecutors’ offices. Four states—Maine, Montana, West Virginia, and Wyoming—devoted a full 100% of JAG funds to law enforcement. In 22 states, crime prevention efforts went completely unfunded.”⁸

The Justice for All Act

Through the Justice for All Act of 2016 (the 2016 act), Congress reauthorized the Byrne JAG Program and added a strategic planning requirement for states. An applicant for a Byrne JAG grant must now submit a statewide strategic plan showing how the funding will be used.⁹ These strategic plans must be designed in consultation with “representatives of all segments of the criminal justice system” and must be updated every five years. Byrne JAG applicants must also

⁶ U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2010 State Solicitation,” April 26, 2010, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2010-2486.pdf>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2011 State Solicitation,” May 23, 2011, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2011-3029.pdf>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2012 State Solicitation,” March 28, 2012, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2012-3255.pdf>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2013 State Solicitation,” April 15, 2013, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2013-3600.pdf>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2014 State Solicitation,” April 17, 2014, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2014-3849.pdf>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2015 State Solicitation,” April 30, 2015, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2015-4165.pdf>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2016 Local Solicitation,” May 16, 2016, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2016-9020.PDF>.

⁷ National Criminal Justice Association, “Looking at the Data: How States Invest Byrne JAG,” accessed October 27, 2020, <https://www.ncja.org/data-on-how-states-invest-byrne-jag>.

⁸ Center for American Progress, “The 1994 Crime Bill Continues to Undercut Justice Reform—Here’s How to Stop It,” March 26, 2019, <https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop/>.

⁹ Pub.L. 114-324, 130 Stat. 1948 § 14 (2016) (codified at 34 U.S.C. § 10153(a)(6)).

provide annual reports “reflect[ing] how the plan influenced funding decisions in the previous year.”¹⁰

The 2016 act also requires the DOJ to provide technical assistance to states and local governments that request support to develop and implement these strategic plans.¹¹ The 2016 act specifically authorized the DOJ to enter into agreements with non-governmental organizations to provide this training and technical assistance.¹²

Trump administration

The Trump administration shifted some of the focus of Byrne JAG towards border security and immigration enforcement. In particular, for fiscal year 2017, the DOJ imposed new conditions for Byrne JAG funding requiring grantees to cooperate and assist federal law enforcement in the enforcement of federal immigration laws. These conditions have engendered significant court challenges from local jurisdictions (“sanctuary cities” including Los Angeles, San Francisco, and New York), which have refused to comply with these conditions.¹³ Litigation regarding these conditions is ongoing.

In fiscal year 2019, there was \$263.8 million available under Byrne JAG (approximately \$181.1 million to states and territories and \$82.7 million to local units of government), and there were 1,138 eligible local applications and 56 states or territories eligible applications for funding.¹⁴

In accordance with the Justice for All Act’s amendments to the Byrne JAG statute, BJA has offered funding to training and technical assistance providers to assist Byrne JAG applicants in the development of their strategic plans.¹⁵ Notably, recipients are allowed to propose subrecipients who may have specialized expertise.

In addition to funding training and technical assistance providers, the BJA also operates the National Training and Technical Assistance Center (NTTAC), established in 2008, which provides specialized assistance and a library of resources on various justice-related training and technical assistance topics. At present there are nine “justice topics” the BJA NTTAC focuses on: adjudication/courts, corrections, crime prevention, justice information sharing, law

¹⁰ *Id.*

¹¹ 34 U.S.C. § 10153(a)(6)(E), (b)(1).

¹² 34 U.S.C. § 10153(b)(1).

¹³ See e.g., *City & Cty. of San Francisco v. Barr*, 965 F.3d 753 (2020), *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019) (striking down the challenged conditions); *Cf. New York v. United States DOJ*, 951 F.3d 84 (2020) (upholding the challenged conditions)

¹⁴ Bureau of Justice Assistance, “Edward Byrne Justice Assistance Grant (JAG) Program Fact Sheet,” May 18, 2020, <https://bj.a.ojp.gov/sites/g/files/xyckuh186/files/media/document/jag-fact-sheet-5-2020.pdf>.

¹⁵ See e.g. U.S. Department of Justice, “Justice For All: Effective Administration of Criminal Justice Training and Technical Assistance Program FY 2019 Competitive Announcement,” March 13, 2019, <https://bj.a.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2019-15252.PDF>.

enforcement, mental health, substance abuse, tribal justice, and capacity building.¹⁶

Community violence intervention

Social science research has brought to light the fact that, in city after city, an incredibly small and readily identifiable segment of a given community is responsible for the vast majority of gun violence.¹⁷ Shootings and homicides in America are highly concentrated in our cities, particularly within city neighborhoods marked by high levels of racial segregation, severe concentrated poverty, and estrangement from law enforcement. An analysis by *The Guardian* observed that more than a quarter of the nation's gun homicides occurred in city neighborhoods containing just 1.5% of the US population.¹⁸ In 2019, research from the National Network for Safe Communities, based on data from nearly two dozen cities, confirmed that at least half of homicides and nonfatal shootings involve people—as victims and/or perpetrators—known by law enforcement to be affiliated with “street groups” involved in violence. These groups were found to constitute, on average, less than 0.6% of a city's population, and among that number, an even smaller percentage actually commit violent crime.¹⁹

However, reliance on the criminal justice system to deal with perpetrators of gun violence does little to address the violence and trauma in communities most impacted.²⁰ Over-reliance on the criminal justice system is not only costly to taxpayers but diverts resources from the community that could be used to address some of the root causes of gun violence and the trauma experienced in the community.²¹ The hefty sentences, disproportionately given to persons of

¹⁶ US Department of Justice, Office of Justice Programs, Bureau of Justice Assistance National Training and Technical Assistance Center, “Justice Topics,” accessed September 25, 2020, <https://bjatta.bja.ojp.gov/justice-topics>.

¹⁷ David M. Kennedy et al., “Reducing Gun Violence: The Boston Gun Project's Operation Ceasefire,” US Department of Justice, September 2001, <https://www.ncjrs.gov/pdffiles1/nij/188741.pdf>.

¹⁸ Aliza Aufrichtig, et al., “Want to fix gun violence in America? Go local,” *The Guardian*, January 9, 2017, <https://www.theguardian.com/us-news/nginteractive/2017/jan/09/special-report-fixing-gun-violence-in-america>.

¹⁹ See Stephen Lurie, et al., “The Less Than 1%: Groups and the Extreme Concentration of Urban Violence,” National Network for Safe Communities (forthcoming); Stephen Lurie, Alexis Acevedo, and Kyle Ott, “Presentation: The Less Than 1%: Groups and the Extreme Concentration of Urban Violence,” National Network for Safe Communities, November 14, 2018, https://cdn.theatlantic.com/assets/media/files/npsc_gmi_concentration_asc_v1.91.pdf; Giffords Law Center to Prevent Gun Violence, “In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence,” January 2020, 31-32, <https://lawcenter.giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-In-Pursuit-of-Peace.pdf>.

²⁰ See Giffords Law Center to Prevent Gun Violence, PICO National Network, and the Community Justice Reform Coalition, “Investing in Intervention: The Critical Role of State-Level Support in Breaking the Cycle of Urban Gun Violence,” December 18, 2017, <https://giffords.org/lawcenter/report/investing-intervention-critical-role-state-level-support-breaking-cycle-urban-gun-violence/>.

²¹ See Ed Chung, Betsy Pearl & Lea Hunter, “The 1994 Crime Bill Continues to Undercut Justice Reform—Here's How to Stop It,” Center for American Progress, March 26, 2019, <https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop/>.

color,²² have only a minimal effect on improving public safety.²³ The criminal justice system is overburdened, resulting in a system that cannot function to provide justice.²⁴ The disparate treatment of Black men and boys, specifically, at the hands of law enforcement, exacerbate community distrust, resulting in individuals being less willing to report violence and cooperate with law enforcement.²⁵ Similarly, the disproportionate prosecution and incarceration of Black men not only impacts community distrust but causes damage to families (including financially and emotionally) and the community as a whole, among other impacts.²⁶

Community violence intervention (CVI) programs, on the other hand, provide services that help to prevent reinjury and recidivism by intervening in the cycle of violence, and target those individuals at highest risk of violence. CVI programs are coordinated violence reduction initiatives that use evidence-based strategies such as group violence intervention, hospital-based violence intervention, and evidence-based street outreach to reduce gun violence.²⁷ Each of these strategies is briefly described below. Research and case studies have shown that through a combination of low-cost CVI programs and much-needed firearms policy reforms, gun violence rates in communities of color can be cut in half in as little as two years.²⁸

- **Group violence intervention (GVI)** is a form of problem-oriented policing based on the insight that an incredibly small and readily identifiable segment of a given community is responsible for the vast majority of gun violence. There are four steps in the GVI model which are repeated until the intervention population understands that, at the request of the community, future shootings will bring strong law enforcement attention to any responsible groups: (1) assemble respected and credible community members, faith leaders, social service providers, researchers, and law enforcement officials into a working partnership, (2) the partnership identifies the individuals in the community most at risk for committing or becoming the victims of gun violence, (3) the partnership conducts a series of in-person meetings with this small segment of the population to communicate a strong message that the shooting must stop and connect those

²² See Weihua Li, “The Growing Racial Disparity in Prison Time,” The Marshall Project, December 3, 2019, <https://www.themarshallproject.org/2019/12/03/the-growing-racial-disparity-in-prison-time>.

²³ Ed Chung, Betsy Pearl & Lea Hunter, “The 1994 Crime Bill Continues to Undercut Justice Reform-- Here’s How to Stop It,” Center for American Progress, March 26, 2019, <https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop/>.

²⁴ *Id.*

²⁵ Giffords Law Center to Prevent Gun Violence, “In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence,” January 17, 2020, <https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/>.

²⁶ See Dorothy E. Roberts, “The Social and Moral Cost of Mass Incarceration in African American Communities,” *Stanford Law Review* 56 (2004): 1281-1297, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1582&context=faculty_scholarship.

²⁷ Giffords Law Center to Prevent Gun Violence, “Intervention Strategies,” accessed July 15, 2020, <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/>.

²⁸ Jake Flanagan, “President Obama applauds revolutionary community policing in Camden, New Jersey,” Quartz, May 19, 2015, <https://qz.com/407763/president-obama-applauds-revolutionary-community-policing-in-camden-new-jersey/>.

individuals with social service providers, and (4) law enforcement representatives deliver a message, in the most respectful terms possible, that if the community's plea is ignored, swift and sure legal action will be taken against any group responsible for a new act of lethal violence.

- **Hospital-based violence intervention programs (HVIPs)** focus on reaching high-risk individuals who have been recently admitted to a hospital for treatment of a serious violent injury. HVIPs call for screening patients based on predetermined criteria to identify those individuals most at risk for re-injury, and then connecting qualifying candidates with trained case managers. These case managers provide clients with intense oversight and assistance, both in the hospital and in the crucial months following the patient's release.²⁹ During this time, case managers help connect high-risk individuals to a variety of community-based organizations in order to give them access to critical resources, such as mental health services, tattoo removal, GED programs, employment, court advocacy, and housing.
- **The evidence-based street outreach approach** is exemplified by the Chicago-based Cure Violence (CV) program.³⁰ The first element of the CV model is to detect and resolve potentially violent conflicts through the use of culturally competent individuals known as "Violence Interrupters," whose role is to serve as street-level conflict mediators.³¹ The second element of the CV approach is the identification and treatment of high-risk individuals, which is accomplished through outreach workers, who connect clients with services designed to bring about positive changes. The third element of the CV model focuses on changing community-level social norms by encouraging community members to speak out in favor of peaceful conflict resolution. These efforts target key stakeholders in the community, including residents, clergy members, school leaders, directors of community-based organizations, and local political leaders.

These intervention programs are data-driven and evidence-based. In fact, evidence shows that these programs are remarkably effective. Oakland, California cut its shootings and homicides nearly in half over six years by incorporating GVI into its city-wide response to crime.³² San Francisco General Hospital's Wraparound Project introduced the HVIP strategy in 2005 and in its first six years of operation was associated with a 400% decrease in the rate of injury

²⁹ Rochelle A. Dicker et. al., "Where Do We Go From Here? Interim Analysis to Forge Ahead in Violence Prevention," *J. Trauma* 67, no. 6 (2009): 1169–1175, <http://violenceprevention.surgery.ucsf.edu/media/1691926/where.pdf>.

³⁰ Wesley G. Skogan et al., "Evaluation of CeaseFire-Chicago," 2009, <http://www.ipr.northwestern.edu/publications/papers/urban-policy-and-community-development/docs/ceasefire-pdfs/mainreport.pdf>.

³¹ Chris Melde et. al., "On the Efficacy of Targeted Gang Interventions: Can We Identify Those Most At Risk?," *Youth Violence and Juvenile Justice* 9 (2011): 279–94, <http://yvj.sagepub.com/content/9/4/279>.

³² Giffords Law Center to Prevent Gun Violence et al., "A Case Study in Hope: Lessons from Oakland's Remarkable Reduction in Gun Violence," April 2019, <https://lawcenter.giffords.org/wp-content/uploads/2019/05/Giffords-Law-Center-A-Case-Study-in-Hope.pdf>.

recidivism.³³ A 2014 quantitative evaluation of four Chicago police districts where Cure Violence was implemented found a 31% reduction in homicide, a 7% reduction in total violent crime, and a 19% reduction in shootings in targeted districts.³⁴

These programs are also remarkably cost effective. In addition to the overwhelming moral cost of loss of life, gun violence is expensive. Researchers estimate that gun violence costs the American economy at least \$229 billion every year, including \$8.6 billion in direct expenses.³⁵ A recent report found that each fatal shooting in Stockton, California, costs taxpayers \$2.5 million, which includes the cost of crime scene response, criminal justice expenses, incarceration, victim support, and lost tax revenue.³⁶ If Stockton reduced its gun violence rate by 20%, the government would save an estimated \$50 million a year.

These savings can be realized through the implementation of CVI programs. From 2012 to 2013, a \$2 million violence reduction program in Boston and Springfield, Massachusetts generated close to \$15 million in savings from decreases in crime.³⁷ In Connecticut, a state-funded violence intervention program that cost less than \$1 million per year, prevented shootings and generated an annual saving of \$7 million. And in New York State, where gun violence rates continue to decrease, the state's \$20 million investment in evidence-based violence reduction programs does not compare to its estimated cost of gun violence at \$5.6 billion per year.

In the past, Byrne JAG funding has been used for some of these violence intervention programs, and the eligibility of these programs for this funding seems well-established.³⁸

³³ Randi Smith et al., "Hospital-based Violence Intervention: Risk Reduction Resources That Are Essential for Success," *J. Trauma Acute Care Surg.* 74, no. 4 (2013): 976–980.

³⁴ David B. Henry et al., "The Effect of Intensive CeaseFire Intervention on Crime in Four Chicago Police Beats: Quantitative Assessment," Institute for Health Research and Policy, University of Illinois at Chicago, 2014, <http://cureviolence.org/wp-content/uploads/2015/01/McCormick-CeaseFire-Evaluation-Quantitative.pdf>. See also "Remarks of Laurie Robinson, Assistant Att'y Gen., Off. of Just. Programs," 2010 Project Safe Neighborhoods National Conference, Wednesday, July 14, 2010, https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/speeches/2010/10_0714lrobinson.htm.

³⁵ Mark Follman, Julia Lurie, Jaeah Lee, and James West, "The True Cost of Gun Violence in America," *Mother Jones*, April 15, 2015, <https://www.motherjones.com/politics/2015/04/true-cost-of-gun-violence-in-america/>.

³⁶ National Institute for Criminal Justice Reform, "Stockton California, The Cost of Gun Violence: The Direct Cost to Tax Payers," accessed September 22, 2020, <https://nicjr.org/wp-content/themes/nicjr-child/assets/Stockton.pdf>.

³⁷ Giffords Law Center to Prevent Gun Violence et al., "Investing in Intervention: The Critical Role of State-Level Support in Breaking the Cycle of Urban Gun Violence," December 18, 2017, <https://giffords.org/wp-content/uploads/2018/02/Investing-in-Intervention-02.14.18.pdf>.

³⁸ See e.g., Office of Governor Ralph S. Northam, "Governor Northam Announces Grant Funding for Community-Based Violence Intervention Programs," July 8, 2019, <https://www.governor.virginia.gov/newsroom/all-releases/2019/july/headline841499-en.html>. Further, on May 22, 2020, a group of Senators wrote to Senate leadership requesting they designate \$100 million in Byrne JAG Program funding specifically for community violence intervention programs. "Duckworth, Booker Urge Senate Leadership to Include Resources for Communities Plagued by Gun Violence in Next Covid-19 Relief Package," May 22, 2020, <https://www.duckworth.senate.gov/news/press-releases/duckworth-booker-urge-senate-leadership-to-include-resources-for-communities-plagued-by-gun-violence-in-next-covid-19-relief-package>.

Notably, in 2016, in New York, Byrne JAG funds supported the state’s SNUG program, an evidence-based, street outreach program based on the Cure Violence model. The New York State SNUG program utilizes a public health approach to gun violence, treating it like a disease by identifying its causes and interrupting its transmission. The state administers state funding for 11 local SNUG programs across the state, and provides training, technical assistance, and general program oversight. Byrne JAG funding was utilized to employ a statewide SNUG program coordinator and a statewide training director.³⁹

III. Proposed action

We expect a significant focus for Byrne JAG in the near future will be directed to efforts to reform police departments and build police–community trust and partnerships. We strongly support these efforts and believe they are critical to addressing gun and community violence. In addition, the BJA should take the following steps to encourage the use of Byrne JAG funding to support CVI programs.

1. Issue a letter to all Byrne JAG grantees regarding CVI⁴⁰

The BJA should send a letter to Byrne JAG grantees highlighting that CVI programs are a cost-effective use for Byrne JAG grants. Much of the information in the above section under “community violence intervention” could be included in this letter, which may also take the form of formal guidance, a toolkit, program guide, or memorandum. In addition, this letter should highlight that Byrne JAG grantees are specifically authorized to “use all or a portion of that grant to contract with or make one or more subawards to one or more...neighborhood or community-based organizations that are private and nonprofit,”⁴¹ including organizations running CVI programs. This letter also should encourage states to consider these programs in their Byrne JAG strategic plans and consult with existing CVI program representatives in the development of those plans. Strategic plans must be designed in consultation with “representatives of all segments of the criminal justice system,”⁴² and CVI programs are important segments of this system.

The letter proposed here could take the form of a guidance document, policy statement, memorandum, agency directive, or other document. Regardless of the title on the document, guidance of the type contemplated here is likely considered a guidance document or an “interpretive rule” because it is “issued by an agency to advise the public of the agency’s

³⁹ National Criminal Justice Association, “How States Invest Byrne JAG in Crime Prevention Programs,” accessed October 27, 2020, https://370377fc-459c-47ec-b9a9-c25f410f7f94.filesusr.com/ugd/cda224_8c33dbd525e14bf7ad96e8fc82284a95.pdf?index=true.

⁴⁰ BJA has communicated with Byrne JAG grantees in letter form before. See e.g., Bureau of Justice Assistance, Letter to Commissioner Thomas Anderson, Vermont Dep’t of Public Safety, “RE: Document request for Grant Award Number 2016-DJ-BX-0406, Vermont Department of Public Safety,” April 12, 2018, <https://www.justice.gov/opa/press-release/file/1052771/download>.

⁴¹ 34 U.S.C. § 10152(b).

⁴² 34 U.S.C. § 10153(a)(6).

construction of the statutes and rules which it administers.”⁴³ Extensive procedural requirements do not apply to interpretative rules unless another statute provides otherwise. As the Supreme Court observed in *Perez*, issuing interpretive rules is “comparatively easier” than issuing legislative rules.⁴⁴ However, “that convenience comes at a price: Interpretive rules do not generally have the force and effect of law.”⁴⁵

Executive Order 13891, issued by the Trump administration in October of 2019, requires agencies to provide increased transparency for their guidance documents by creating “a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component.”⁴⁶ Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, unless expressly authorized by statute or expressly incorporated into a contract, grant, or cooperative agreement.⁴⁷

In August 2020, the DOJ amended its regulations regarding guidance documents in an interim final rule, *Processes and Procedures for Issuance and Use of Guidance Documents* (the interim rule).⁴⁸ The interim rule codifies the requirements of Executive Order 13891 that limits the use of guidance documents and implements department-wide procedures governing the review, clearance, and issuance of guidance documents.

Given the importance of Byrne JAG and the guidance contemplated here, there is a possibility that any letter the DOJ issues with respect to Byrne JAG would qualify as a “significant guidance document,” as Executive Order 13891 and DOJ’s interim rule define that term, based on OMB’s own guidance.⁴⁹ Under Executive Order 13891, guidance documents that qualify as “significant” under this definition must meet certain procedural requirements, including a 30-day notice-and-comment period.⁵⁰ So in the event that the guidance issued pursuant to this memorandum is deemed to be a significant guidance document, the interim rule would provide the framework for the process that should be followed.⁵¹

⁴³ *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

⁴⁴ *Id.* at 97.

⁴⁵ *Id.* (citing *Guernsey*, 514 U.S. at 99). See also 5 U.S.C. § 553(b)(A); Administrative Conference of the United States, “Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules,” June 13, 2019, <https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules>.

⁴⁶ Exec. Order 13,891, 84 Fed. Reg. 55235 (October 15, 2019).

⁴⁷ *Id.*

⁴⁸ Department of Justice, Office of the Attorney General, “Processes and Procedures for Issuance and Use of Guidance Documents,” accessed October 27, 2020, <https://www.justice.gov/file/1308736/download>. This is the text of the interim final rule as signed by the Attorney General, but the official version of the interim final rule will be as it is published in the Federal Register.

⁴⁹ *Id.*, Exec. Order 13,891, 84 Fed. Reg. 55235 (October 15, 2019).

⁵⁰ *Id.*

⁵¹ Specifically, a significant guidance document is one that “may reasonably be anticipated to ... Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and

The BJA should then incorporate the substance of the letter in all program documents, including the solicitations for applications.⁵² In the solicitations, “Community Violence Intervention” should be labeled as an area of emphasis with an adequate explanation and links to additional resources.

2. Make CVI an area of emphasis for Byrne JAG

The BJA should make Community Violence Intervention an area of emphasis for Byrne JAG grants. The BJA’s areas of emphasis feature predominantly in its solicitations for these grants, ensuring that grant applicants know that BJA encourages grant applications that focus on these areas.

We would suggest the following language for this area of emphasis:

Community Violence Intervention. The BJA encourages state and local jurisdictions to use JAG funds to support “Community Violence Intervention” (CVI) programs, especially in the neighborhoods in their jurisdictions experiencing high rates of shootings and gun homicides. CVI programs use hospital-based violence intervention strategies, group violence intervention strategies using focused deterrence, and evidence-based street outreach, to interrupt cycles of violence among individuals at highest risk. When properly implemented and consistently funded, CVI programs can produce lifesaving and cost-saving results in a short period of time. These strategies are often most effective when local officials and dedicated staff work to coordinate stakeholders, relevant public agencies, and service providers.

3. CVI training and technical assistance

The BJA should ensure that CVI training and technical assistance is available to Byrne JAG applicants in the strategic planning process, and for Byrne JAG grantees seeking to implement CVI programs. The BJA should do this by encouraging training and technical assistance providers that receive Byrne JAG funds to grow their expertise in CVI, or work with already established CVI experts; and funding new providers who specialize in this area. The BJA may also do this by making CVI the BJA National Training and Technical Assistance Center’s tenth “justice topic” on which it provides specialized assistance and technical assistance.

IV. Risk analysis

An agency action can be judicially challenged for being beyond the agency’s statutory authority,

obligations of recipients thereof; or (iv) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities...” Guidance issued pursuant to the approach recommended here may be deemed to be “significant” for this reason.

⁵² See 31 U.S.C. § 6304 (regarding grant agreements).

violating a constitutional right, not following rulemaking procedures, or being arbitrary or capricious.⁵³ The actions described above, including sending a letter to Byrne JAG grantees, identifying areas of emphasis, and providing training and technical assistance, are not likely to be successfully challenged.

BJA's statutory authority

Providing guidance, in the form of a letter to grantees or otherwise, is clearly within the BJA's statutory authority. A guidance document would have no binding effect, but would inform Byrne JAG grantees about an authorized use of Byrne JAG funds. The associate attorney general, who heads the Office of Justice Programs, of which the BJA is a constituent agency, is specifically authorized to, among other things, "maintain liaison with ... State governments in matters relating to criminal justice," "provide information to ... State and local governments, and the general public relating to criminal justice," and "maintain liaison with public and private educational and research institutions, State and local governments, and governments of other nations relating to criminal justice."⁵⁴ In addition to providing Byrne JAG funds, the director of the BJA also has the following duties, among others:

- "cooperating with and providing technical assistance to States, units of local government, and other public and private organizations or international agencies involved in criminal justice activities"
- "providing for the development of technical assistance and training programs for State and local criminal justice agencies and fostering local participation in such activities"
- "establishing and carrying on a specific and continuing program of cooperation with the States and units of local government designed to encourage and promote consultation and coordination concerning decisions made by the Bureau affecting State and local ... criminal justice priorities"⁵⁵

The proposed actions described above are clearly within the scope of these duties. In addition, CVI programs fall squarely into two categories of Byrne JAG Program funding outlined by statute: "prevention and education programs," and "crime victim and witness programs."⁵⁶

Constitutional challenges

An agency's decisions regarding formula grants to states and local government, such as the BJA's decisions regarding Byrne JAG funding, may face claims that they violate: (1) the principle of separation of powers between the legislative, judicial, and executive branches, (2) the Spending Clause of the Constitution, and (3) the Tenth Amendment's reservation of power to the states.⁵⁷ However, none of these claims is likely to succeed. Notably, the proposed

⁵³ 5 U.S.C. § 706.

⁵⁴ 34 U.S.C. § 10102(a)(2), (3), (4).

⁵⁵ 34 U.S.C. § 10142(3), (4), (6).

⁵⁶ 34 U.S.C. § 10152.

⁵⁷ See *New York v. United States DOJ*, 951 F.3d 84 (2020) (addressing these sorts of claims).

actions described here are fundamentally different from the actions of the Trump administration with regards to “sanctuary cities,” which have engendered litigation. While the Trump administration has attempted to condition Byrne grants on state and local law enforcement’s cooperation with federal immigration authorities,⁵⁸ the proposed actions described above do not mandate that jurisdictions use their Byrne JAG funding for any particular purpose. In this way, these actions are consistent with the flexibility that Congress contemplated in the Byrne JAG statute for the use of these federal funds by states and local jurisdictions. Consequently, constitutional challenges to these proposed actions are not likely to succeed.

Procedural challenges

The BJA may avoid a challenge based on procedural concerns by carefully following the particular procedures applicable to the particular kind of document BJA creates. These procedures may depend on the formality and significance of the document, and whether it is publicly available or binding on relevant stakeholders.

Arbitrary and capricious agency action

A court might invalidate an agency action if the agency action or conclusion is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁵⁹ However, in implementing the law, federal agencies often fill in the gaps between the statutory language and practicable regulations. After all, administering a congressionally created program “necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”⁶⁰ Thus, an agency may fill in any ambiguities as long as the agency’s regulation is “based on a permissible construction of the statute” and does not contradict Congress’s answer to the specific question at hand.⁶¹

There is nothing in federal law that suggests Congress did not intend Byrne JAG funds to be available for CVI programs. Consequently, the letter to Byrne JAG grantees described here is not “arbitrary and capricious” within the meaning of the law.

The director of the BJA is charged with “providing for the development of technical assistance and training programs for State and local criminal justice agencies and fostering local participation in such activities.”⁶² This is a broad grant of authority that could be considered to cover training for CVI programs. As further evidence of this broad grant of authority to the director of the BJA to develop trainings, there do not appear to be any cases challenging a BJA

⁵⁸ See *City & Cty. of San Francisco v. Barr*, 965 F.3d 753 (2020), *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019) (striking down the challenged conditions). Cf. *New York v. United States DOJ*, 951 F.3d 84 (2020) (upholding the challenged conditions).

⁵⁹ 5 U.S.C. § 706.

⁶⁰ *Morton v. Ruiz*, 415 U.S. 199, 231, (1974); see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

⁶¹ *Chevron*, 467 U.S. at 843.

⁶² 34 U.S.C. § 10142(4).

training program as an improper use of BJA funds. Therefore, it is unlikely that there would be a successful legal challenge to the actions proposed above with respect to training and technical assistance.

Similarly, past BJA solicitations for Byrne JAG show that Byrne JAG areas of emphasis can change significantly from administration to administration. Under the Obama administration, from 2010 to 2016, the top areas of emphasis in application solicitations for Byrne JAG funding were:⁶³

- justice system reform, reentry assistance, and recidivism reduction
- public defense, particularly for indigent populations
- evidence-based “smart” programs (these programs were prioritized more often in early years)
- gun violence reduction⁶⁴

Under the Trump administration, areas of emphasis in application solicitations varied from year to year, but there were several consistent topics.⁶⁵ Reduction of violent crime and/or gun

⁶³ U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2010 State Solicitation,” April 26, 2010, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2010-2486.pdf>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2011 State Solicitation,” May 23, 2011, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2011-3029.pdf>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2012 State Solicitation,” March 28, 2012, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2012-3255.pdf>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2013 State Solicitation,” April 15, 2013, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2013-3600.pdf>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2014 State Solicitation,” April 17, 2014, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2014-3849.pdf>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2015 State Solicitation,” April 30, 2015, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2015-4165.pdf>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2016 Local Solicitation,” May 16, 2016, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2016-9020.PDF>.

⁶⁴ Improving mental health services for people in the justice system was a priority in three of these solicitations, including two from more recent years. Each of the following areas were priorities for two of the above years: body-worn camera programs, counterterrorism, economic crime (in response to the 2008 recession), and responding to child exposure to violence. Officer safety and wellness, statewide criminal justice planning, DOJ accreditation of forensic science providers, and implementation of the National Incident-Based Reporting System were each a priority during one of the above years. *Id.*

⁶⁵ U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2017 State Solicitation,” July 25, 2017, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2017-11360.pdf>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2018 State Solicitation,” July 20, 2018, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2018-13625.PDF>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2019 State Solicitation,” June 18, 2019, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2019-15142.PDF>; U.S. Department of Justice, “Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2020 State Solicitation,” May 28, 2020, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/bja-2020-17277.pdf>.

violence was a top priority each year, along with officer safety and wellness. Three-quarters of the solicitations included border security as an area of emphasis, and the two most recent solicitations place emphasis on combating the opioid crisis.

The BJA sets areas of emphasis for Byrne JAG funding as a way to “encourage” jurisdictions to focus in these areas.⁶⁶ The BJA’s decision to establish an area of emphasis has none of the coercive power that setting forth conditions for Byrne JAG funding does. As a result, the BJA’s decision to alter the Byrne JAG areas of emphasis is not likely to be challenged in court.

In addition, the Violence Against Women and Department of Justice Reauthorization Act of 2005 expanded the assistant AG’s authority over DOJ grants, specifically authorizing the assistant attorney general to “plac[e] special conditions on all grants, and determin[e] priority purposes for formula grants.”⁶⁷ To the extent that the proposed letter would identify a priority purpose, and BJA’s “areas of emphasis” function as “priority purposes” for these grants, this provision specifically authorizes them.

Finally, as noted above, Byrne JAG funding has occasionally been used in the past to support CVI programs. This use of this funding has not given rise to judicial challenges. Consequently, the actions proposed in this memorandum are not “arbitrary and capricious” within the meaning of the law.

⁶⁶ See Bureau of Justice Assistance, “Fiscal Year (FY) 2020 State JAG Information,” accessed October 27, 2020, <https://bja.ojp.gov/program/jag/fy-2020-state-jag-information#3bw09f>.

⁶⁷ 34 U.S.C. § 10102(a)(6).