



## RECOMMENDED ACTION MEMO

**Agency:** Department of Justice, Bureau of Justice Assistance (BJA)  
**Topic:** Use of Project Safe Neighborhoods (PSN) Funding  
**Date:** November 2020

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**Recommendation: Redirect PSN funding towards evidence-based initiatives concentrating on the small subset of individuals responsible for community violence, as required by law.**

### I. Summary

#### **Description of recommended executive action**

Project Safe Neighborhoods (PSN) is a nationwide grant program administered by the Bureau of Justice Assistance (BJA), which is a constituent office within the Department of Justice (DOJ). US attorneys are the recipients of this funding, which they must use to lead efforts to reduce violence in their districts. In 2018, Congress reauthorized the program in the Project Safe Neighborhoods Grant Program Authorization Act of 2018 (the PSN Act). This authorization expires after fiscal year 2021. This act provides explicit instructions about the use of appropriated funds and requires the DOJ to issue guidance for the program.<sup>1</sup> The Trump administration used these funds mainly to prosecute illegal gun possession cases, with little regard for the statutory language. Accordingly, under the next administration, the DOJ should issue guidance regarding the use of these funds, redirecting the funding so it is used in accordance with the language of the PSN Act.<sup>2</sup> In particular, the guidance should:

- de-emphasize prosecution efforts under PSN (the program), and instead call for the concentration of PSN efforts on the small subsets of individuals responsible for violence in particular communities
- prioritize evidence-based intervention and prevention initiatives, such as street-level outreach, conflict mediation, provision of treatment and social services, and the changing of community norms
- instruct that all funded programs should collect data on outcomes achieved through the program, including the effect on the violent crime rate, incarceration rate, and recidivism rate of the jurisdiction
- make clear that PSN funding can be used for the additional purpose areas listed in the statute, and clarify the role of Gang Task Forces and US attorneys
- contextualize the act's requirement that grant funding be used to prioritize the investigation and prosecution of certain individuals

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<sup>1</sup> Project Safe Neighborhoods Grant Program Authorization Act of 2018, 115 P.L. 185, 132 Stat. 1485, (2018) (codified at 34 U.S.C. § 60701–60705.)

<sup>2</sup> The next administration should also consider how to address PSN in DOJ's next budget.

This guidance is the focus of this memorandum and should become the basis under which the BJA and US attorneys administer the program.

## **Overview of process and time to enactment**

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 adopt 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, unless it is included in a grant agreement. 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, or should take the form of a memorandum to US attorneys. Once finalized, the document should be published on the BJA's website. The BJA should then update other documents regarding the program to reflect the substance of this guidance.

## **II. Current state**

### **Gun violence in underserved communities of color**

Nowhere is the gun violence crisis more evident than in our underserved communities of color, where homicide rates often reach 10 times the national average.<sup>3</sup> Young Black men are especially vulnerable—the chance of a Black family losing a son to a bullet is 62% greater than losing him to a car accident in the US. Black men, an often underserved population, constitute 6% of the US population but account for 50% of all gun homicides each year. The rate of gun injuries is 10 times higher for Black children and teens than it is for white children and teens.<sup>4</sup>

This high concentration of violence creates a vicious cycle.<sup>5</sup> A study of adolescents participating in an urban violence intervention program showed that 26% of participants had witnessed a person being shot and killed, while *half* had lost a loved one to gun violence.<sup>6</sup> The impact of this is compounded because exposure to firearm violence—being shot, being shot at, or witnessing a shooting—doubles the probability that a young person will commit a violent act within two

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<sup>3</sup> Giffords, "Community Violence," accessed July 15, 2020, <https://giffords.org/issues/community-violence/>.

<sup>4</sup> The rate of non-fatal shootings is 51.1 per 100,000 people for young black Americans versus 5.0 per 100,000 people for young whites. Arthur R. Kamm, Violence Policy Center, and Amnesty International, "African-American Gun Violence Victimization in the United States, Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination," June 30, 2014, [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT\\_CERD\\_NGO\\_USA\\_17803\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17803_E.pdf).

<sup>5</sup> 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/>.

<sup>6</sup> Jonathan Purtle et al., "Scared safe? Abandoning the Use of Fear in Urban Violence Prevention Programmes," *Injury Prevention* 21, no. 2 (2015): 140–141, doi: 10.1136/injuryprev-2014-041530.

years.<sup>7</sup> In other words, exposure to violence perpetuates further violent behavior, creating a chain of killing and violence that will continue absent an intervention.

### **The establishment of PSN under the Bush (W) administration**

Established by President George W. Bush in 2001, PSN was originally conceived as “a network of law enforcement and community initiatives targeted at gun violence.”<sup>8</sup> President Bush launched the initiative through a letter to the US attorneys, seeking enforcement of gun laws.<sup>9</sup> Attorney General John Ashcroft followed up with a letter directing the US attorneys to establish task forces that would create strategic plans to reduce gun violence, and promising funding for this initiative.<sup>10</sup> This letter emphasized the involvement of community leaders and insisted that “rivalries and competing agendas among law enforcement agencies” must give way to strategic partnerships. The letter cited Project Exile in Richmond, Virginia, and Operation Ceasefire in Boston, Massachusetts, as good examples of strong, coordinated partnerships. These letters were accompanied by a letter from the Bureau of Alcohol, Tobacco, and Firearms (ATF), offering to help law enforcement by tracing firearms and providing training.<sup>11</sup>

Then, in 2002, Congress enacted, and President Bush signed, the 21st Century Department of Justice Appropriations Authorization Act, authorizing various programs within the DOJ. That act established PSN as “a program for each United States Attorney to provide for coordination with State and local law enforcement officials in the identification and prosecution of violations of Federal firearms laws including school gun violence and juvenile gun offenses.” The act also authorized the hiring of additional Assistant US attorneys for this purpose.<sup>12</sup>

### **PSN under the Obama administration**

In its first term, the Obama administration maintained the PSN funding mechanisms that had existed in the Bush administration. Starting in 2012, however, the presidential budget requests for the DOJ began turning away from funding programs that emphasized high-prosecution and enforcement for gun-related crimes to programs that incentivized “evidence-based, competitive programs designed to encourage data-driven, smart-on-crime strategies.”<sup>13</sup> As a result, the DOJ transitioned the PSN from a formula-based allocation of funding to a competitive grant

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<sup>7</sup> Jeffery B. Bingenheimer, Robert T. Brennan, and Felton J. Earls, “Firearm Violence, Exposure and Serious Violent Behavior,” *Science* 308 (2005): 1323–1326.

<sup>8</sup> See Bureau of Justice Assistance, “Project Safe Neighborhoods Toolkit,” accessed October 27, 2020, 1-3, [https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/psn\\_toolkit.pdf](https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/psn_toolkit.pdf).

<sup>9</sup> *Id.*

<sup>10</sup> See *id.* at 1-5 - 1-6.

<sup>11</sup> *Id.* at 1-7.

<sup>12</sup> 107 P.L. 273, 116 Stat. 1758 § 104 (2002).

<sup>13</sup> “Remarks of Laurie Robinson, Assistant Att’y Gen.,” 2010 Project Safe Neighborhoods National Conference, July 14, 2010, [https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/speeches/2010/10\\_0714lrobinson.htm](https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/speeches/2010/10_0714lrobinson.htm).

application program.<sup>14</sup> Thus, a district’s “need” and use of more effective, intelligence- and data-driven strategies were key factors for funding selections, combined with performance results and other factors.<sup>15</sup>

This new approach was implemented via the FY 2012 Competitive Grant Announcement for PSN.<sup>16</sup> In FY 2012, the BJA gave thirteen awards totaling \$3,949,423.<sup>17</sup> For example, the City of Memphis was awarded \$150,000 to enact a “suppression strategy in selected micro-places” in two Memphis communities. The strategy “[identifies] and closely track[s] individuals” that constitute Memphis’ “most chronic, violent offenders,” with the goal to create collaborative partnerships between law enforcement and community partners to “develop a working analytical framework focused on data sharing.”<sup>18</sup>

The Obama administration continued issuing competitive grants up until the end of President Obama’s second term in 2016, with total award amounts between \$4 and \$7 million each year.<sup>19</sup> The overall effect of the Obama administration’s targeted, data-driven policy—including its PSN strategy—resulted in a steady decline of federal weapons convictions,<sup>20</sup> and violent crime steadily decreased from 458.6 to 386.6 per 100,000 residents.<sup>21</sup>

## **Trump administration action and the PSN Act**

### **A. Initial approach to PSN**

The Trump administration immediately began reversing the Obama-era PSN policies and reverted to a non-competitive, formula-based grant system that focused less on violent crime and more on charging individuals with felony convictions for illegal firearms possession—regardless of whether the individual’s criminal history was violent. This reversal was initially announced in March 2017 via a memorandum from then-Attorney General Jeff Sessions, in

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<sup>14</sup> Bureau of Just. Assistance, “Violent Gang and Gun Crime Reduction Program [Project Safe Neighborhoods] FY 2012 Competitive Grant Announcement,” April 17, 2012, 2, 14, <https://bj.a.ojp.gov/sites/g/files/xyckuh186/files/media/document/12PSNsol.pdf>.

<sup>15</sup> *Id.*

<sup>16</sup> *See generally id.*

<sup>17</sup> Bureau of Justice Assistance, “BJA FY 2012 Violent Gang and Gun Crime Reduction Program (Project Safe Neighborhoods): Category 2: 2 million-4,999,999,” accessed August 27, 2020, <https://bj.a.ojp.gov/funding/opportunities/bja-2012-3302>.

<sup>18</sup> Office of Justice Programs, “Detailed information for award 2013-GP-BX-0014: Western District of Tennessee JAG Project,” accessed August 27, 2020, <https://external.ojp.usdoj.gov/selector/awardDetail?awardNumber=2013-GP-BX-0014&fiscalYear=2013&applicationNumber=2013-H0742-TN-GP&programOffice=BJA&po=BJA>.

<sup>19</sup> Bureau of Just. Assistance, “Violent Gang and Gun Crime Reduction Program (Project Safe Neighborhoods) FY 2016 Competitive Grant Announcement,” February 16, 2016, <https://bj.a.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2016-9202.pdf>; Bureau of Just. Assistance, “Violent Gang and Gun Crime Reduction Program (PSN),” August 27, 2020, <https://bj.a.ojp.gov/funding/opportunities/bja-2016-9202>.

<sup>20</sup> Syracuse University, “Ten Year Decline in Federal Weapons Convictions,” TRAC Reports, October 27, 2015, <https://trac.syr.edu/tracreports/crim/409/>.

<sup>21</sup> Federal Bureau of Investigation, “Crime in the U.S. 1998–2017,” accessed August 27, 2020, table 1, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-1>.

which Attorney General Sessions ordered all federal prosecutors to prioritize firearm prosecutions, especially for illegal possession of firearms.<sup>22</sup> In the first three months after that initial memo, the number of defendants charged with unlawful possession of a firearm increased 23%.<sup>23</sup>

In October 2017, Attorney General Sessions called for the reinvigoration of PSN, stating that all U.S. prosecutors would be evaluated based on the amount of illegal firearm possession cases prosecuted in each US attorney's district.<sup>24</sup> In issuing memoranda to the US attorneys to this effect, Attorney General Sessions did not focus efforts on those driving the violence.<sup>25</sup> As a result, districts have implemented PSN models that are “less targeted due to the absence of an important factor: there is no indication that the types of cases will be constrained to violent crimes.”<sup>26</sup> This de-emphasis on cases involving violent crimes has resulted in prosecutions for even the most minor illegal possession cases—including 15-year mandatory minimums for possessing a single round of ammunition.<sup>27</sup> In the first half of 2018, federal attorneys prosecuted more firearms cases than any previous administration in the same time period.<sup>28</sup>

The 2018 solicitation for grants under the program demonstrates that the administration's approach centered on the creation of PSN task forces in each judicial district, stating that “enforcement is a cornerstone of violence reduction” and enforcement efforts must ensure “offenders are prosecuted.”<sup>29</sup>

Approximately 75% of these gun charges were against persons of color, with Black defendants in the majority. Specifically, of the over 7,600 illegal firearm possession charges brought in fiscal year 2019, 55% of the defendants were Black and 17% were Hispanic.<sup>30</sup> In certain districts that prosecuted the highest number of illegal firearm cases, only a small fraction of cases were brought to the court due to gun offenses indicating serious violent intentions.<sup>31</sup>

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<sup>22</sup> Office of the Attorney General, “Memorandum on Commitment to Targeting Violent Crime,” March 17, 2017, <https://www.justice.gov/opa/press-release/file/946771/download>.

<sup>23</sup> DOJ, Office of Public Affairs, “Federal Gun Prosecutions Up 23 Percent After Sessions Memo,” July 28, 2017, <https://www.justice.gov/opa/pr/federal-gun-prosecutions-23-percent-after-sessions-memo>.

<sup>24</sup> Office of the Attorney General, “Memorandum on Project Safe Neighborhoods,” October 4, 2017, <https://www.justice.gov/opa/press-release/file/1001581/download>.

<sup>25</sup> Edward K. Chung, “Project Safe Neighborhoods: A Targeted and Comprehensive Approach?” 30 *Fed. Sentencing Rep.* (2018): 192, 193.

<sup>26</sup> *Id.* at 193--94.

<sup>27</sup> *Id.*

<sup>28</sup> Syracuse University, “Federal Weapons Prosecutions Rise for Third Consecutive Year,” TRAC Reports, November 29, 2017, <https://trac.syr.edu/tracreports/crim/492/>.

<sup>29</sup> U.S. Department of Justice, “The Project Safe Neighborhoods FY 2018 Grant Announcement,” June 4, 2018, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2009-2018.PDF>.

<sup>30</sup> U.S. Sentencing Commission, “Quick Facts: Felon in Possession of Firearm,” 2017, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon\\_in\\_Possession\\_FY17.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY17.pdf).

<sup>31</sup> Carol Robinson, “‘Their profession is violent crime’: Alabama police operation seizes 140 guns, indicts 71 suspects,” *Al.com*, updated January 30, 2019,

## B. The PSN Act

Congress attempted to redirect the course of PSN in 2018 via the PSN Act, which President Trump signed into law. The PSN Act states that it establishes a PSN “Block Grant Program,”<sup>32</sup> but does not provide much detail about the way the funds should be allocated or used. The act specifies that the purpose of the program is to:

foster and improve existing partnerships between Federal, State, and local agencies, including the United States Attorney in each Federal judicial district, entities representing members of the community affected by increased violence, victims' advocates, and researchers to create safer neighborhoods through sustained reductions in violent crimes...<sup>33</sup>

The act laid out three main strategies these partnerships may use to accomplish this goal:

“(1) developing and executing comprehensive strategic plans to reduce violent crimes, including the enforcement of gun laws, and prioritizing efforts focused on identified subsets of individuals or organizations responsible for increasing violence in a particular geographic area;

(2) developing evidence-based and data-driven intervention and prevention initiatives, including juvenile justice projects and activities which may include street-level outreach, conflict mediation, provision of treatment and social services, and the changing of community norms, in order to reduce violence; and

(3) collecting data on outcomes achieved through the Program, including the effect on the violent crime rate, incarceration rate, and recidivism rate of the jurisdiction.”<sup>34</sup>

The act also listed four “additional purposes areas” that the attorney general may use PSN funds for:

- competitive and evidence-based programs to reduce gun crime and gang violence
- the Edward Byrne criminal justice innovation program
- community-based violence prevention initiatives
- gang and youth violence education, prevention and intervention, and related activities.<sup>35</sup>

While specifying these strategies and purpose areas, the act also contained language about PSN task forces:

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[https://www.al.com/news/birmingham/2018/05/their\\_profession\\_is\\_violent\\_cr.html](https://www.al.com/news/birmingham/2018/05/their_profession_is_violent_cr.html) (few of the listed indicted suspects were committing violent crimes upon arrest).

<sup>32</sup> 34 U.S.C. § 60703(a).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 34 U.S.C. § 60703(b).

- Section 5(c) of the act sets aside 30% “of the amounts made available as grants” under the program for “Gang Task Forces in regions experiencing a significant or increased presence of criminal or transnational organizations engaging in high levels of violent crime, firearms offenses, human trafficking, and drug trafficking.”<sup>36</sup>
- Section 5(d) of the act specified that “[a]mounts made in grants under the Program shall be used to prioritize the investigation and prosecution of individuals who have an aggravating or leadership role in criminal or transnational organizations described in subsection (c).”<sup>37</sup>
- The act contains few definitions, the most notable of which is the one for “transnational organized crime group,” a term not directly used in the act.<sup>38</sup>

The act requires the DOJ to issue guidance “to create, carry out, and administer the program in accordance with this section.”<sup>39</sup> The act authorized \$50,000,000 to be appropriated to the attorney general to carry out the PSN program from 2019 through 2021.<sup>40</sup>

The legislative history of the act revealed some of the tension that went into the creation of this language. When the bill was debated in the House of Representatives, Congresswoman Barbara Comstock spoke about MS-13, an international criminal group.<sup>41</sup> However, the language that was eventually enacted into law differed significantly from the language initially passed by the House. The Senate amended the bill to:

- focus less on “gang crime” and “criminal street gangs,” removing definitions of both of those terms
- mention “entities representing members of the community affected by increased violence, victims' advocates” or “the provision of social services”
- mention “researchers” and “collecting data on outcomes achieved through the Program...”
- contain the statement in section 5(d) regarding the prioritization of prosecutions
- authorize the use of PSN funding for the four “additional purpose areas” listed above (the House-passed bill would have explicitly prohibited this use of PSN funding).<sup>42</sup>

As described below, these changes indicate the significance of this language. In addition, the House Judiciary Committee’s Report on the bill included additional views that specifically objected to the provision that would have prevented funding for the programs that became the additional purpose areas in the act.<sup>43</sup>

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<sup>36</sup> 34 U.S.C. § 60704(d).

<sup>37</sup> 34 U.S.C. § 60704(d).

<sup>38</sup> 34 U.S.C. § 60701.

<sup>39</sup> 34 U.S.C. § 60704(a).

<sup>40</sup> *Id.* at § 60705.

<sup>41</sup> “Project Safe Neighborhoods Grant Program Authorization Act of 2017, Congressional Record Vol. 164, No. 93,” House of Representatives, June 6, 2018, <https://www.congress.gov/congressional-record/2018/06/06/house-section/article/H4793-2>.

<sup>42</sup> H.R. 3249, 115th Cong. (as passed by House, March 14, 2018).

<sup>43</sup> H.R. Rep No. 115-597 (2018).

### C. PSN after the act

Even after the PSN Act became law, federal weapons prosecutions continued to increase.<sup>44</sup> In 2019, there were 11,309 federal weapons charges filed and prosecuted.<sup>45</sup> While the data is still incomplete, violent crime statistics have not shown a significant enough decrease to justify the amount of arrests for non-violent crimes (such as simple gun possession) under the Trump administration.<sup>46</sup>

The 2020 solicitation for the program includes almost the exact same language as the 2018 solicitation emphasizing the creation of task forces and the prosecutions of offenders.<sup>47</sup> Nevertheless, former Deputy Attorney General Rod J. Rosenstein declared in December 2018 that the goal of PSN was “not to maximize the number of criminal defendants,” but “minimize the number of crime victims.”<sup>48</sup>

Since its founding, approximately \$2 billion in federal funds have flowed to PSN,<sup>49</sup> but what these funds are used for, and in what form they are provided are critical aspects of increasing the effectiveness of the PSN program.

Despite the PSN Act’s requirement that the DOJ issue guidance for the program, the only formal guidance that the DOJ currently applies is the Uniform Guidance (UG) for federal agency grant programs, promulgated by the Office of Management and Budget (OMB).<sup>50</sup> The UG is a government-wide framework for grants management. Documents on the PSN website do, however, support the Trump administration’s approach to PSN, especially its emphasis on gun prosecutions.<sup>51</sup>

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<sup>44</sup> Syracuse University, “Federal Weapons Prosecutions Continue to Climb in 2019,” TRAC Reports, June 9, 2019, <https://trac.syr.edu/tracreports/crim/560/>.

<sup>45</sup> *Id.*

<sup>46</sup> See Federal Bureau of Investigation, “Crime in the U.S. 1998–2018,” accessed September 2, 2020, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-1> Notably, a spike in violent crime occurred in 2016, ostensibly related to the 2016 election cycle. This high volume of crime stagnated and then diminished in 2018. See U.S. Department of Justice (hereinafter, “DOJ”), “Project Safe Neighborhoods, One Year Progress Report,” March 2019, <https://www.justice.gov/file/1149381/download> (claiming PSN is responsible for decreasing in crimes in PSN target areas). Although the violent crime rate between 2017 and 2018 decreased by 3.3 per 100,000, the same metric for the period spanning 2014 to 2018 actually increased by 4.7 percent—thus showing an overall increase in violent crime as presidential administrations changed during this time.

<sup>47</sup> U.S. Department of Justice, “The Project Safe Neighborhoods FY 2020 Formula Grant Solicitation,” March 31, 2020, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/bja-2020-17027.pdf>.

<sup>48</sup> DOJ, “Project Safe Neighborhoods, One Year Progress Report,” March 2019, <https://www.justice.gov/file/1149381/download>.

<sup>49</sup> *Id.*

<sup>50</sup> Uniform Guidance for Federal Grants, 2 C.F.R. Part 200.

<sup>51</sup> See e.g., Bureau of Justice Assistance, “Common Components of Successful PSN Strategies,” accessed October 27, 2020, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/Common-Components-of-Successful-PSN-Strategies.pdf>.



The Senate Committee on Appropriations included the following language in its report on the appropriations bill that led to \$20 million in funding for PSN for fiscal year 2020:

Project Safe Neighborhoods [PSN].—The Committee's recommendation includes \$20,000,000 for PSN. The Committee encourages OJP to use PSN funds to support evidence-based and data-driven focused intervention, deterrence, and prevention initiatives that aim to reduce violence. These initiatives should be trauma-informed, recognizing that people who are at risk of committing violence often themselves have been victims of violent trauma or have witnessed traumatic experiences in the past.

Group Violence Intervention [GVI].—The Committee recognizes that GVI is a strategy the Department should consider in its efforts to reduce violent crime. The Committee encourages the Department, in conjunction with the Project Safe Neighborhood program, to fund GVI initiatives in cities where GVI programs have proven to reduce gun violence.<sup>52</sup>

Notably, the Trump administration's OJP FY 2021 budget specifically allows for "amounts designated for the project safe neighborhoods program be used for successful or promising efforts that may not fall precisely within the scope of the PSN Act of 2018."<sup>53</sup>

## **II. Proposed action**

### **A. Substance of the proposed guidance**

PSN has always involved a tension between community-based intervention programs and prosecutorial efforts. In the 2018 PSN Act, Congress struck a balance between these two, but the Trump administration's focus on increasing the number of prosecutions for illegal gun possession is not consistent with this balance. Consequently, a new administration should formally issue a new guidance document, through the DOJ, interpreting the PSN Act in accordance with the statutory language. This guidance document would provide the US attorneys who are administering the program and other stakeholders with much-needed advice on its proper focus. This kind of guiding document would refocus the program on cooperative partnerships among federal, state, and local agencies; entities representing members of the community affected by increased violence; victims' advocates; and researchers.

In particular, the guidance should do the following.

- (1) De-emphasize prosecution efforts under the program, and instead call for the concentration of PSN efforts on the small subsets of individuals responsible for violence in particular communities—the first strategy identified in the statute.**

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<sup>52</sup> S. Rept. 116-127 (reporting on S.2584) (Sept. 26, 2019).

<sup>53</sup> Office of Management & Budget, Executive Office of the President, Office of Justice Programs, "FY 2021 Performance Budget," February 2020, 33, <https://www.justice.gov/doj/page/file/1246736/download>.

PSN's first strategy is "developing and executing comprehensive strategic plans to reduce violent crimes, including the enforcement of gun laws, and prioritizing efforts focused on identified subsets of individuals or organizations responsible for increasing violence in a particular geographic area."<sup>54</sup> A new administration's updated guidance should emphasize the statute's explicit goal of reducing violent crimes, rather than prosecuting offenders.

The first strategy correctly suggests that the best way to reduce violent crime is to focus on the "identified subsets of individuals or organizations responsible for increasing violence in a particular geographic area." 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.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup>

Social science research also demonstrates the effectiveness of programs that intervene directly with these individuals. One of these programs directly inspired the creation of PSN in the first place. As mentioned above, in his letter regarding the creation of PSN, Attorney General Ashcroft cited Operation Ceasefire in Boston, Massachusetts. That program pioneered the use of Group Violence Intervention (GVI), a form of problem-oriented policing (as opposed to traditional "incident-driven" policing), which has now been implemented in a wide variety of American cities, with consistently impressive results. To implement the GVI strategy, police departments must partner closely with community leaders and service providers to jointly convene "call-ins" with a relatively small number of individuals at the highest risk of involvement

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<sup>54</sup> 34 U.S.C. § 60703(a).

<sup>55</sup> 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>.

<sup>56</sup> 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>.

<sup>57</sup> 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](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>.

in violence in the near future. At the call-ins, community leaders communicate a strong demand for the shooting to stop. Social service providers then present plans to connect high-risk individuals with services, ranging from trauma counseling, mediation, and peer coaching to job training and relocation assistance. Finally, law enforcement officers often deliver a respectful notification regarding the legal risks individuals may face if the community’s plea for peace is ignored. This notification or promise of accountability can have a new focused deterrent effect.

The GVI model has a remarkably strong track record, featuring a documented association with homicide reductions of 30–60%.<sup>58</sup> When violence intervention experts compared more than 1,400 individual studies of crime-reduction strategies in 2016, they identified group violence intervention as having “the strongest and most consistent anti-violence effects.”<sup>59</sup> Additionally, the Department of Justice compiled a review of known crime prevention strategies, in which it gave the GVI approach its highest rating, noting the existence of multiple studies confirming GVI’s efficacy.<sup>60</sup>

The GVI strategy demonstrates an effective approach to the subset of individuals that the PSN Act’s first strategy identifies. The Trump administration seems to have interpreted the first strategy to authorize a solely prosecutorial approach to these individuals, with little regard for whether these prosecutions serve the goal of reducing violent crime. In reality, the best way to achieve this goal may be not through prosecutions, but through intervening with these individuals so that they do not commit further violent crimes.

**(2) Prioritize evidence-based “intervention and prevention” initiatives, such as “street-level outreach, conflict mediation, provision of treatment and social services, and the changing of community norms”—the second strategy identified in the statute.**

The guidance should also elucidate the second strategy named by the act: “developing evidence-based and data-driven intervention and prevention initiatives, including juvenile justice projects and activities which may include street-level outreach, conflict mediation, provision of treatment and social services, and the changing of community norms, in order to reduce

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<sup>58</sup> Giffords Law Center to Prevent Gun Violence, “Intervention Strategies,” accessed October 27, 2020, <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/>.

<sup>59</sup> Thomas Abt, “We Can’t End Inequality Until We Stop Urban Gun Violence,” *The Trace*, July 12, 2019, <https://www.thetrace.org/2019/07/we-cant-endinequality-until-we-stop-urban-gun-violence/>; “What Works in Reducing Community Violence: A Meta-review and Field Study for the Northern Triangle,” US Agency for International Development, February 2016, <https://www.usaid.gov/sites/default/files/USAID-2016-What-Works-in-Reducing-CommunityViolence-Final-Report.pdf>; National Academies of Sciences, Engineering, and Medicine, *Proactive Policing: Effects on Crime and Communities* (Washington: The National Academies Press, 2018), <https://www.nap.edu/catalog/24928/proactive-policing-effects-on-crime-and-communities>.

<sup>60</sup> Office of Justice Programs, “Crime & Crime Prevention,” National Institute of Justice, accessed February 22, 2016, <https://www.crimesolutions.gov/TopicDetails.aspx?ID=13>; see also Office of Justice Programs, “Community Crime Prevention Strategies,” US Department of Justice, accessed February 22, 2016, <https://www.crimesolutions.gov/TopicDetails/>.

violence.”<sup>61</sup> The Trump administration has largely ignored this strategy. Yet, these initiatives are remarkably effective. One of these kinds of initiatives is the GVI strategy described above. Another kind of initiative that fulfills this strategy is hospital-based violence intervention.

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.<sup>62</sup> 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.

Another approach that fits the act’s second strategy is the Chicago-based Cure Violence (CV) program.<sup>63</sup> This approach is clearly what Congress had in mind through the act’s reference to “street-level outreach,” and “conflict mediation.” 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.<sup>64</sup> The second element of the CV approach is the identification and treatment of high-risk individuals, which is accomplished through outreach workers (OWs), 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.

As the PSN Act requires, 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.<sup>65</sup> San Francisco General Hospital’s Wraparound Project introduced the HVIP strategy in 2005, and in its first six years of operation, the project was associated with a 400%

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<sup>61</sup> 34 U.S.C. § 60703(a).

<sup>62</sup> 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>.

<sup>63</sup> Wesley G. Skogan et al., “Evaluation of CeaseFire-Chicago,” March 20, 2008, <https://www.ncjrs.gov/pdffiles1/nij/grants/227181.pdf>.

<sup>64</sup> 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>.

<sup>65</sup> 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>

decrease in the rate of injury recidivism.<sup>66</sup> 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.<sup>67</sup>

Community members might prefer one or more of a number of other programs or actions that could be used to curb violence beyond the three discussed above.<sup>68</sup> Provided that these programs are evidence-based, PSN funding should be used to support them.

**(3) Instruct that all programs funded should collect “data on outcomes achieved through the Program, including the effect on the violent crime rate, incarceration rate, and recidivism rate of the jurisdiction”—the third strategy identified in the statute.**

The PSN Act’s third strategy is “collecting data on outcomes achieved through the program, including the effect on the violent crime rate, incarceration rate, and recidivism rate of the jurisdiction.”<sup>69</sup> While solicitations for PSN funding under the Trump administration have mentioned a requirement that grantees collect data on “outcomes,” including violent crime, and the number of investigations and prosecutions, they have said nothing about incarceration or recidivism rates. As described above, the DOJ’s recent instructions to US attorneys administering the program have focused on rates of prosecution and conviction, especially convictions for illegal gun possession. Consequently, the guidance should clarify that the BJA and the US attorneys must take into account the effect of their activities on incarceration and recidivism, and collect data to demonstrate these effects.

The BJA should also insist on the collection of data regarding the racial disparities under the program, to ensure the program is being administered equitably. The incoming administration should fund or undertake rigorous studies to better understand the demographics of those arrested for illegal gun possession under the previous administration, and whether those arrests were made in connection with the commission of violent crime. Doing so may support the new administration’s PSN policy because it may evidence the disproportionate effect a sweeping prosecution policy can have on racial minorities—as these federal weapons charges typically carry five-year mandatory minimum sentences.<sup>70</sup>

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<sup>66</sup> 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.

<sup>67</sup> 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 Attorney General, Office of Justice Programs,” 2010 Project Safe Neighborhoods National Conference, [https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/speeches/2010/10\\_0714lrobinson.htm](https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/speeches/2010/10_0714lrobinson.htm).

<sup>68</sup> See, e.g., City of Milwaukee Health Department, Office of Violence Prevention, “Milwaukee Blueprint for Peace,” (2017) <https://www.preventioninstitute.org/sites/default/files/publications/Milwaukee%20Blueprint%20for%20Peace.pdf>.

<sup>69</sup> 34 U.S.C. § 60703(a).

<sup>70</sup> See 18 U.S.C. § 924.

**(4) Make clear that PSN funding can be used for the additional purpose areas listed in the statute, and clarify the role of Gang Task Forces and US attorneys.**

**Additional purposes**

The act also listed four “additional purposes areas” that the Attorney General may use PSN funds for:

- competitive and evidence-based programs to reduce gun crime and gang violence
- the Edward Byrne criminal justice innovation program
- community-based violence prevention initiatives
- gang and youth violence education, prevention and intervention, and related activities.<sup>71</sup>

This language allows PSN funding to be redirected to certain programs that have existed alongside PSN and use primarily non-prosecutorial approaches.<sup>72</sup> Although the act labels PSN a “block grant,” the inclusion of these additional purpose areas indicates that at least some of the funding may be distributed on a competitive basis. Notably, the act does not require the US attorneys to play a role in the administration of funds to these programs. As a result, the BJA may disburse PSN funds to these programs directly.

**The proper role of US attorneys**

As noted above, President Bush launched PSN through a letter to the US attorneys, and in 2002, Congress officially established the program as “a program for each United States Attorney to provide for coordination with State and local law enforcement officials in the identification and prosecution of violations of Federal firearms laws...” This language conflicts significantly with the more recent PSN Act.

Traditionally, all PSN funding has been directed through the US attorneys’ Offices. The PSN Act, however, re-established the program within the OJP, and mentioned the US attorneys only as one of the federal, state, and local agencies who must, in partnership with “entities representing members of the community affected by increased violence, victims’ advocates, and researchers,” aim to “create safer neighborhoods through sustained reductions in violent crimes.”<sup>73</sup>

There is no statutory requirement that all PSN funding be directed through the US attorneys’ Offices. The strategies described in the act do not require the leadership of US attorneys, and the “additional purposes areas” listed in the act all refer to certain programs that are not led by

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<sup>71</sup> 34 U.S.C. § 60703(b).

<sup>72</sup> See e.g., Bureau of Just. Assistance, Innovations in Community-Based Crime Reduction (CBCR) Program FY 2019 Competitive Grant Announcement (May 2019), <https://bj.a.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2019-15364.pdf>.

<sup>73</sup> 34 U.S.C. § 60703(a).

US attorneys. Consequently, the OJP may choose to award PSN funding in accordance with the act directly to other organizations or entities to further the act's goal.

The PSN Act does, however, require US attorneys to have some role in the partnerships formed to implement the program. The guidance document should specify the nature of this role, with an emphasis on building relationships between US attorneys' offices and the communities they serve.<sup>74</sup>

### **The proper role of “gang task forces”**

The guidance should also clarify the role of “gang task forces.” The Trump administration has focused most PSN efforts requiring US attorneys to create gang task forces in every judicial district, even though the act calls for only 30% of the funding available in the form of grants to be provided to these task forces, and only calls for their existence “in regions experiencing a significant or increased presence of criminal or transnational organizations engaging in high levels of violent crime, firearms offenses, human trafficking, and drug trafficking.”<sup>75</sup> Furthermore, under the Trump administration, these task forces have not properly focused on individuals with leadership or aggravating roles in criminal organizations, but instead have focused on maximizing prosecutions for illegal gun possession.<sup>76</sup>

As described above, high levels of violent crime tend to be concentrated in specific neighborhoods; vast areas of the country do not experience these high levels of crime. Even where high levels of crime exists, this crime does not necessarily indicate a “significant or increased presence of criminal or transnational organizations.” The phrase “criminal or transnational organizations” indicates a level of organization and sophistication that is often lacking from the loose affiliations of young men that actually drive large portions of gun violence, especially in communities of color.

The act defines the term “transnational organized crime group,” even though that term is not explicitly used in the act. It is unclear why Congress chose to include this definition. The best possible explanation is that this definition is intended to help explain the phrase “criminal or transnational organizations.” By cross-reference, the act defines “transnational organized crime group” as “a group of persons that includes one or more citizens of a foreign country, exists for a period of time, and acts in concert with the aim of engaging in transnational organized crime.”<sup>77</sup> Transnational organized crime is:

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<sup>74</sup> See Kenneth L. Alexander, “32 Black federal prosecutors in Washington have a plan to make the criminal justice system more fair,” *Wash. Post*, Sept. 5, 2020, [https://www.washingtonpost.com/local/public-safety/32-black-federal-prosecutors-in-washington-have-a-plan-to-make-the-criminal-justice-system-more-fair/2020/09/05/1774d646-ed4b-11ea-ab4e-581edb849379\\_story.html](https://www.washingtonpost.com/local/public-safety/32-black-federal-prosecutors-in-washington-have-a-plan-to-make-the-criminal-justice-system-more-fair/2020/09/05/1774d646-ed4b-11ea-ab4e-581edb849379_story.html).

<sup>75</sup> 34 U.S.C. § 60704(c).

<sup>76</sup> See 34 U.S.C. § 60704(d).

<sup>77</sup> 34 U.S.C. § 60701(3) (cross-referencing 22 U.S.C. § 2708(k)(6)).

(i) racketeering activity ...that involves at least one jurisdiction outside the United States; or (ii) any other criminal offense punishable by a term of imprisonment of at least four years under Federal, State, or local law that involves at least one jurisdiction outside the United States and that is intended to obtain, directly or indirectly, a financial or other material benefit; and (B) includes wildlife trafficking .... and severe forms of trafficking in persons .... involving at least 1 jurisdiction outside of the United States.<sup>78</sup>

Thus, a transnational organization (or transnational organized crime group) engages or intends to engage in: high-level, international criminal activity with an intent to obtain a financial or material benefit; and wildlife or human trafficking. While not defining a “criminal organization,” the definition of “transnational organization” suggests that the term “criminal organization” is akin, however, without the international relationships. The definition also suggests the sophistication of criminal and transnational organizations: wildlife or trafficking in persons have both been found by Congress to be “increasingly perpetrated by organized, sophisticated criminal enterprises.”<sup>79</sup>

Taken together, the term “criminal or transnational organizations” in the act likely does not refer to the kind of groups that drive street-level gun violence in most of the US. Violent acts within these street-level groups are often committed not for financial or material benefit, but as a way of getting vengeance for a prior act of violence that goes unresolved by formal, legal systems of justice. By and large, these acts of day-to-day interpersonal gun violence are not conspiratorial acts designed to further more elaborate criminal enterprises.

As a result, the gang task forces required by the PSN Act should not attempt to address the kind of violence that plagues many communities of color. Instead, the act requires these task forces to be used to address organized crime and to use only 30% of PSN funding to do so. The investigation and prosecution of individuals who have an aggravating or leadership role in these criminal and transnational organizations must remain a priority in accordance with section 5(d) of the act. Beyond these individuals and this 30%, however, PSN funding must be used in accordance with the other provisions of the act, and, as described above, must serve the goal of reducing violent crimes.

The statute does not require every judicial district to have its own gang task force. On the contrary, the act requires them only in “regions experiencing a significant or increased presence of criminal or transnational organizations engaging in high levels of violent crime, firearms offenses, human trafficking, and drug trafficking.” To comply with the act, the BJA must first identify these regions. These regions may constitute only a small area within the US and may cross several judicial districts. Thirty percent of PSN funding must be directed to these areas, and gang task forces must be formed to address them.

This approach to PSN funding is required by the act. However, it will differ dramatically from the Trump administration’s approach. For one thing, the BJA may lead the creation of these task

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<sup>78</sup> 22 U.S.C. § 2708(k)(5).

<sup>79</sup> VERDAD Act, Pub. L. No. 116-94, 133 Stat. 3069; TARGET Act, Pub. L. No. 115-141, 132 Stat. 1123.



forces directly, rather than delegating this role to the US attorneys. In this way, the BJA will have greater control over the work of these task forces to ensure they properly serve the purposes of the act.

**(5) Contextualize section 5(d)'s requirement that grant funding under the act be used to prioritize the investigation and prosecution of certain individuals.**

As noted above, the act contains language about how PSN grant funding should be prioritized. This language appears inconsistent with the act's strategies. Specifically, section 5(d) of the act states that "[a]mounts made in grants under the Program shall be used to prioritize the investigation and prosecution of individuals who have an aggravating or leadership role in criminal or transnational organizations described in subsection (c)."<sup>80</sup> While this language appears to apply to all grants under the program, it can only apply to the extent there are identifiable individuals who have such a role. Where these leaders exist, section 5(d) requires PSN funding to be used to investigate and prosecute them.

In addition, this restriction does not apply to any amounts made in forms other than grants. An alternative form of federal funding under which federal assistance can flow to PSN is that of a "cooperative agreement."<sup>81</sup> Under the Federal Grant and Cooperative Agreement Act of 1977 (FGCAA), cooperative agreements are distinguished from grants.<sup>82</sup> Consequently, if BJA or a US attorney uses a cooperative agreement to spend PSN funds, section 5(d)'s requirement to prioritize investigations and prosecutions does not apply. That amount of funding can be removed from the calculation accounting for the 30% of funding that must be used for gang task Forces.

The FGCAA's definition of a cooperative agreement differs from its definition of a grant agreement only with respect to whether "substantial involvement" between the executive agency and the recipient of the funding assistance is anticipated during performance of the contemplated activity.<sup>83</sup> In the case of a grant agreement, "no substantial involvement" is expected.<sup>84</sup> Providing PSN funding in the form of cooperative agreements would therefore have the added benefit of enabling the BJA or the US attorney to have substantial involvement in carrying out the activities funded by cooperative agreement awards. That substantial involvement, in turn, is likely to help ensure that local and state recipients use their federal funding effectively—in contrast with grants, which observers criticize as being amenable to

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<sup>80</sup> 34 U.S.C. § 60704(d).

<sup>81</sup> Other OJP offices have established cooperative agreements for non-prosecutorial activities under PSN in the past. The guidance recommended here would emphasize the priority of such agreements. See e.g., National Institute of Justice "PSN Academy: Proposal to Provide Technical Assistance," accessed October 27, 2020, <https://nij.ojp.gov/funding/awards/2002-gp-cx-1003#supplimental-award-0-1>.

<sup>82</sup> 41 U.S.C. § 501 et seq.,

<sup>83</sup> 41 U.S.C. 501, § 6 (emphasis added).

<sup>84</sup> *Id.*, § 5.

redistribution away from “individuals or communities with the greatest need toward those with greater political influence.”<sup>85</sup>

## B. Process

The guidance proposed here could take the form of a policy statement, memorandum, agency directive, or other document. Regardless of its title, the guidance document, as described in this memorandum, would be considered an “interpretive rule” because it would be “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”<sup>86</sup> 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.<sup>87</sup> However, “that convenience comes at a price: Interpretive rules do not generally have the force and effect of law.”<sup>88</sup>

Executive Order 13891, issued by the Trump administration in October 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.”<sup>89</sup> 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.<sup>90</sup> Importantly, part or all of the guidance contemplated in this memorandum is likely to be incorporated into grant agreements.

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).<sup>91</sup> 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.

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<sup>85</sup> Congressional Research Service, “Block Grants: Perspectives and Controversies,” updated February 21, 2020, 9, <https://fas.org/sgp/crs/misc/R40486.pdf> (discussing block grant critics’ argument that such grants can undermine the achievement of national objectives).

<sup>86</sup> *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

<sup>87</sup> *Id.* at 97. 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>.

<sup>88</sup> *Id.* (citing *Guernsey*, 514 U.S. at 99).

<sup>89</sup> Exec. Order 13,891, 84 Fed. Reg. 55235 (October 15, 2019).

<sup>90</sup> *Id.*

<sup>91</sup> Department of Justice, “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.

Given the importance of PSN and the guidance discussed here, there is a possibility that any guidance the DOJ issues with respect to its interpretation of the PSN Act 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.<sup>92</sup> Guidance documents that qualify as “significant” under this definition must meet certain procedural requirements, including a 30-day notice-and-comment period.<sup>93</sup> Although the likelihood of such a finding cannot be determined with certainty, 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.<sup>94</sup>

The BJA should then incorporate the substance of the guidance in all program documents, and, most importantly, the grant agreements that govern the obligations of the US attorneys and subrecipients who receive these grants.<sup>95</sup> Issuing such guidance through memoranda would substantially change the language in the grant solicitation as well, which currently uses Attorney General Sessions’s 2017 memorandum as one of the major frameworks for how each PSN should apply for grants. Additionally, issuing guidance through proposed appropriations language in the incoming administration’s OJP budget would also significantly impact how grants are solicited and spent—as this appropriations language is the other major framework from which the solicitations are drafted and spent.

Finally, as the current language of the PSN Act expires on September 30, 2021, the guidance recommended here would similarly influence any future rewrite of the language appropriating funds for the PSN program.<sup>96</sup> Should Congress seek to reauthorize PSN, the goal should be to rewrite the PSN Act once the current appropriation bill expires, in order to have an impact on non-prosecutorial funding through PSN beyond 2021. However, should Congress seek to end PSN, other options exist to reroute this funding altogether.

#### **IV. Risk analysis**

##### **Timing of review**

An agency action is subject to judicial review only after it is final. Whether an agency action is final in this context has two components: first, the action must mark the “consummation” of the agency’s decision-making process—it cannot be of a tentative or intermediate nature. Second,

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<sup>92</sup> *Id.*, Exec. Order 13,891, 84 Fed. Reg. 55235 (October 15, 2019).

<sup>93</sup> *Id.*

<sup>94</sup> 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 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.

<sup>95</sup> See 31 U.S.C. § 6304 (regarding grant agreements).

<sup>96</sup> See Congressional Budget Office, “Expired and Expiring Authorizations of Appropriations: Fiscal Year 2020,” February 5, 2020, Supplemental Data, <https://www.cbo.gov/system/files/2020-02/56082-CBO-supplemental-data.xlsx>.

the action must be one by which “rights or obligations have been determined” or from which “legal consequences will flow.”<sup>97</sup> Consequently, the guidance document proposed by this memorandum may not qualify as a final agency action. The BJA’s actions with regards to PSN grants may not be considered final and reviewable until grant applications have been approved or denied. In some cases, however, potential grantees have been able to seek preliminary injunctions earlier on in the funding process to prevent the administration of grant programs in accordance with certain guidance.

### **Agency action committed to discretion by law**

The DOJ may argue that challenges to PSN guidance fail as a matter of law because such decisions are committed to agency discretion by law. The Administrative Procedures Act withdraws judicial review where “an agency action is committed to agency discretion by law.”<sup>98</sup> “[I]f the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion,” then it is unreviewable.<sup>99</sup>

In addition, the DOJ may argue that, pursuant to federal law, the attorney general possesses “final authority over all functions, including any grants, cooperative agreements, and contracts made, or entered into, for the Office of Justice Programs,”<sup>100</sup> which is headed by an assistant attorney general;<sup>101</sup> in turn, the assistant attorney general overseeing the Office of Justice Programs is authorized by law to “exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants.”<sup>102</sup> Thus, the DOJ has significant authority over the administration of these grants. These threshold arguments may or may not prevent judicial review of the guidance document proposed here.

### **Judicial challenges to the guidance document**

If challengers are able to overcome the threshold issues mentioned above—such as finality and the extent of agency discretion—they may challenge the guidance document as being beyond the agency’s statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.<sup>103</sup>

The administration of PSN grants is clearly within the BJA’s statutory authority, and the PSN Act explicitly requires the creation of guidance to implement the program. There are no constitutional issues involved in the administering of PSN grants as proposed here. In addition,

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<sup>97</sup> *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

<sup>98</sup> 5 U.S.C. § 701(a)(2).

<sup>99</sup> *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985).

<sup>100</sup> 34 U.S.C. § 10110(2).

<sup>101</sup> 34 U.S.C. § 10101.

<sup>102</sup> 34 U.S.C. § 10102(a)(6).

<sup>103</sup> 5 U.S.C. § 706.

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. As described above, these procedures will depend on the formality of the document, whether it is publicly available (or merely an internal directive for US attorneys), and whether the DOJ determines that it is a “significant guidance document” in accordance with the interim rule.

### **Arbitrary and capricious challenge under the APA**

If there is a judicial challenge brought regarding the new guidance being arbitrary or capricious, a court will invalidate it if the agency action or conclusion is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>104</sup>

One potential challenge of the approach described above is the de-emphasis on gang task forces. State and local law enforcement agencies have historically been involved in these task forces and may object to decreases in their funding. As noted above, however, the act only requires 30% of PSN funding to be used for these task forces. In addition, even though the Trump administration has required these task forces to be created in every federal judicial district, the act only requires them to be created in specific regions “experiencing a significant or increased presence of criminal or transnational organizations engaging in high levels of violent crime, firearms offenses, human trafficking, and drug trafficking.” Consequently, a court would probably find that the explicit language of the act supports this de-emphasis on these task forces.

A challenge claiming that a funding decision is arbitrary and capricious may focus on the allocation of this funding among different grantees. On this point, the PSN Act represents a compromise between the Obama and Trump administrations’ approaches to the program. While the Obama administration used the funding for competitive grants, limiting the judicial districts that received the funding, the act refers to the funding as “Block Grants” meant to foster partnerships in “each Federal judicial district.” Accordingly, the Trump administration has used a formula to make PSN funding available to every judicial district, but also prioritizing funding for those districts with a high level of violent crime.<sup>105</sup> This formula appears to be modeled on the formula set by statute for a different program.<sup>106</sup> The PSN Act does not explicitly provide a formula for the distribution of PSN funding, however, so courts are not likely to find that changes to this approach are arbitrary and capricious.

A challenger may claim that the guidance document is not “in accordance with law” if it conflicts with the language of the PSN Act. In implementing the law, federal agencies often fill in the gaps

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<sup>104</sup> 5 U.S.C. § 706(2)(A).

<sup>105</sup> See U.S. Department of Justice, “The Project Safe Neighborhoods FY 2019 Grant Announcement,” April 23, 2019, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2019-15125.PDF>; “Revised FY 2018 Project Safe Neighborhoods Funding Allocation Amounts,” accessed October 17, 2020, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/FY-2018-Project-Safe-Neighborhoods-Funding-Allocation-Amounts-rev.pdf>.

<sup>106</sup> The formula is remarkably similar to the formula under which states receive Byrne JAG funding. See 34 U.S.C. § 10156.

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.”<sup>107</sup> 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.<sup>108</sup> Moreover, “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer,” although the measure of deference will vary depending on “the degree of the agency’s care, its consistency, formality, and relative expertise, and to the persuasiveness of the agency’s position.”<sup>109</sup>

Pursuant to these principles, the Supreme Court has established a two-step process to analyze an agency’s construction of a statute it administers. First, applying the ordinary tools of statutory construction, the court must determine “whether Congress has directly spoken to the precise question at issue.”<sup>110</sup> If the intent of Congress is clear, that is the end of the matter, “for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>111</sup> But “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”<sup>112</sup> Notably, in making the threshold determination—whether the statute is ambiguous—a court must look to the surrounding text and the overall statutory scheme to ensure that Congress has not expressed a particular intent on the question at issue.<sup>113</sup> In turn, whether the agency’s interpretation is permissible depends on whether it is a “reasonable interpretation” of the enacted text, i.e. is not “arbitrary or capricious.”<sup>114</sup>

In some respects, the PSN Act is not ambiguous. It lists the three strategies that partners may use to accomplish the goal of the program and specifically authorizes PSN funding to be used for the four additional purposes. The act also clearly specifies the overall goal of the program to “create safer neighborhoods through sustained reductions in violent crimes.” The Trump administration has largely ignored these strategies and focused exclusively on increasing the number of prosecutions for firearms offenses, without regard for whether it serves this goal. This approach is contrary to the clear text of the PSN Act. In contrast, the approach contemplated in the guidance document described above is consistent with the language of the act.

In other respects, the PSN Act is ambiguous. The act does not specify the way funds must be allocated, the role of gang task forces, the role of US attorneys, or the scope of the requirement

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<sup>107</sup> *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).

<sup>108</sup> *Chevron*, 467 U.S. at 843.

<sup>109</sup> *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

<sup>110</sup> *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 296 (2013).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (explaining that the ambiguity of statutory language is determined “by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole”).

<sup>114</sup> *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011).

that certain prosecutions be prioritized under section 5(d). Having determined that the PSN Act is ambiguous, a court would turn to whether the guidance document proposed here is based on a permissible interpretation of the act. As described above, there are strong arguments for the interpretation in the guidance document proposed above.

In addition, the relationship between the PSN Act and the provision regarding PSN in the 21st Century Department of Justice Appropriations Authorization Act is unclear. That provision in the 21st Century Department of Justice Appropriations Authorization Act focuses on “the identification and prosecution of violations of Federal firearms laws” and appears to support the Trump administration’s approach.<sup>115</sup> However, “[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.”<sup>116</sup> As described above, Congress intended the PSN Act, as subsequent legislation, to redirect the course of the program away from the earlier statute’s emphasis on prosecutions. Thus, a court is not likely to find the guidance document “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

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<sup>115</sup> 107 P.L. 273, 116 Stat. 1758 § 104 (2002).

<sup>116</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969).