17-2991

United States Court of Appeals for the Seventh Circuit

CITY OF CHICAGO,

Plaintiff-Appellee,

v.

JEFFERSON B. SESSIONS, III,
Attorney General of the United States,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 17-cv-05720
The Honorable Harry D. Leinenweber, Judge Presiding

BRIEF FOR AMICI CURIAE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW MEXICO, OREGON, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEE

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INTERESTS OF AMICI CURIAE

In our federal system, States and localities have primary responsibility for the design of law-enforcement policies to keep their residents safe. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 618 (2000). The Edward Byrne Memorial Justice Assistance Grant (Byrne-JAG) is a mandatory formula grant that Congress created to provide States and localities with a reliable source of funding in accordance with state and local law-enforcement and criminal justice policies. Like Chicago, the amici States—New York, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Vermont, and Washington—and the District of Columbia are entitled to receive Byrne-JAG grants. And also like Chicago, the amici States have been using those grants and their predecessors for almost fifty years to support a broad array of critical law-enforcement programs tailored to local needs.

The United States Attorney General now claims authority to withhold Byrne-JAG funding from States and localities that have made law-enforcement policy judgments that federal law permits, but with which he disagrees. Specifically, he contends that he may deny grants to States and localities that limit their voluntary involvement with enforcing federal immigration policy because they have concluded that fostering a relationship of trust between their law-enforcement officials and their immigrant

communities will promote public safety for all of their residents. The Byrne-JAG statute does not authorize the U.S. Attorney General's position, which is also contrary to the federalism principles that Congress enshrined in the Byrne-JAG program.

The amici States have adopted different approaches to cooperating with the federal government in immigration matters based on their own determinations about the measures that will promote public safety for their citizens. They join this brief whether or not they believe that Chicago's approach would be optimal for them, because they believe that the Byrne-JAG statute permits Chicago to choose that approach without financial penalty.

Moreover, if this Court vacates or narrows the preliminary injunction, the amici States will face the same impermissible choice as Chicago: accept invalid conditions that diminish their ability to set their own law-enforcement priorities, or lose Byrne-JAG funding and the vital programs those grants support. The amici States therefore also have a strong interest in ensuring that the protection provided by the district court's nationwide injunction remains in place throughout the course of this litigation.

STATEMENT OF THE CASE

A. The Byrne-JAG Program

The Byrne-JAG program has its origins in the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title I, 82 Stat. 197,[1] which created the first block grants for States and localities to use for law-enforcement and criminal justice programs.[2] Recognizing that "crime is essentially a local problem that must be dealt with by State and local governments," 82 Stat. at 197, Congress designed the grant program to provide a reliable funding stream that States and localities could use in accordance with state and local law-enforcement policies.[3]

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[1] Available at https://www.gpo.gov/fdsys/pkg/STATUTE-82/pdf/STATUTE-82-Pg197.pdf. All websites cited herein were last visited on January 3, 2018.

[2] *See* Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167, 1179 (amending Title I of the 1968 Act and reauthorizing law-enforcement block grants to States and local governments); Justice Assistance Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2077-85 (same); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, pt. E, 102 Stat. 4181, 4329 (amending Title I of the 1968 Act and creating a formula law-enforcement grant); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1111, 119 Stat. 2960, 3094 (2006) (amending Title I of the 1968 Act and creating the modern Byrne-JAG program).

[3] *See, e.g.*, S. Rep. No. 90-1097, at 2 (1968) (stating that Congress sought to encourage States and localities to adopt programs "based upon their evaluation of State and local problems of law enforcement") (Excerpt available in Addendum (Add.) to this brief at 2); *see also Ely v. Velde*, 451 F.2d 1130, 1136 (4th Cir. 1971) (reviewing the legislative history of the 1968

Consistent with its deference to local priorities, Congress at the same time prohibited federal agencies and executive-branch officials from using law-enforcement grants such as Byrne-JAG to "exercise any direction, supervision, or control over any police force or any other law enforcement agency of any State or any political subdivision thereof." *Id.* § 518(a), 82 Stat. at 208. Although Congress has repeatedly modified the structure and terms of the law-enforcement grants authorized under Title I of the 1968 Act, the prohibition originally set forth in § 518 of the 1968 Act remains in effect with virtually no modification, and is now codified in the same chapter of the *United States Code* as Byrne-JAG. *See* 34 U.S.C. § 10228(a).[4]

Congress codified the modern Byrne-JAG program in 2006.[5] See *supra* n.2; 34 U.S.C. §§ 10151–58. Like its predecessors, Byrne-JAG aims to "give state and local governments more flexibility to spend money for programs

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Act and concluding that "[t]he dominant concern of Congress apparently was to guard against any tendency towards federalization of local police and law enforcement agencies").

[4] The full text of § 10228(a) provides as follows:

> Nothing in this chapter or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other criminal justice agency of any State or any political subdivision thereof.

[5] The program is named after a former New York City police officer who was killed in the line of duty. *See About Officer Byrne*, https://goo.gl/pLm8JM.

that work for them rather than to impose a 'one size fits all' solution." H.R. Rep. No. 109-233, at 89 (2005). To that end, the Byrne-JAG statute creates a formula grant and gives recipients substantial discretion to use funds for eight "broad purposes," *id.*, including law enforcement, crime prevention and education, and drug treatment, 34 U.S.C. § 10152(a)(1).

The Byrne-JAG program is administered by the United States Department of Justice (DOJ) through its Office of Justice Programs (OJP). DOJ is required by law to issue grants "in accordance with the formula" set forth in the Byrne-JAG statute. *Id.* Specifically, "[o]f the total amount appropriated" by Congress, the U.S. Attorney General "shall, except as provided in paragraph (2), allocate" fifty percent of the funds based on each State's population and fifty percent based on each State's crime rate. *Id.* § 10156(a)(1). The exception in paragraph (2) provides that each State must receive at least one-quarter of one percent of the funds appropriated by Congress for a given year, regardless of what the formula would otherwise dictate. *Id.* § 10156(a)(2). Between a State and its localities, sixty percent of funding "shall be for direct grants to States," *id.* § 10156(b)(1), and forty percent "shall be for grants" directly to localities (compared within a State based on crime rate), *id.* § 10156(b)(2), (d).

The amici States have each received Byrne-JAG funding from DOJ since 2006, as well as funding from Byrne-JAG's predecessor grant programs.

Amici have used the funds to support a diverse array of critical law-enforcement programs tailored to local needs. For example, New York has used Byrne-JAG funding to support a multi-county program to combat gun violence, improve criminal records systems, enhance forensic laboratories, and support prosecution and defense services.[6] For fiscal year 2017, New York will use Byrne funds to fight the opioid epidemic. California has used Byrne-JAG funds for education, employment, and substance abuse services; prevention and intervention initiatives for high-risk students; and diversion and re-entry programs.[7] Hawaii has used Byrne-JAG funds to combat sexual assault, eliminate elder abuse, and to reduce recidivism.[8] Massachusetts plans to use its 2017 Byrne-JAG funds to reduce gun violence, combat the opioid crisis, and promote community-based policing programs.[9] And Connecticut plans to use 2017 Byrne-JAG funds to reduce recidivism, prevent

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[6] *See New York State's Application for Byrne-JAG Program Funds—FFY 2016*, at 4-9 (June 30, 2016), *at* https://goo.gl/3WsuWr.

[7] *See* Br. for States of California and Illinois as Amici Curiae at 11-12, *City of Chicago v. Sessions*, No. 17-2991 (7th Cir. Oct. 18, 2017), ECF No. 25.

[8] *See* Hawaii Dep't of the Attorney Gen., *Creating Safer Communities—Edward Byrne Memorial Justice Assistance Grant Strategic Plan 2015-2018*, at 36-59 (2017), *at* https://goo.gl/cuJeMi.

[9] *See* Commonwealth of Mass. Exec. Office of Pub. Safety & Sec. Office of Grants and Research, *Edward J. Byrne Memorial Justice Assistance Grant Federal Fiscal Year 2017*, at 4-43 (2017), *at* https://goo.gl/5mnUZT.

gun violence, provide training to mentally ill offenders, and provide treatment for offenders addicted to opioids and heroin.[10] Without Byrne-JAG, the amici States may be forced to cut funding to these and other vital programs.

B. The New Immigration-Related Conditions

On July 25, 2017, DOJ announced it was imposing three immigration-related conditions on Byrne-JAG funding for fiscal year 2017.[11] DOJ subsequently published the proposed conditions' text in two awards issued to the County of Greenville, South Carolina and the City of Binghamton, New York. (DOJ's Appendix (App.) (ECF No. 32-1) 44-85.) DOJ stated that substantively identical conditions will be imposed on States.[12]

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[10] *Request for Public Comment, FY 2017 Justice Assistance Grant Program*, at 5-6 (2017), *at* https://goo.gl/hEfLnd.

[11] *See* Press Release, *Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Programs* (July 25, 2017), *at* https://goo.gl/txMfU1; Dep't of Justice, *Backgrounder on Grant Requirements* (July 25, 2017), *at* https://goo.gl/wf7L3n.

[12] *See* Decl. of Alan R. Hanson, Opp'n to Pl.'s Amended Mot. for Prelim. Inj. ¶ 8, *California ex rel. Becerra v. Sessions*, No. 17-cv-4701 (N.D. Cal. Nov. 22, 2017), ECF No. 42-1 (statement of Acting Assistant Attorney General for OJP that, absent an injunction, state awards will contain "substantively identical language" to the conditions in the Greenville and Binghamton award documents).

First, DOJ's new "access condition" requires States to have a rule, policy, or practice designed to ensure that, upon request, federal agents may access a state or state-contracted correctional facility to question suspected aliens about their right to remain in the United States. Second, the "notice condition" requires States to have a rule, policy, or practice designed to ensure that state officers will respond as quickly as possible to any formal written request from the Department of Homeland Security (DHS) to a correctional facility seeking advance notice of a particular alien's scheduled release date. States must require subgrantees to comply with the notice and access conditions and monitor subgrantee compliance. (App. 83.)

DOJ has also stated it will require all grantees to accept various conditions related to 8 U.S.C. § 1373, which prohibits States and localities from restricting their officials from communicating with federal immigration authorities "regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a). The "Section 1373 conditions" will require each State to:

- Certify the State's compliance with § 1373;
- Comply with § 1373 throughout the duration of the award;
- Monitor the compliance of all of subgrantees with § 1373;
- Notify DOJ if the State becomes aware that any subgrantee has violated § 1373. (App. 80-82.)

After the district court in this case enjoined the notice and access conditions but not the Section 1373 conditions, DOJ has taken an increasingly broad view of § 1373's requirements, suggesting that it covers information beyond that relating to citizenship and immigration status, and that it imposes affirmative obligations. For example, in October 2017, DOJ issued letters to seven cities, including Chicago and New York City, challenging their "so-called 'sanctuary policies.'"[13] The letter to New York City argued that § 1373 requires the city to share "information regarding an alien's incarceration status and release date and time." The letter also purported to require New York City to "communicate[] this interpretation to its officers and employees."[14]

Like Chicago, the amici States have not received final Byrne-JAG awards for fiscal year 2017. DOJ has stated that it will not issue awards while this appeal is pending but that, if the preliminary injunction is vacated or limited,

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[13] Press Release, Dep't of Justice, *Justice Department Provides Last Chance for Cities to Show 1373 Compliance* (Oct. 12, 2017), *at* https://goo.gl/W9dM7n.

[14] Letter from Alan Hanson, Acting Assistant Attorney Gen., to Elizabeth Glazer, Director, New York City Mayor's Office of Criminal Justice (Oct. 11, 2017), *at* https://goo.gl/aTDF9i.

it will impose the notice, access, and Section 1373 conditions on other Byrne-JAG grantees.[15]

ARGUMENT

POINT I

The New Conditions Are Unlawful

The district court correctly enjoined the notice and access conditions on Byrne-JAG funding. The text of the Byrne-JAG statute creates a mandatory formula grant, leaving no room for DOJ to deviate from the legislative formula by imposing new generally applicable substantive conditions. The structure and legislative history of the statute confirm DOJ's lack of authority to prescribe new general conditions, especially of the type it has proposed here. And the limits on DOJ's authority are further underscored by 34 U.S.C. § 10228(a), a statutory provision that applies to the Byrne-JAG program and prohibits DOJ from construing any grant as authorizing it to exercise "direction, supervision, or control" over any state or local police force or criminal justice agency.

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[15] *See* Decl. of Alan R. Hanson in Opp. to Pl.'s Amended Mot. for Prelim. Inj. ¶¶ 9-10, *California ex rel. Becerra v. Sessions*, No. 17-cv-4701-WHO (N.D. Cal. Nov. 22, 2017), ECF No. 42-1.

A. The text, structure, and history of Byrne-JAG confirm that Congress did not authorize DOJ to add new generally applicable substantive conditions.

Under basic separation-of-powers principles, an executive "agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Here, the Byrne-JAG statute contains no express provision authorizing DOJ to impose new generally applicable substantive conditions like the notice and access conditions. The statute instead provides that "the Attorney General shall … allocate" grant money based on the statutory formula. 34 U.S.C. § 10156(a)(1). Formula grants leave no discretion to the administering agency: if a grantee satisfies the statutory requirements, it is entitled to what the formula dictates. *See, e.g.*, *City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989).[16]

Other provisions of Byrne-JAG confirm Congress's intent to minimize the ability of DOJ to deviate from Congress's statutory formula. For example, § 10157(b) permits DOJ to reserve up to five percent of appropriated funds and reallocate them to a State or locality if the U.S. Attorney General determines that reallocation is necessary to combat "extraordinary increases

[16] *See also* Paul G. Dembling & Malcom S. Mason, *Essentials of Grant Law Practice* § 5.03, at 33-34 (1991). (Add. 12-13.)

in crime" or to "mitigate significant programmatic harm resulting from" the formula. By expressly restricting DOJ's authority to redirect Byrne-JAG funds, Congress clearly signaled that DOJ must otherwise abide by the statutory formula. *See, e.g.*, *Department of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (provision of express authority in one section of statute implies intent to exclude elsewhere).[17]

The Byrne-JAG statute's legislative history leads to the same conclusion. From the time it first created a law-enforcement block grant program in 1968, Congress has sought to ensure that such grants do not become a means for federal agencies to control, direct, or supervise state and local law enforcement. See *supra* at 3-4; *infra* 15-16. In enacting Byrne-JAG—the latest version of the 1968 program (*supra* at 3)—Congress reaffirmed this priority, stating that the grant was designed to "give State and local governments more flexibility to spend money for programs that work for

[17] The structure of title 34, chapter 101 of the *U.S. Code* also confirms DOJ's limited authority. Byrne-JAG is located in part A of Chapter 101, which is entitled "Edward Byrne Memorial Justice Assistance Grant Program." *See* 34 U.S.C. §§ 10151–58. Part B, entitled "Discretionary Grants," authorizes DOJ to issue grants to support projects similar to those supported by Byrne-JAG but at DOJ's discretion. *See id.* §§ 10171–10191.

them rather than to impose a 'one size fits all' solution." H.R. Rep. No. 109-233, at 89 (2005).[18]

What is more, since the 1990s, Congress has repeatedly considered and rejected legislation that would withhold grant funding as a penalty for noncooperation with federal immigration law.[19] When Congress enacted the modern Byrne-JAG program in 2006, it repealed the only immigration-related condition imposed on grants under Byrne-JAG's predecessor program. *See* 42 U.S.C. § 3753(a)(11) (2000) (requiring grantees to inform federal immigration authorities of an alien's criminal conviction); Pub. L. No. 109-162, § 1111(a)(1), 119 Stat. at 3094 (repeal). And more recently, Congress has considered and rejected legislative proposals to impose funding conditions on so-called "sanctuary cities," including under Byrne-JAG.[20]

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[18] The Bush Administration proposed the modern Byrne-JAG program in its 2003 budget, stating that the "paramount goal" was to "provide fund recipients maximum flexibility and control over funding." *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 2004: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 108th Cong. 1338-39 (2003). (Add. 17-18.)

[19] The Senate version of the 1994 Crime Bill, for example, included such a provision, but it was eliminated in conference. *See* H.R. 3355, § 5119, 103d Cong. (version dated Nov. 19, 1993); H.R. Rep. No. 103-694, at 424 (1994) (Conf. Report).

[20] *See, e.g.*, Stop Dangerous Sanctuary Cities Act, H.R. 5654, 114th Cong. § 4 (2016); Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. § 4 (2016); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong.

Where Congress considers and rejects legislative action, an agency's attempt to adopt the same policy is suspect. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000). Here, Congress's repeated failure to enact legislation imposing similar, immigration-related conditions on grants renders DOJ's current exercise of authority suspect.

When Congress has wanted to authorize deviations from the Byrne-JAG formula, it has done so explicitly and authorized only modest withholdings. For example, a State that fails to "substantially implement" relevant provisions of the Sex Offender Registration and Notification Act (SORNA) "shall not receive 10 percent of the funds" it would otherwise receive under Byrne-JAG. *See* 34 U.S.C. § 20927(a).[21] The amici States are unaware of Congress ever imposing a condition on Byrne-JAG that would withhold *all* funding as DOJ now seeks to do.

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§ 3 (2015); Mobilizing Against Sanctuary Cities Act, H.R. 3002, 114th Cong. § 2 (2015); Stop Sanctuary Policies and Protect Americans Act, S. 2146, 114th Cong. § 3(a) (2015); Stop Sanctuary Cities Act, S. 1814, § 2 (2015). The full text of the bills and their legislative histories are available at https://www.congress.gov.

[21] *See also* 34 U.S.C. § 30307(e)(2) (providing a five-percent penalty for non-compliance with the Prison Rape Elimination Act); 42 U.S.C. § 3756(f) (2000) (providing a ten-percent penalty for not testing sex offenders for HIV at victim's request).

B. The new conditions are inconsistent with 34 U.S.C. § 10228(a).

Since 1968, Congress has prohibited executive officials from using law-enforcement grants to exert "any direction, supervision, or control" over any state or local police force or criminal justice agency. Pub. L. No. 90-351, § 518(a), 82 Stat. 208 (codified as amended at 34 U.S.C. § 10228(a)). The current version of that prohibition, which is codified in the same chapter of the *U.S. Code* as the Byrne-JAG statute, provides that "[n]othing *in this chapter* or *any other Act* shall be construed to authorize *any* department, agency, officer, or employee of the United States to exercise *any* direction, supervision, or control over *any* police force or *any* other criminal justice agency of *any* State or *any* political subdivision thereof." 34 U.S.C. § 10228(a) (emphasis added). The repeated use of "*any*" signals Congress's intent to speak broadly, *see Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218-19 (2008)—and in this context, to prohibit all agency action that could interfere with state and local authority over law enforcement. The notice and access conditions violate this statutory prohibition by seeking to control, direct, and supervise state and local law enforcement.

The legislative history of § 10228(a) confirms this understanding. Opponents of the Omnibus Crime Control and Safe Streets Act of 1968 had expressed concerns that the U.S. Attorney General would use law-enforcement grants to coerce States and localities into adopting federal law-

enforcement priorities.[22] Supporters of the Act responded that § 10228, which was pending before Congress as part of the 1968 Act, would prohibit such control. U.S. Attorney General Ramsey Clark testified it would violate both "the mandate and spirit" of § 10228(a) to withhold funds because police departments were not run "the way the Attorney General says they must," and that § 10228(a) prevented DOJ from imposing extra-statutory conditions on grants.[23] Reviewing this history, the only appellate decision to construe § 10228 observed that § 10228(a)'s purpose was "to shield the routine operations of local police forces from ongoing control by [DOJ]—a control which conceivably could turn the local police into an arm of the federal government." *Ely*, 451 F.2d at 1136.

Although arising in a different context, the Supreme Court's anti-commandeering jurisprudence sheds further light on what it means to prohibit federal "direction" and "control" of state and local law-enforcement entities. As the Court's cases make clear, anti-commandeering prohibitions

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[22] *See, e.g.*, S. Rep. 90-1097, at 230 (1968) (views of Senators Dirksen, Hruska, Scott, and Thurmond) (expressing concern that the Act would enable the U.S. Attorney General to "become the director of state and local law enforcement"). (Add. 9.) *See generally* John K. Hudzik et al., *Federal Aid to Criminal Justice: Rhetoric, Results, Lessons* 15, 23-26 (1984) (discussing opposition to the grant). (Add. 21-24.)

[23] *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedure of the S. Comm. on the Judiciary*, 90th Cong. 100, 384, 497 (1967). (Add. 42, 45, 48.)

prevent the federal government from compelling States to enact federal programs, *see New York v. United States*, 505 U.S. 144, 188 (1992), or compelling state officers to enforce such programs, *see Printz v. United States*, 521 U.S. 898, 930, 935 (1997). *Printz* suggests at least two actions constitute impermissible "direction" or "control": requiring state law-enforcement officers to assist in "the administration of a federally enacted regulatory scheme," and requiring those officers to receive information as part of their administrative responsibilities. *Id.* at 904.[24]

Here, the U.S. Attorney General's proposed notice and access conditions conscript States into administering a federal program in violation of § 10228(a) by requiring them to continuously monitor whether subgrantees are complying with those new program conditions. (App. 83.) In addition, the notice condition requires state officials to administer federal immigration policy by *requiring* them to respond to DHS requests for information. And the access condition violates anti-commandeering principles by *requiring* state officials to devote staff, resources, and real property to facilitate federal agents' access to aliens in correctional facilities. If requiring state official to

[24] The legislation at issue in *Printz*, the Brady Act, violated these prohibitions by requiring local officers to run background checks on handgun purchasers, and requiring state officers "to accept" forms from gun dealers. 521 U.S. at 904, 905, 934.

"accept" a form is impermissible direction, *see Printz*, 521 U.S. at 904, then surely requiring them to accept and assist federal officials at state facilities is too. *See also Kennedy v. Allera*, 612 F.3d 261, 269 (4th Cir. 2010) (SORNA does not violate Tenth Amendment because it does not require States to accept sex offender registrations).

C. The new conditions are not authorized by 34 U.S.C. § 10102(a).

The district court correctly rejected the U.S. Attorney General's argument that the notice and access conditions are authorized by 34 U.S.C. § 10102(a)(6), which establishes the position of the Assistant U.S. Attorney General for OJP and authorizes that official to "plac[e] special conditions on all grants" and "determin[e] priority purposes for formula grants." *See* Br. for Appellant (Br.) at 17-21.

As the district court explained, § 10102 and the Byrne-JAG program are located in different subchapters of the *U.S. Code*, and no language suggests Congress intended § 10102(a)(6) to apply to Byrne-JAG. *See City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 2017 WL 4081821, at *5-6 (N.D. Ill. Sept. 15, 2017). The district court also rightly observed that even if § 10102(a)(6) applies to Byrne-JAG, that provision "implies that any authority of the Assistant Attorney General to place special conditions on grants must flow either from the [Byrne-JAG] statute itself or from a delegation of power

independently possessed by the Attorney General." *Id.* at *6-7. *See also City of Philadelphia v. Sessions*, No. 17-cv-3894, 2017 WL 5489476, at *26 (E.D. Pa. Nov. 15, 2017) (adopting the same rationale).

In this case, the U.S. Attorney General has identified no statute authorizing him to impose immigration-related grant conditions. Moreover, his reliance on § 10102(a)(6) is inconsistent with the text of that provision, which refers to the authority to impose "special conditions": a term of art describing conditions that are "tailored to problems perceived in a particular grant project" rather than "generally applicable to all grants under a particular grant program," Dembling & Mason, *supra*, § 11.01, at 107. (Excerpts available in Addendum (Add.) to this brief at 14.)

Indeed, when Congress amended § 10102(a)(6) in 2006 to add a reference to "special conditions," a DOJ regulation defined that term to mean a condition that is imposed for a limited time to address financial or performance concerns specific to a particular applicant, 28 C.F.R. § 66.12(a) (2006)—for example, a requirement that a financially unstable grantee provide a more detailed financial report, *id.* § 66.12(b). Under established approaches to statutory construction, this history and context offers strong support for reading § 10102(a)(6) to incorporate that regulatory definition. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) ("[W]e assume that when a statute uses [a term of art], Congress intended it to have its

established meaning."); *see also City of Philadelphia*, 2017 WL 5489476, at *27 (concluding that "special condition" is a term of art that does not authorize the new conditions).[25]

Had Congress intended to grant DOJ broader authority, it would have done so explicitly, as it has in other statutes.[26] This is particularly true given the significance of such a change for a mandatory formula program like Byrne-JAG. *See Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).[27]

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[25] In 2014, DOJ repealed § 66.12 but adopted a virtually identical substitute promulgated by the federal Office of Management and Budget. *See* Federal Awarding Agency Regulatory Implementation, 79 Fed. Reg. 75870, 76081 (Dec. 19, 2014). That regulation uses the phrase "specific condition" instead of "special condition," but the regulations are otherwise parallel. *See* 2 C.F.R. § 200.207.

[26] *See, e.g.*, 22 U.S.C. § 2272 (declaring that "[t]he President shall ensure that assistance authorized by this chapter and the Arms Export Control Act … is furnished in a manner which fosters demonstrated progress toward and commitment to the objectives set forth in 2271 of this title" and providing that "[w]here necessary to achieve this purpose, the President shall impose conditions on the furnishing of such assistance"); 25 U.S.C. § 1652(b) (declaring that "[s]ubject to section 1656 of this title, the Secretary [of the Interior] … shall include such conditions as the Secretary considers necessary to effect the purpose of this subchapter … in any grant the Secretary makes to, any urban Indian organization pursuant to this subchapter.").

[27] Following the district court's order enjoining the notice and access conditions but not the Section 1373 conditions, DOJ has argued outside this litigation that the Section 1373 conditions provide an independent basis for the notice condition. See *supra* at 9. Although amici States believe DOJ's position is incorrect, we do not address the issue here because DOJ has not raised that argument in this appeal.

POINT II

The District Court Properly Enjoined DOJ From Imposing the Notice and Access Conditions on Any Byrne-JAG Recipient.

When a plaintiff mounts a successful facial challenge to an executive policy, that policy is invalid in all its applications, and should be struck down on its face. *See Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011) ("[A] successful facial attack means the statute is wholly invalid and cannot be applied *to anyone*.").

Here, because DOJ possesses neither constitutional nor statutory authority to impose the notice and access conditions, the district court properly enjoined DOJ from imposing those conditions on Chicago and other grantees. *See Decker v. O'Donnell*, 661 F.2d 598, 617-18 (7th Cir. 1980); (upholding nationwide injunction based on facial challenge); *see also National Mining Ass'n v. U.S. Army Corp. of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (noting that "the ordinary result" when agency regulations are found unlawful "is that the rules are vacated—not that their application to the individual petitioners is proscribed" (quotation marks omitted)).[28]

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[28] *See also, e.g., Hawaii v. Trump*, 859 F.3d 741, 787-88 (9th Cir. 2017) (affirming nationwide injunction), *vacated and remanded*, 2017 WL 4782860 (Oct. 24, 2017); *International Refugee Assistance Project v. Trump*, 857 F.3d 554, 588-606 (4th Cir.) (same), *cert. granted*, 137 S. Ct. 2080, *vacated and*

The U.S. Attorney General is incorrect in contending (Br. at 21-25) that Article III of the Constitution required an injunction covering Chicago only. "In fashioning a remedy for any constitutional violation," the "touchstone" is the "nature and the scope of the constitutional violation." *Koo v. McBride*, 124 F.3d 869, 873 (7th Cir. 1997). Here, the U.S. Attorney General's attempt to impose the notice and access conditions violates bedrock separation-of-powers principles. See *supra* 10-14. The violation would be present whether the conditions were imposed on Chicago or any other Byrne-JAG recipient. Thus, the injunction was appropriately tailored to the constitutional violation.[29]

The injunction's nationwide scope was also necessary to ensure Chicago can obtain "complete relief" in light of the formula structure of the grant. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 778 (1994). The Byrne-JAG statute authorizes DOJ to reallocate funding in certain circumstances if a jurisdiction does not qualify for its allocated funds. *See, e.g.*, 34 U.S.C. § 10156(f); *id.* § 10157(b). Accordingly, if the preliminary injunction is lifted

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remanded, 2017 WL 4518553 (Oct. 10, 2017); *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015) (same).

[29] The scope of the injunction is appropriate even if, as the U.S. Attorney General contends (Br. at 24), the violation was statutory rather than constitutional. *See, e.g.*, *Utility Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2449 (2014) (invalidating EPA regulation when agency exceeded its statutory authority).

or narrowed, DOJ could disburse funding to other grantees during the course of this litigation, depriving Chicago of funds even if Chicago ultimately prevails. *See, e.g.*, *County of Suffolk v. Sebelius*, 605 F.3d 135 (2d Cir. 2010) (affirming, on mootness grounds, dismissal of challenge to denial of grant funds because government distributed funds to others during the pendency of the litigation).[30]

Finally, the equities strongly favor the injunction. District courts enjoy "sound discretion to consider the necessities of the public interest when fashioning injunctive relief." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (quotation marks omitted). Thus, "courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than . . . when only private interests are involved." *Virginian Ry. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937).

Like Chicago, the amici States are longtime recipients of federal law-enforcement block grants. Since 1968, the amici States have used these funds

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[30] For these reasons, the U.S. Attorney General (Br. at 22) is also wrong to contend that a class-action was required. "[A]n injunction is not necessarily made over-broad by extending the benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled*." *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987).

to support a variety of important law-enforcement projects, such as programs to reduce gun violence and to combat drug addiction. If the preliminary injunction is vacated or narrowed, the amici States will face the same impermissible choice as Chicago. That is, they will be compelled to accept invalid grant conditions that limit their ability to set their own law-enforcement policy, or else forego the Byrne-JAG funds that support important law-enforcement programs in their communities.[31]

In contrast to these wide-ranging harms, the U.S. Attorney General has identified no irreparable harms that would result from maintaining the status quo during the duration of these proceedings. DOJ has never imposed the notice and access conditions before. And the U.S. Attorney General has not identified—before the district court or on appeal—any change in background circumstances that would warrant the new conditions, nor has he articulated how a delay in imposing the new conditions would undermine law-enforcement or any other interests. *See also City of Chicago*, 2017 WL 4081821, at *13.

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[31] *See, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (forced choice between acquiescing to law that plaintiff believed to be unconstitutional or facing liability was an irreparable injury); *In re EPA*, 803 F.3d 804, 808-09 (6th Cir. 2015) (staying agency regulation on nationwide basis to protect federalism).

CONCLUSION

This Court should affirm the preliminary injunction.

Dated: New York, NY
January 4, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29 and 32(a) of the Federal Rules of Appellate Procedure, Anisha S. Dasgupta, counsel for amici curiae States of New York et al., hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,546 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the Local Rules of the Seventh Circuit.

/s/ Anisha S. Dasgupta

ADDENDUM

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Calendar No. 1080

90TH CONGRESS 2d Session } SENATE { REPORT No. 1097

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1967

APRIL 29, 1968.—Ordered to be printed

Mr. MCCLELLAN, from the Committee on the Judiciary,

REPORT

Submitted the following

together with

MINORITY, INDIVIDUAL, AND ADDITIONAL VIEWS

[To accompany S. 917]

The Committee on the Judiciary, to which was referred the bill (S. 917) to assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes, having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

AMENDMENT

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Omnibus Crime Control and Safe Streets Act of 1967".

TITLE I—LAW ENFORCEMENT ASSISTANCE

DECLARATIONS AND PURPOSE

Congress finds that the high incidence of crime in the United States threatens the peace, security, and general welfare of the Nation and its citizens. To prevent crime and to insure the greater safety of the people, law enforcement efforts must be better coordinated, intensified, and made more effective at all levels of government.

Congress finds further that crime is essentially a local problem that must be dealt with by State and local governments if it is to be controlled effectively.

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It is therefore the declared policy of the Congress to assist State and local governments in strengthening and improving law enforcement at every level by national assistance. It is the purpose of this title to (1) encourage States and units of general local government to prepare and adopt comprehensive plans based upon their evaluation of State and local problems of law enforcement; (2) authorize grants to States and units of local government in order to improve and strengthen law enforcement; and (3) encourage research and development directed toward the improvement of law enforcement and the development of new methods for the prevention and reduction of crime and the detection and apprehension of criminals.

PART A—LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

SEC. 101. (a) There is hereby established within the Department of Justice, under the general authority of the Attorney General, a Law Enforcement Assistance Administration (hereafter referred to in this title as "Administration").

(b) The Administration shall be composed of an Administrator of Law Enforcement Assistance and two Associate Administrators of Law Enforcement Assistance, who shall be appointed by the President, by and with the advice and consent of the Senate. No more than two members of the Administration shall be of the same political party, and members shall be appointed with due regard to their fitness, knowledge, and experience to perform the functions, powers, and duties vested in the Administration by this title.

(c) It shall be the duty of the Administration to exercise all of the functions, powers, and duties created and established by this title, except as otherwise provided.

PART B—PLANNING GRANTS

SEC. 201. It is the purpose of this part to encourage States and units of general local government to prepare and adopt comprehensive law enforcement plans based on their evaluation of State and local problems of law enforcement.

SEC. 202. The Administration is authorized to make grants to States, units of general local government, or combinations of such States or units of local government for preparing, developing, or revising law enforcement plans to carry out the purpose set forth in section 302: *Provided, however,* That no unit of general local government or combination of such units shall be eligible for a grant under this part unless such unit or combination has a population of not less than fifty thousand persons.

SEC. 203. A grant authorized under section 202 shall not exceed 80 per centum of the total cost of the preparation, development, or revision of a plan.

SEC. 204. The Administration may advance such grants authorized under section 202 upon application for the purposes described. Such application shall:

(1) Set forth programs and activities designed to carry out the purposes of section 302.

(2) Contain such information as the Administration may prescribe in accordance with section 501.

PART C—GRANTS FOR LAW ENFORCEMENT PURPOSES

SEC. 301. It is the purpose of this part to encourage States and units of general local government to carry out programs and projects to improve and strengthen law enforcement.

SEC. 302. (a) The Administration is authorized to make grants to States, units of general local government, and combinations of such States or units of general local government to improve and strengthen law enforcement: *Provided however,* That no unit of general local government or combination of such units shall be eligible for a grant under this part unless such unit or combination has a population of not less than fifty thousand persons.

(b) Under this part grants may be made pursuant to an application which is approved under section 303 for—

(1) Public protection, including the development, demonstration, evaluation, implementation, and purchase of methods, devices, facilities, and equipment designed to improve and strengthen law enforcement and reduce crime in public and private places.

(2) The recruiting of law enforcement personnel and the training of personnel in law enforcement.

(3) Public education relating to crime prevention and encouraging respect for law and order, including education programs in schools and programs to

INDIVIDUAL VIEWS MESSRS. DIRKSEN, HRUSKA, SCOTT, AND THURMOND ON TITLES I, II, AND III

Since 1960, serious crime in the United States has increased an alarming 88 percent. This fact is cause for the gravest national concern. This is not a partisan issue. It is an American tragedy.

In consideration of the omnibus crime bill, we have sought to strengthen and improve the proposal sent to Congress. To a limited extent, these efforts have been successful. The committee bill, however, still needs further upgrading and refinement.

Minority Contributions

The Omnibus Crime Control Act reported by the Senate Judiciary Committee bears an unmistakable imprint of constructive Republican contributions. These contributions range from new substantive provisions to perfecting technical changes.

ORGANIZED CRIME

The most significant Republican contributions to the bill are those which increase significantly the tools and financial resources to combat the scourge of organized crime. In this regard, two major provisions were added at our insistence.

First, the substance of Amendment 223, introduced on June 29, 1967, by Senators Dirksen, Hruska, Scott, Thurmond and several others, has been approved. The amendment creates a category of special financial assistance to state and local governments. Such assistance has two purposes:

(1) To assist in the establishment or expansion of special prosecuting groups on a local level to ferret out and prosecute the multifarious illegal activities of organized crime.

(2) To provide special federal assistance in establishing a coordinated intelligence network among states including computerized data banks of syndicate operations and activities. These efforts would be under the direction and control of State Organized Crime Councils. A special authorization up to $15 million for fiscal year 1969 would be available for this purpose.

ELECTRONIC SURVEILLANCE

Another major contribution to efforts to combat organized crime is found in Title III of the committee bill. To a great degree, this title reflects the provisions of S. 2050, the proposed Electronic Surveillance Act of 1967, which was introduced by Senators Dirksen, Hruska, Scott, Thurmond, Percy, Hansen and others in June of 1967. Included in the committee bill is the formula for strict impartial court authorization and supervision of surveillance and a broad prohibition on private snooping. S. 2050 was introduced in the wake of the Supreme Court's decision of *Berger v. New York*. It was tailored to meet the constitutional requirements imposed by that decision.

Specifically, the sponsors of S. 2050 drew heavily upon the recommendations of the President's Crime Commission. Also, the services of the Commission's expert consultants on organized crime were secured in preparing the bill. Since S. 2050 was incorporated into the subcommittee bill, it has been further refined and changed to reflect the clear guidance of the Supreme Court decision in *Katz v. U.S.* and constructive comments from interested parties.

The original bill which provided the foundation for Title III was S. 675, a bill introduced by Senator McClellan in January of 1967 for himself and Senator Hruska.

The electronic surveillance title will provide an essential tool to law enforcement officials in waging all-out war against organized crime. Yet, the right of privacy of our citizens will be carefully safeguarded by a scrupulous system of impartial court authorized supervision. Such court supervision will monitor and control use of these techniques by law enforcement officials. A broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations.

Special emphasis on organized crime was essential because of the tragic lack of progress made in recent years in bringing the kingpins of organized crime before the bar of justice. Testimony by Professor Robert G. Blakey before the Criminal Laws Subcommittee last summer indicated:

> If you examine the work that was done a number of years ago, I think you can say the existing program is a success. But if you examine the existing program in reference to what could be done, I think you are going to have to say it is a colossal failure. Let me give you a measuring stick to test this judgment.
>
> The Department (of Justice) has indentified an estimated 5,000 members of La Cosa Nostra. Between 1961 and 1966, the Department has succeeded in indicting approximately 200 of them and convicting approximately 100. That gives them against the hard core in organized crime about a 2-percent batting average. With the best we have to offer, that is, the FBI, the Internal Revenue, the top lawyers of of the Department of Justice, with an expenditure of $20 million a year over a 5-year period, we have not secured the conviction of more than 2 percent of the hard core of identified people. I think there is an indication of failure. And the reason we haven't been able to get beyond that point is simply because we haven't given the best men the necessary legal tool.

As evidence of the Administration's superficial and indifferent understanding of the threat of organized crime, the Attorney General recently described the mass of organized crime as a "tiny part" of the entire crime problem. It is earnestly hoped, however, that the new arsenal of tools which this bill provides will be effectively used; Senator Scott does not necessarily support this amendment.

We associate ourselves fully with the comments on organized crime which are contained in the committee report in Titles I and III. In doing so, we pay tribute to the long dedication and hard work of the

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chairman of the Criminal Laws Subcommittee, Senator John L. McClellan.

Further, we urge early hearing on S. 2048, S. 2049, and S. 2051. These bills were introduced by Senator Hruska and others to provide additional legal tools to combat organized crime.

STATE AND LOCAL CORRECTIONAL INSTITUTIONS

In the original drafts of the omnibus bill circulated to members of the Criminal Laws Subcommittee, state and local correctional systems were either prohibited from participating in the various assistance programs made available for this purpose or such participation was severely limited. At our insistence, this vital but tragically neglected area of law enforcement was restored to an appropriate place within the statutory framework.

Our nation's prisons must become something more than mere way stations in criminal careers.

CONTINUATION OF THE LAW ENFORCEMENT ASSISTANCE PROGRAM

On Senator Hruska's motion, language was added to the crime control bill in committee to insure that the activities and functions of the Office of Law Enforcement Assistance would be continued until the appropriations become available to establish and operate the new program.

The Office of Law Enforcement Assistance was established pursuant to the Law Enforcement Assistance Act of 1965. This act, which received substantial minority support in both houses of the Congress, provided for federal support of research and development into the problems associated with the law enforcement and criminal justice systems. Even though the existing program has been grossly underfunded at a third of its present $20 million authorization and is substantially undermanned, we feel that it is essential that it be continued until the new program gets underway. Otherwise, there would be a significant break in continuity. The staff of 25 would have to be discharged, transferred to other positions or similar objectionable readjustments made.

The amendment approved by the committee will insure an orderly transition.

DEFICIENCIES OF TITLE I

Although we are in substantial agreement with many of the provisions of Title I which authorize federal assistance to state and local law enforcement agencies, we are not satisfied with the title as reported from the committee. We offered three major amendments to the measure in full committee which were narrowly defeated. The first amendment included the so-called block grants provisions similar to those of the House-passed bill. The second amendment would reinstate the provisions of the Senate subcommittee-approved bill in which the Law Enforcement Assistance Administration would be independent of the control of the Attorney General. Finally, we attempted to remove the provisions of the committee bill which provide for federal supplements to policemen's salaries.

We will offer these amendments for consideration by the Senate.

BLOCK GRANTS

The overriding deficiency of the committee bill is the failure to retain the so-called block grant provisions of the House-passed bill. We offered amendments to reinstate the block grant features in the full committee, but they were defeated by a one vote margin. We will offer them again on the floor of the Senate.

It is the purpose of these amendments to insure that federal assistance to state and local law enforcement does not bring with it federal domination and control nor provide the machinery or potential for the establishment of a federal police force. Frankly, we fear that S. 917, without such provisions, could well become the vehicle for the imposition of federal guidelines, restrictions and eventual domination.

Our block grant amendments would revise Parts B and C of Title I, to adopt, with some changes, the provisions of Titles II and III of the bill as it was passed by the House of Representatives. The amendments provide that federal financial assistance to state and local law enforcement be channeled through "state planning agencies" created or designated by the several states. These moneys would be allocated by the state authority to state and local enforcement activities pursuant to comprehensive plans which must be approved annually by the federal Law Enforcement Administration. Each state agency would determine its own priorities for expenditures consistent with its comprehensive plan.

Local activities could apply directly to the Law Enforcement Assistance Administration if a state planning agency is not designated or created within six months after the effective date of the Federal Act. Specific criteria for comprehensive state plans are set forth in the amendment to Part C. Funds appropriated for Part C grants would be available to the states according to their respective populations, except that 15 percent of the funds would be reserved for allocation as the Administration may determine.

Of the funds made available to the states 75 percent must be spent at the local level unless there is no local demand.

We offer this amendment for many reasons, reasons which the House of Representatives has recognized and overwhelmingly approved.

The House very wisely did not pass a local police forces bill, but a law enforcement and criminal justice bill. Criminal justice is a system covering law enforcement, court judgments, and corrections. Better protection and security for every individual American necessitates coordinated and simultaneous improvement in the system, and not just a single-shot effort to improve some local police forces. The House chose to require that states give written evidence of their intentions to improve their criminal justice systems, in cooperation with local governments, before federal funds could be spent. This is a call for state responsibility.

The administrative complexities and long delays associated with too many federal grants made directly to local governments are well documented. Every member of the Senate has spent long hours trying to beg, bludgeon or cajole some bureaucrat to pry loose from voluminous dusty files grant applications which have been pending for months or years.

The federal government should concern itself with the coordination of 50 state programs rather than trying to evaluate, judge, and fund the projects of thousands of local governments.

The states are ready to assume their responsibilities for action. In 1966 when limited federal funds were offered to the states to establish planning commissions to combat crime, 16 states established these commissions, and eight others have had applications pending with the Justice Department for varying lengths of time. During the same 18 month period, the Justice Department with the active cooperation of national organizations representing cities and counties, only managed to approve a total of 11 grants to both cities and counties, plus eight grants for the District of Columbia, out of a potential of over 18,000 cities and 3,000 counties. The published Justice Department facts show that the states more than other jurisdictions are assuming their responsibilities. In all, more than one-half of the states have already received state planning grants. Several more have applications pending.

Within the last month, 47 Governors meeting in Washington unanimously recommended that Congress push forward with these bills, but with due regard for required statewide planning and project coordination, including provisions for local officials to participate with the state officials in the development of these programs. The National Association of Attorneys General recently passed a resolution in support of the Law Enforcement and Criminal Justice Act as amended and passed by the House. The unanimous judgment of these state officials plus a substantial majority of the members of the House of Representatives is that if creative federalism is to become workable federalism, then it must move away from direct project grants to local governments that would bypass state financial and technical assistance related to the solution of the same problem. Seldom does the solution of a problem involve only one functional area; in most cases other functional elements are directly related.

New York City may have 29,000 policemen, but New York City's problems of law enforcement, courts and corrections, and juvenile delinquency extend into the jurisdiction of three states and over 14,400 separate taxing authorities in the New York metropolitan area. Direct federal aid for police functions in New York City without proper requirements for concerted action on the part of New York State would be a simple distribution of more federal money with no regard for the multiplication of benefits that would result from a requirement that the state approve the grant while at the same time relating the grant to all existing and proposed state programs.

Most direct grants that bypass the states are project-oriented stop-gap measures, which never approach the level of comprehensive program orientation and fail to provide measurable evidence that problems are actually being solved. With $100 million in federal funds for law enforcement and criminal justice programs, about 350 project grants are proposed. The House very wisely foresaw the fruitlessness of scattering these funds among such a minute number of uncoordinated separate projects. Consequently, the House required that a coordinated action plan be submitted by each state before the funds are released.

Administratively, most cities and counties have a greater chance of getting some of the $20 billion of federal aid funds when they are processed through a state agency. When they must deal directly with Washington, the premium is on the new art of "Grantsmanship."

Certainly, large cities with several fulltime Grantsmanship Officers would prefer direct relations with Washington. However, our national concern should be problem solving, with workable programs to meet local needs. The state will always be the primary administrative unit that can see that funds are going where they are needed, not where the Grantsmen are operating.

The prestigious National Council on Crime and Delinquency, in a recent policy statement on block grants observed:

> A serious program of law enforcement assistance will promote at least pooling of police departments in the major metropolitan areas. The President's Commission recommended this, and there really cannot be a question of doing it. Regionalization, sharing of facilities and services, and realistic planning are going to occur. The real question is who will decide how and which combinations will take place. Cities, even those with a population of 50,000, cannot do it. Metropolitan areas are beyond the jurisdiction of cities. It must be done either by the state or Federal governments.
>
> The Administration's new bill would leave this decision to the Attorney General and the 331 cities with populations over 50,000. For the law enforcement agencies serving the other 58 percent of the population, state governments would make the decisions. The bill passed by the House would leave to the state planning body the decision in all jurisdictions. To choose between these it is necessary to look beyond law enforcement, narrowly construed, to see it as what it is—part of a larger system.

It is inconsistent to expand direct federal-local relationships at a time when the crucial need is for more and better state-local relations. Direct federal-local actions generate unnecessary misunderstandings, confusions, and endless debate at a time when local governments are in need of home rule powers, model court systems, greater state financial and technical assistance, and modernization of a wide variety of laws for every functional activity.

The days are long overdue when the unmanageable and unworkable proportion of 495 separate authorizations for federal aid programs should be revamped, repackaged, and consolidated where feasible, in the form of block grants to the states in broad program categories. At the very least, when it comes to adding new grant programs to the total such as Law Enforcement, Criminal Justice, and Juvenile Delinquency, state responsibility in urban affairs should be required, and not optional as encouraged by all bypassing proposals.

But the most persuasive argument in support of increasing state responsibility for law enforcement was well stated by the distinguished director of the Federal Bureau of Investigation when he said:

> America has no place for, nor does it need, a national police force. It should be abundantly clear by now that in a democracy such as ours effective law enforcement is basically a local responsibility. In the great area of self-government reserved for States, counties and cities, the enforcement of the laws is not only their duty but also their right.

We agree.

INDEPENDENT LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

In pursuit of one of the same objectives of the block grant provisions, namely the prevention of federal domination and control of state and local law enforcement, the Criminal Laws Subcommittee, upon the initiative of Chairman McClellan, added a provision to its bill for the establishment of an independent Law Enforcement Assistance Administration to administer the federal aid program. The administering agency was to be headed by a three-man board appointed by the President with the advice and consent of the Senate. Minority party representation was assured by the requirement that one of the three men would be a representative of the party out of power.

The subcommittee bill provided:

> In the exercise of its functions, powers, and duties, the Administration shall be independent of the Attorney General and other offices and officers of the Department of Justice.

This was deemed essential to insure that, as much as possible, the law enforcement assistance program would be administered impartially and free from political pressures. Also, it was considered to be important to refrain from placing in the hands of one man the potential power of granting or denying federal financial assistance in very large amounts to state and city law enforcement agencies.

It is regrettable that the provision for the independent status of the Administration was dropped from the bill. We attempted unsuccessfully to reinstate the provision in the full committee, and will urge its adoption on the floor of the Senate.

In short, we don't want the Attorney General, the so-called "Mr. Big" of federal law enforcement to become the director of state and local law enforcement as well. It is true that the Attorney General is chief law enforcement officer of the federal government. But he is not chief law enforcement officer of states or cities. We believe America does not want him to serve in this latter capacity.

Organization and management experts may object to a dilution of executive authority, but we want no part of a national police force. Such dilution, if a price at all, is a small price to pay to preserve a fundamental balance of police power.

We don't want this bill to become the vehicle for the imposition of federal guidelines, controls, and domination.

POLICE SALARY SUPPORT

The Administration's original proposal to Congress in early 1967 contained a feature allowing up to one-third of each federal grant to be utilized for compensation of law enforcement personnel. In the hearing record of both the House and Senate Judiciary Committees, this provision proved to be quite controversial. When the House Committee reported the bill, the provision for salary support was deleted. Commenting on this action, the committee report on page 6 stated:

> The committee deleted all authority to use grant funds authorized by the bill for the purpose of direct compensation to police and other law enforcement personnel other than for training programs or for the performance of innovative

> functions. Deletion of authority to use Federal funds for local law enforcement personnel compensation underscores the committee's concern that responsibility for law enforcement not be shifted from State and local government level. It is anticipated that local governments, as the cost for research, innovative services, training, and new equipment developments are shared by the Federal Government in the programs authorized in the bill will be able to devote more of their local resources to the solution of personnel compensation problems. The committee recognizes that adequate compensation for law enforcement personnel is one of the most vexing problems in the fight against crime.

We wholeheartedly subscribe to the House committee's view. There is indeed a grave concern that responsibility for law enforcement not be shifted from the state and local levels.

The Senate Criminal Laws Subcommittee also deleted a similar provision by an overwhelming vote, but subsequently a somewhat modified salary provision was reinstated. In modified form, up to one-third of each grant could be made available to pay one-half the cost of salary *increases* for law enforcement personnel. Even with this modification, we must strongly oppose the provision. This is not because we are indifferent to the low pay of the nation's law enforcement officers. It is because we fear that "he who pays the piper calls the tune" and that dependence upon the federal government for salaries could be an easy street to federal domination and control.

In addition, this provision would not have equal application or provide equal benefits to all law enforcement officials. In fact, most of the nation's 400,000 police officers would not be eligible because under the committee bill only local jurisdictions or groups of local jurisdictions with populations of more than 50,000 would be eligible to apply for grant aid. Thus, those smaller jurisdictions, some 80 percent of the nation's total with 58 percent of the population, would not be eligible for grant assistance. Who is to say that the officers of City A which meets the population standard could receive federal salary supplements whereas the officers of City B, perhaps an adjoining community whose population requirements do not meet the test, could not qualify.

The unfairness of the Administration proposal becomes crystal clear when it is considered that not all large cities and policemen will be beneficiaries of federal law enforcement grants. This is so because there is simply not enough federal money to go around. Thus, City C which perhaps got its application in early or whose political leadership was in favor with the Department of Justice received a grant and salary support, while City D with the same needs, the same crime problems and same low pay scales was left out because its application was tardy or not in compliance with contemporary federal notions on what a good application should contain. What could be more manifestly unfair?

Finally, it should be noted that once salary support is granted, it would be difficult if not impossible for the federal government to abandon its assistance, thus leaving a permanent dependence on the federal treasury.

Title II

The spectre of American society—the greatest in the history of the world—plunging into chaos as the national fabric unravels into law-

ESSENTIALS OF GRANT LAW PRACTICE

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There are overlapping characteristics among these classifications and categories of grant programs. For example, in a particular mandatory grant, although the grant is not considered "discretionary," there is some degree of discretionary judgment for the grantor agency in fact.

There are also subcategories of grants within these general classifications, and certain terminology important to understanding the grant field.

For example, since certain grants are made as a matter of right to recipients who qualify. These are called "entitlement" grants.

When, as is typical, grants to states (typically mandatory) require submission of a state plan for approval, they are called "state plan" grants.

"Formula" grants are so called because the amount of these grants are determined by a mathematical formula. The formula for a grant program is often based on the amount appropriately spent by the state, without a maximum limit. There may or may not be a minimum limit, but the state can claim larger amounts if it spends more in a manner conforming to the statute or rules. Such grants are called "open-ended."

These various categories are referred to throughout this and the following chapters.

§ 5.02 DISCRETIONARY GRANTS

Discretionary grant programs authorize grants for stated purposes.[2] When authorized, and moneys are appropriated, the program must be carried out by the Government agency. The question is, to whom will the grants go? In that sense, the statutory program is discretionary as among the applicants.

An application is necessary. The grantor agency may make a grant or refuse it to a particular applicant. It may ordinarily make a grant in a large amount or small amount; occasionally the amount of the grant is fixed by statute, but that is not usual. The grantor agency may make no grant at all if no applications appear sufficiently meritorious; but it may not make a general refusal on fiscal grounds to

[2]See § 2.04(b), *supra* and Chapter 9, "Direct, Discretionary, Project Grants."

consider applications on their merits without a disclosure to the Congress and the opportunity for congressional action.

When grants are discussed without indication of the type of grant, it is often discretionary grants that are intended, although mandatory grants are far larger in total dollar amount and probably more important in social impact.

§ 5.03 MANDATORY GRANTS

A mandatory grant program is one in which entitlement to the grant is established by statute.[1] If the particular applicant meets the requirements or criteria established, the agency must award that applicant a grant. An eligible grantee has a right to receive a grant, and the amount of the grant is also legally determined. Although these statutes are not compelled by constitutional provisions to follow any particular pattern, certain recognizable patterns have formed over the years that generally apply to these mandatory grants.

§ 5.03(a) State Plan Grants

In the mandatory grant program, the grantee is usually a state. The grantee is usually required to submit a "state plan" that meets statutory tests of eligibility. These grants are therefore commonly called "state plan" grants. There is of course some discretionary judgment for the grantor agency to determine whether the state plan meets the statutory requirements, but these requirements are generally stated in fairly sharp terms. The area of discretion is thus narrow, and it is narrowed further by traditional practice. In practice, if the grantor and grantee disagree, there is likely to be a negotiated resolution. If the dispute is not resolved by negotiation, there is generally a provision for administrative or judicial determination. The discretion that exists is seldom used to refuse a grant, but it is sometimes used to negotiate details.

When the state plan is approved, it controls the grant, and any change in the plan ordinarily should be made by an amendment that goes through substantially the same process as the original state plan.

[1]See § 2.04(a), *supra*, Chapter 6, "A Sample Mandatory Grant Program — Medicaid," and Chapter 7, "Mandatory Grants — The *Town Court* Case."

The amount of a mandatory grant is generally fixed by a "formula." For that reason these grants are often called "mandatory state plan formula" grants.

§ 5.03(b) Requirements for the State Plan

The requirements for the state plan are generally quite lengthy and complex. They typically require the benefits of the grant to be passed on to the state's residents in an evenhanded way. Various standards of this evenhandedness are spelled out in detail including often some degree of procedural protection for the intended indirect beneficiaries. The formulas for the grant payments take into account relevant factors, such as economic, social, and demographic data. They may have such variables as the population of the state, or the juvenile population, or the population residing in certain kinds of institutions. Grants for weatherization may have as parameters the number of "degree days" in an average year and the number of single family homes and their average square footage or cubic footage. The formula for Medicaid grants to the states under Title XIX of the Social Security Act fills more than a dozen pages of printing in the United States Code.[4]

Often, the state has been required to administer the grant through a single state agency, but this requirement may be waivable.[5]

§ 5.03(c) Formula Provisions

The amount of funds available is also typically set by a rather complex formula. A definition of formula grants given by the General Accounting Office reads: "Formula grants are grants in which a structured mathematical statement and data elements, such as statistical data, are used to (1) allocate funds to eligible recipients, or (2) determine a potential grant recipient's eligibility to receive funds, or both."[6] For example, the amount may run to approxi-

[4]42 U.S.C. §§ 1396b, 1396d(b).

[5]31 U.S.C. § 6504.

[6]GAO, Grant Formulas: A Catalog of Federal Aid to States and Localities at 10, GAO/HRO-87-28 (March 1987). The GAO report collects a large number of grant formulas. We discuss in Chapter 6 the Medicaid formula as a sample.

mately one-half to two-thirds of the total amount spent by the state for the grant purposes, but may include 100 percent reimbursement of certain expenditures, 90 percent of other expenditures, and 50 percent of others. The definition of expenditures that may be counted towards determining the federal share is also typically quite complex.

§ 5.03(d) Common Assurances for Mandatory Grants

An assurance that the federal government will not interfere in certain areas is frequently present. The areas typically protected are education, medicine, and police.[7] Similar assurances are sometimes found in discretionary grant statutes as well.

§ 5.03(e) Flow-Through of Benefits

Although the state may be the grantee, the underlying purpose of the grant is typically to assist local governments through sub-awards by the state, or to assist the state's residents. Because of this, and perhaps, in part, because of some confusion of ideas, the ultimate intended beneficiary may be recognized as having rights, which the courts often approach in terms of constitutional doctrine.[8]

§ 5.04 CATEGORICAL GRANTS AND BLOCK GRANTS

There are grants that are classified as "categorical" grants, which can be contrasted with those classified as "block" grants.[9]

Grant programs that typically deal with assistance for fairly limited and specific purposes are often called "categorical" grants. Discretionary grants that may be for fairly limited purposes are also considered to be categorical.

In contrast, "block" grants are grants that are made to provide assistance within broad limits rather than for narrowly defined purposes. They authorize a broader range of activities. They are not categorical, since they deliberately leave the state a range of

[7]*Cf. Current Developments*, Pub. Cont. Newsl. No. 2, at 16 (Jan. 1979). See § 4.09, *supra*.

[8]See, *e.g.*, § 1.01(c), *supra*, and Chapter 7, "Mandatory Grants — The *Town Court* Case."

[9]§ 2.04(c), *supra*, and Chapter 8, "Block Grants."

11

Cross-Cutting Conditions

§ 11.01 DIFFERENCES AMONG GRANT CONDITIONS

A grant is normally accompanied by conditions. A major distinction among grant conditions is in the degree of generality. There are *government-wide* conditions, which apply nearly universally to all grant programs of all agencies. These are sometimes called "cross-cutting" conditions.[1] There are *agency-wide* conditions, sometimes called "general" conditions, which apply broadly to all grants of a certain type issued by a particular agency. There are *program* conditions, which are generally applicable to all grants under a particular grant program — these are most conveniently discussed along with agency-wide conditions. And there are *special* conditions, which are more or less tailored to problems perceived in a particular grant project. These different types of conditions will be discussed in turn.

§ 11.02 GOVERNMENT-WIDE CONDITIONS

Government-wide, or cross-cutting conditions, are largely imposed directly by statute. Some are imposed by Executive Order. A few are imposed by OMB circulars pursuant to statute. Others are imposed pursuant to OMB recommendation or other Executive Department policy advice, without statutory requirement.

The cross-cutting requirements are of two principal types: a) socio-economic policy requirements — such as prohibition of

[1]For a brief discussion of the history of the imposition and enforcement of conditions in grant programs, see P. Dembling & R. Dembling, *Significant Legislative Developments*, FEDERAL GRANT LAW 281, 294 *et seq.*, particularly § VI, "Cross-Cutting Conditions," and n. 25 (ABA, M. Mason ed. 1982).

DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS FOR 2004

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

SUBCOMMITTEE ON THE DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES

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NOTE: Under Committee Rules, Mr. Young, as Chairman of the Full Committee, and Mr. Obey, as Ranking Minority Member of the Full Committee, are authorized to sit as Members of all Subcommittees.

MIKE RINGLER, CHRISTINE KOJAC, LESLIE ALBRIGHT, and JOHN F. MARTENS
Subcommittee Staff

PART 2

Justification of the Budget Estimates

DEPARTMENT OF JUSTICE

Printed for the use of the Committee on Appropriations

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Office of Justice Programs
Justice Assistance
Program Performance Justification
(Dollars in Thousands)

Justice Assistance Grant Program	Amount
2003 President's Budget	$ ---
2003 Performance-Based Realignment	---
2004 Transfers In	800,000
2004 Adjustments-to-Base	244
2004 Performance-Based Realignment	(10,740)
2004 Current Services	789,504
2004 Program Improvements/Offsets	(189,780)
2004 Request	$599,724
2003-2004 Total Change	$ 599,724

CURRENT SERVICES PROGRAM DESCRIPTION:

In FY 2004, OJP requests $599.724 million for the Justice Assistance Grant (JAG) Program. The total program amount includes $60 million for the Boys & Girls Clubs of America, $19.956 million for the National Institute of Justice (NIJ) Technology R&D Program, and $5.921 million for the Tribal Courts Initiative.

This program would provide financial assistance to state and local jurisdictions aimed at crime reduction through locally determined projects that can range across the entire spectrum of possible criminal justice system operations. The program targets funding for the following purposes:

(1) Law enforcement programs;
(2) Adjudication programs;
(3) Community-based and statewide prevention and education programs;
(4) Corrections and treatment programs; and,
(5) Program and system improvements.

In FY 2004, JAG will be the single largest program to be administered by BJA. It combines and consolidates the best features of the Local Law Enforcement Block Grant (LLEBG) Program and the Edward Byrne Memorial Formula Grant (Byrne) Program. The JAG program collapses the 7 specific purpose areas of the LLEBG Program and the 29 specific, repetitive purpose areas of the Byrne Program into five broad purpose areas that reflect the expanse of the criminal justice system. The reduction in the number of purpose areas does not eliminate any previously allowed uses and provides the grantees increased flexibility to respond to local crime priorities by strengthening and eliminating duplication among existing approved uses. The consolidation of these two grant programs as part of the President's Budget for FY 2003 also supports the Administration goal of streamlining and simplifying the federal grant application process and provides broad grant authorizations for use of funds by all state and local recipients in one program.

The JAG Program represents an important step toward streamlining OJP programs and the federal grant process. JAG is the only formula grant program that provides general purpose criminal justice assistance to state and local constituents. The paramount goal of the JAG Program is to provide fund recipients maximum flexibility and control over funding to respond to their emerging and changing needs. Recent events have shown just how quickly national and local priorities can change.

The JAG Program supports the U.S. Department of Justice's strategic goal 3.1: Improve the crime fighting and criminal justice administration capabilities of state, tribal, and local governments.

JAG funding will be distributed to both state and local governments. In determining the distribution formula for JAG funds, BJA has made every effort to maintain an equitable level of funding distribution. Cities and counties that currently receive direct funding under the LLEBG program will receive direct funding under JAG. States will also continue to receive direct awards. BJA anticipates awarding between 3,150 and 3,300 grants in FY 2003 and in FY 2004, most of which will be to local jurisdictions.

Funding available to states may be used for statewide initiatives, technical assistance and training, supporting rural jurisdictions, and supporting local jurisdictions with urgent, unmet needs. Compared to the predecessor grant program supporting local agencies, JAG provides local jurisdictions with greater discretion in administering awarded funds. Additionally, BJA encourages local jurisdictions to work together by combining resources on projects that can easily traverse jurisdictional boundaries.

JAG will become the umbrella for achieving numerous Administration and Congressional priorities, including many that support homeland security and the prevention of violent crime. BJA will encourage recipients, encourage them to use this FY 2003 and FY 2004 funding for projects addressing high-priority national issues, such as: (1) counter-terrorism, (2) drug and violent crime prevention and control, (3) offender re-entry opportunities, and (4) community- and faith-based initiatives.

BJA anticipates coordination and collaboration among grant recipients will continue to increase because BJA's on-line reporting system allows states to see what local jurisdictions are planning to do or have accomplished. The administrative burden on applicants and recipients has been eased by a streamlined (on-line, paperless) application process and a single set of administrative reporting requirements. The system removes unnecessary administrative requirements, but also improves the quality and usefulness of the data reported. These data are now more readily available for internal use, as well as to facilitate better reporting overall. Implementing the JAG program will allow BJA to simplify and streamline the policies, practices, and procedures necessary to administer a substantial grant program.

JAG is essentially a combination of two existing programs, the Byrne Formula and LLEBG programs, thoguh it also may fund activities previously under the COPS Hiring grant programs. Program activities for both are examined as follows:

Byrne: The Byrne Formula program has provided support for thousands of projects, starting over 15 years ago, with the widest possible range of focuses and outcomes. BJA has emphasized innovation and promoted strategic planning, evaluation, and preparing for eventual assumption of project costs by recipients after federal support ends. JAG will continue this broad range of support, and BJA will continue with these emphases, but in a more streamlined and efficient manner.

While Byrne funds represent a relatively small portion of the state's expenditures on criminal justice, they help states and local governments engage in developing new programs and cross cutting initiatives, including the field testing and evaluation of these initiatives. Historically, the vast majority of funds are used for multi-jurisdictional task force programs to integrate federal, state, and local drug law enforcement agencies and prosecutors for the purpose of enhancing interagency coordination and intelligence and facilitating multi-jurisdictional investigations. In FY 2001, 42% of funds were allocated toward support of multi-jurisdictional task forces. In addition, 11 % of total funds were allocated to information systems, 5% toward corrections programs and 4% toward innovative drug programs.

LLEBG: Historically, law enforcement has been the principal beneficiary of LLEBG funds with a substantial amount going into officer hiring and technology improvements to help police do their jobs, rather than for overtime and more traditional equipment. Use of funds for school safety has increased, with at least 375 projects representing $22 million allocated to this area in 2000. In 2000, gun (violence) control was selected by recipients as a primary descriptor of their use of funds for 212 projects and $32.3 million, while gun safety accounted for 233 more projects representing $23.9 million. Use of funds for school safety has increased, with at least 502 projects representing $23.9 million allocated to this area in 2001. In 2001, gun (violence) control was selected by recipients as a primary descriptor of their use of funds for 271 projects and $24.02 million, while gun safety accounted for 249 more projects

Federal Aid to Criminal Justice

Rhetoric, Results, Lessons

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the findings and recommendations were based on the most comprehensive review ever undertaken of the nature and causes of crime, of the performance and capability of the criminal justice system, and of the problems confronted by that system. Criticism was levelled not so much against the Commission's findings and conclusions as against its failure to offer concrete suggestions for meaningfully affecting crime in the *near* term.[34] This too would be addressed if not resolved in the debates surrounding passage of the Safe Streets Act in 1968.

Safe Streets: The Panoply of Conflicting Views

By 1967 reports of crime continued to paint an increasingly gloomy picture. Civil disorders of massive proportions engulfed several American cities during the summers of 1965, 1966, and 1967. Public ire and concern required a federal response greater than that made under provisions of the 1965 Law Enforcement Assistance Act. In response, President Johnson sent Congress a legislative message on crime (his third) that included a proposed bill entitled, "The Safe Streets and Crime Control Act of 1967." The President's message was delivered on February 6, 1967, and thirteen days later the President's Commission issued its long awaited report. The timing of the two events was not accidental, and the title of the President's bill was calculated to elicit maximum positive political response.

The Safe Streets Bill recognized the primacy of state and local police powers; all of its provisions were aimed at *assisting* the states in performing their functions rather than at taking over those functions or unduly interfering in the performance of them. Specific provisions included proposals of assistance to modernize equipment, to reorganize law enforcement agencies, to recruit and train law enforcement officers, to modernize the court system, to develop more effective rehabilitation techniques, and to set up effective crime-prevention programs. Even though several portions of the bill offered assistance to corrections and the courts, there was an apparently widespread assumption held in Congress as well as by the public that the assistance was primarily, if not exclusively, aimed toward law enforcement. Both the President's proposed legislation and the subsequent report of his Commission gave forthright recognition to the concept of a criminal justice system—an interrelated and interdependent group of "crime-fighting" agencies.

Yet, during debate and passage of the legislation there was little to indicate that this concept received marked recognition or treatment.

The President's Safe Streets proposals were closely fashioned after the approach undertaken in the 1965 Law Enforcement Assistance Act. The grants would fund innovation and improvement in a variety of categories. Grant administration would be federally controlled under the Attorney General. There was much more money involved in the 1967 proposals, but the intent of grants-in-aid, as in the 1965 legislation, would be to make direct "categorical" grants. Cities with a population of fifty thousand or more (following the course laid out by other great-society funding ventures) would be eligible for action funds, but funding levels proposed were far smaller than those proposed for other great-society program efforts such as OEO.[35] This may have been a conscious effort to shield the crime proposals from the type of criticism then being levelled by Congress against OEO—namely, that OEO had gone in too fast with too much and had produced massive waste because the infrastructure was not available to manage the funds effectively.[36]

Although the President's funding and program proposals were limited to innovation and improvement that were likely to have a significant effect on the crime problem only in the long run, the public and Congress were for quicker fixes. Part of this disparity can be traced to President Johnson himself: in 1965 he charged his Crime Commission to find the ways not only to reduce crime but to "banish" it.[37] Later attempts by the President to retreat from this excessive goal were too late—the public was fixed on the notion of quickly minimizing if not eliminating crime. The President's Commission in its final report did not help in setting expectations straight: at one point it asserted, "America can control crime."[38] The Commission noted that it would not be achieved quickly or easily, but few heard that. Among other factors involved, the nation was moving through a period of unbridled faith in the power of money and especially in the power of federal expenditures to solve problems.

Chapter 2 will treat the legislative debates and final features of the Safe Streets Act in greater detail. However, there are aspects to that debate and to the changes subsequently made to the President's proposal that reflect the several competing social and political forces discussed above. Clearly, the state's prerogatives in exercising the police power were hotly at issue. So, too, the get-tough preferences of conservatives, largely ignored in President Johnson's legislative proposals,

26. Richard Harris, *The Fear of Crime*, (New York, Frederick A. Praeger, 1968), p. 10. Also see Walker, op. cit., p. 231.
27. Lyndon Johnson, *The Choices We Face* (New York: Bantam Books, 1969), p. 125.
28. See Caplan, op. cit., p. 586.
29. Walter B. Miller, "Ideology and Criminal Justice Policy: Some Current Issues," *Journal of Criminal Law* and *Criminology* 64, no. 2 (June, 1973), p. 141.
30. Caplan, op. cit., p. 590.
31. Hearings on S. 1792 and S. 1825 before a Subcommittee of the Senate Committee on the Judiciary, 89th Congress, 1st session (1965), p. 7.
32. Caplan, op. cit., pp. 593-594.
33. The President's Commission on Law Enforcement and Administration of Justice Report, op. cit., p. 15.
34. See, for example, James Q. Wilson, "A Reader's Guide to the Crime Commission Reports," *The Public Interest*, Fall, 1967, p. 65. Also see, Henry Ruth, "To Dust Shall Ye Return?", *Notre Dame Lawyer* 43 (1968), p. 811.
35. *The Budget in Brief*, Executive Office of the President, Bureau of the Budget, U.S. Government Printing Office. See these for the years 1965-1969.
36. Thomas E. Cronin, Tania Z. Cronin, and Michael E. Milakovich, *U.S. v. Crime in the Streets* (Bloomington: Indiana University Press, 1981), p. 32.
37. Public Papers of the Presidents of the United States, Lyndon B. Johnson, 1965 (1966) pp. 982-83.
38. The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (New York, Avon Books, 1968), p. 621.
39. Cronin, Cronin, and Milakovich, op. cit., pp. 50-53.
40. Law Enforcement Assistance Administration, Office of General Counsel, "Index to the Legislative History of the Omnibus Crime Control and Safe Streets Act of 1968," January 23, 1973, p. 117.
41. Cronin et al., op. cit., p. 51.
42. LEAA, Office of General Counsel, op. cit., p. 240.
43. Ibid., p. 238.
44. Walker, op. cit., p. 237.

Chapter 2

LAWS AND REGULATIONS GOVERNING THE LEAA PROGRAM

Thomas J. Madden

In the 1960s, Congress began to use the constitutional spending power to exert substantial policy controls over state and local functions and to create a host of new grant programs. In 1962, there were only 160 federal grant programs authorized by the Congress.[1] By January of 1967, when Congress prepared to take up the debate on the Safe Streets Act, the number of intergovernmental grant programs had grown to 379 with some 109 new grant programs being enacted in 1965 alone.[2] Federal assistance in dollar terms more than doubled between 1963 and 1967, rising from 7.7 percent to 11 percent of all federal budget outlays and from 1.5 percent to 2.2 percent of the gross national product.[3]

By 1967, it was also clear that the new programs and laws controlling the expenditure of the new grants[4] had substantially altered the relationships between state, local, and federal government relationships without establishing an essential rationale for assigning intergovernmental functions other than that of pragmatic politics.[5]

The Safe Streets Act followed the pattern leading to the creation of many of these new programs. The rise in crime in 1963 and 1964 was the subject of debate in the 1964 elections and it was addressed by President Johnson in a crime message in 1965 calling for a national response to the crime problem.[6] This message was followed by Congressional enactment of a small criminal justice assistance program and the appointment of the President's Commission on Law Enforcement and the Administration of Justice.[7] The Commission documented the need for a major federal response to state and local crime problems, and Congress responded with the Omnibus Crime Control and Safe Streets Act.

When Congress took up the debate on President Johnson's proposal in 1967 to create a major new criminal justice assistance program, it quickly became clear that there were two issues of overriding concern to the conservative members who were in a position to control the

debate. The first was a concern that by vesting the Attorney General with the authority to provide grants to states, the Congress would also be giving the Attorney General the power to control state and local law enforcement agencies and would thereby be nationalizing state and local law enforcement functions. The second and related concern was that the Johnson proposal bypassed state government and allowed the Attorney General to deal directly with cities in making grants. In the view of then House Minority Leader Gerald R. Ford, a "direct" federalism approach would enable the Attorney General to "arbitrarily" decide which local law enforcement agencies would receive funds and what these agencies could do with the funds.[8]

The Senate Judiciary Committee was the initial focus of much of the concern over the creation of the national police force. The minority report of the committee, for example, in commenting on the discretionary authority given to the Attorney General to make grants stated:

> [W]e don't want the Attorney General, the so-called "Mr. Big" of Federal law enforcement to become the director of State and local law enforcement as well. It is true that the Attorney General is the chief law enforcement officer of the Federal government. But he is not chief law enforcement officer of States and cities. We believe America does not want him to serve in that capacity. . . . We don't want this bill to become the vehicle for the imposition of Federal guidelines, controls, and domination.[9]

The House of Representatives, which acted first on the Johnson proposal, had accepted the view that the states should have control over expenditures by local government.[10] This view was rejected by the Senate Judiciary Committee[11] and the Senate floor became the forum for the key debate on this issue. The contest was between the supporters of direct federalism—large city mayors and their Congressional supporters—and the supporters of state control through so-called block grants—governors from the Midwest and the Western states and Republican senators and southern Democratic senators.

Amendments to convert the Senate Committee bill from a direct local aid program to a state block grant program were introduced by Senate Minority Leader Everett M. Dirksen. Senator Dirksen contended that gubernatorial supervision over state planning was necessary to avoid duplication or conflict between local and state crime reduction plans and programs. In the debate he stated that:

> We are never going to do a job in this field until we have a captain at the top, in the form of the Governor, and those he appoints, to coordinate the matter for a State because crime may be committed in a spot, but before it gets through its ramifications, it may spread over a very considerable area.[12]

The view stated by Senator Dirksen had roots not only in the Senator's traditional concern for state interests but also in the 1967 report of the President's Commission on Law Enforcement and the Administration of Justice, which recommended that:

> In every State and every city, an agency, or one or more officials, should be specifically responsible for planning improvements in crime prevention and control and encouraging their implementation.[13]

The recommendation of the President's Crime Commission reflected a concern for system-wide planning. This meant at the very least *ad hoc* coordination among police, courts, and corrections agencies so that policies implemented in one part of the system would not have an adverse effect on other components.

The Dirksen amendments required each state to create a state criminal justice planning agency (SPA) and to develop an annual comprehensive plan. These amendments were intended, in part, to address the concerns of the President's Crime Commission. The amendments were also intended to assure that there was a coordinated intergovernmental approach to crime control in each state.

The block grant was also seen by its supporters as a way of minimizing substantive federal control over state and local law enforcement. In the Senate Judiciary Committee report on the Safe Streets Act, the supporters of block grants stated that the purpose of the block grant was "to insure that federal assistance to state and local law enforcement does not bring with it federal domination and control nor provide the machinery or potential for the establishment of a federal police force."[14]

The United States Court of Appeals for the Fourth Circuit in 1971 had an opportunity to comment on this latter concern of the block grant proponents. In a law suit challenging the lack of controls exerted over block grant expenditures, the court stated:

> "The dominant concern of Congress apparently was to guard against any tendency towards federalization of local police and

law enforcement agencies. Such a result, it was felt, would be less efficient than allowing local law enforcement officials to coordinate their state's overall efforts to meet unique local problems and conditions. Even more important than Congress's search for efficiency and expertise was its fear that over-broad federal control of state law enforcement would result in the creation of an Orwellian 'federal police force.'"[15]

The Senate passed the bill containing the Dirksen amendments by a 72 to 4 roll-call vote and final action on the legislation came on June 6, when the House accepted without change the Senate version.[16] On June 19, 1968, President Johnson signed into law the Omnibus Crime Control and Safe Streets Act of 1968.[17]

A key assumption underlying the Safe Streets program was that, like many of the hundreds of new grant programs created by the Johnson Administration, "money makes a difference,"—that is, the more funds that are available, the greater the possibility of reducing crime.[18]

While the federal government had been extending nonfinancial criminal justice assistance to state and local governments at the operational level for several years prior to the enactment of the Safe Streets Act, the Act was the first major effort to provide financial assistance for state and local criminal justice efforts.[19] The Safe Streets Act had three basic purposes:

- the stimulation of efforts to improve the effectiveness of state and local criminal justice agencies;
- the coordination of the activities of state and local criminal justice systems;
- the upgrading of the capabilities of state and local criminal justice agencies to deal with crime.[20]

The Safe Streets Act also gave the federal government new powers to enforce control over the sale and possession of handguns.[21] It made possession of firearms by convicted felons a federal crime.[22] It also made unauthorized wiretapping a federal crime.[23]

Title I of the Safe Streets Act which established the LEAA program, had the following major provisions:

Administration. A Law Enforcement Assistance Administration (LEAA) was established within the Department of Justice. In doing so, Congress severely limited the authority of the Attorney

General over LEAA by establishing LEAA within the Department of Justice under the "general authority of the Attorney General." In essence, this meant that LEAA was to be free of the day-to-day supervision of the Attorney General to operate as an independent agency. LEAA was subject to the Attorney General's control only when the Attorney General established policies of general applicability to the entire Justice Department. The Attorney General did have final authority to recommend to the President and the Office of Management and Budget the amount of funds that should be appropriated each year for the LEAA programs.

The LEAA was put under the direction of a "troika"—an administrator and two associate administrators, appointed by the President, and confirmed by the Senate. The "troika" had authority jointly to carry out, the functions, powers and duties of the LEAA.

Block Grants. Block grants were authorized under Part B of the Act to cover up to 90 percent of the total cost of the operation of state planning agencies (SPAs), which were to be created or designated by the governor of each state and were to develop annual comprehensive criminal justice plans. The SPA was to have a representative character including representatives of law enforcement and units of local government. Each state was to be allocated each year a flat amount of $100,000, with the remainder of planning funds to be distributed on a population basis. Forty percent of the planning grant funds were to be made available to local jurisdictions.

Under Part C of the Act, eighty-five percent of the so-called "action grant" funds were to be allocated to the states on a population basis as block grants, with seventy-five percent of the funds to be passed through to local governments. In order to receive a block action grant, the state had to submit a comprehensive plan that met certain requirements, including special emphasis on organized crime and civil disorder programs. The federal government was authorized to pay up to seventy-five percent of the total cost for organized-crime and riot-control projects, fifty percent for construction projects, and sixty percent for other action purposes. One significant limitation, added by those concerned about federal control of state and local law enforcement

personnel, specified that not more than one-third of any action grant could be used for personnel compensation, i.e., salaries.

Discretionary Grants. Fifteen percent of the Part C action funds were set aside to be awarded at the sole discretion of the troika. The only limit on the use of these funds was that they be awarded to state and local governments for law enforcement and criminal justice programs.

Research. The Act, following another recommendation of the 1967 Crime Commission, established a National Institute of Law Enforcement and Criminal Justice within the LEAA with its own director. The National Institute was authorized to make grants for research, demonstration, and training programs.

Education. The Act created a program of direct student loans and grants to be awarded to individuals enrolled in college and graduate school level programs. The loans and grants could be forgiven if the student pursued a career in law enforcement or criminal justice.

Technical Assistance and Training. The administrator of LEAA was authorized to use funding to provide technical assistance to state and local law enforcement and criminal justice agencies. The Act also contained limited authority to carry out training programs.

Funding. Approximately $100 million was authorized for FY 1969 and $300 million for FY 1970. The initial $100 million was divided into $25 million for planning grants, $50 million for law enforcement action grants, and $25 million for training, education, technical assistance and research.

The basic elements of the comprehensive planning process established by the statute are shown in schematic form in Figure 1.

The Omnibus Crime Control and Safe Streets Act of 1968 was a product of political compromise. As is generally the case in these situations, the resulting legislation contained provisions that, if not contradictory, were at least pursuing somewhat different goals. Although the Act was generally regarded as a block grant program it had distinct categorical features which excluded certain areas of funding and encouraged others. The mandated pass-through of planning and action funds to local governments, for example, prevented effective

CONTROLLING CRIME THROUGH MORE EFFECTIVE LAW ENFORCEMENT

1833-1

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETIETH CONGRESS

FIRST SESSION

ON

S. 300, S. 552, S. 580, S. 674, S. 675, S. 678, S. 798, S. 824, S. 916, S. 917, S. 992, S. 1007, S. 1094, S. 1194, S. 1333, and S. 2050

BILLS RELATING TO CRIME SYNDICATES, WIRETAPPING, ADMISSIBILITY IN EVIDENCE OF CONFESSIONS, ASSISTING STATE AND LOCAL GOVERNMENTS IN COMBATING CRIME AND RELATED AREAS OF CRIMINAL LAWS AND PROCEDURES

MARCH 7, 8, AND 9; APRIL 18, 19, AND 20; MAY 9; JULY 10, 11, AND 12, 1967

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II

CONTENTS

Exhibits—Continued

Letter from—

tial community treatment centers, to permit them to take emergency or rehabilitative leave, and to permit them to work at paid employment or participate in community training programs. As a result, new techniques involving prerelease and work release programs are being perfected in the hope we will more often return useful, rehabilitated citizens to their communities.

The instant proposal would constitute a further step in the improvement of our corrections process. It would establish a United States Corrections Service which would combine under a single direction the supervision of convicted persons, irrespective of whether they are confined in an institution, totally in the free community on probation or parole, or somewhere between complete confinement and complete freedom—for example, in a half-way house. This consolidation of responsibility for the supervision and rehabilitation of Federal offenders certainly has the potential of being more effective.

The proposal would also make several changes in the membership and responsibility of the Advisory Corrections Council. The Council would be composed of four United States judges, and, ex officio, the Chairman of the Board of Parole, the Chairman of the Youth Division of the Board of Parole, the Director of the United States Corrections Service, and a physician designated by the Secretary of Health, Education, and Welfare. This Council would continue to consider problems of treatment and correction and would also consider problems of coordination and integration of policy among the branches of the Government having statutory responsibilities in this area. It would make recommendations to the Attorney General and to the Judicial Conference of the United States relating to these responsibilities and to the improvement of the administration of criminal justice. In addition, the Council would be authorized to employ an Executive Director and other necessary personnel to carry out its expanded functions.

Last Congress, the Department of Justice submitted a proposal similar to this one, but broader. It would have transferred the United States Probation Service from the courts to the Department of Justice, lodging with this Department all of the functions of the Service, including responsibility for the preparation of presentence reports. Unlike the earlier proposal, however, the current measure continues the Probation Service as a part of the court system with the responsibility for preparing presentence reports for the use of district judges.

The continued increase in crime warrants the prompt, close attention of the Congress to this proposal. I urge its early introduction and consideration.

The Bureau of the Budget has advised that there is no objection to the submission of this legislation from the standpoint of the Administration's program.

Sincerely,

RAMSEY CLARK,
Acting Attorney General.

[S. 917, 90th Cong., first sess.]

A BILL To assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Safe Streets and Crime Control Act of 1967".

FINDINGS AND DECLARATION OF PURPOSE

SEC. 2. The Congress hereby declares it to be the policy of the United States to promote the general welfare by improving law enforcement and the administration of criminal justice. Crime is essentially a local problem that must be dealt with by State and local governments. But sustained and substantial national assistance is necessary to aid these governments in coping with the lawlessness that has become a serious problem of national significance.

It is the purpose of this Act to increase the personal safety of the people of the Nation by reducing the incidence of crime; to stimulate the allocation of new resources and the development of technological advances and other innovations for preventing crime; to increase the efficiency and fairness of law enforcement and criminal justice through improved manpower, training, organization, and equipment; and to encourage coordination in planning, operations,

and research by law enforcement and criminal justice agencies throughout the Nation.

TITLE I—PLANNING GRANTS

SEC. 101. It is the purpose of this title to encourage States and units of general local government to prepare and adopt comprehensive plans based on their evaluation of State and local problems of law enforcement and criminal justice.

SEC. 2. The Attorney General is authorized to make grants to States, units of general local government, or combinations of such States or units, for preparing, developing, or revising the plans described in section 204: *Provided, however*, That no unit of general local government or combination of such units shall be eligible for a grant under this title unless it has a population of not less than fifty thousand persons.

SEC. 103. A Federal grant authorized under section 102 shall not exceed 90 per centum of the total cost of the preparation, development, or revision of a plan.

TITLE II—GRANTS FOR LAW ENFORCEMENT AND CRIMINAL JUSTICE PURPOSES

SEC. 201. It is the purpose of this title to authorize grants to States and units of general local government for new approaches and improvements in law enforcement and criminal justice. The purposes for which grants may be made may include but shall not be limited to—

(a) public protection, including the development, demonstration and evaluation of methods, devices, equipment and design to increase safety from crime in streets, homes, and other public and private places;

(b) equipment, including the development and acquisition of equipment designed to increase the effectiveness and improve the deployment of law enforcement and criminal justice personnel;

(c) manpower, including the recruitment, education, and training of all types of law enforcement and criminal justice personnel;

(d) management and organization, including the organization, administration, and coordination of law enforcement and criminal justice agencies and functions;

(e) operations and facilities for increasing the capability and fairness of law enforcement and criminal justice, including the processing, disposition, and rehabilitation of offenders;

(f) community relations, including public understanding of and cooperation with law enforcement and criminal justice agencies; and

(g) public education relating to crime prevention, including education programs in school and community agencies.

SEC. 202. (a) Beginning January 1, 1968, the Attorney General is authorized to make grants to States, units of general local government, or combinations of such States or units for the purposes described in section 201. The amount of any such grant shall not exceed 60 per centum of the improvement expenditure of the applicant: *Provided, however*, That—

(1) no grant under this section shall be used for the construction of any building or other physical facility; and

(2) not more than one-third of any grant under this section shall be expended for the compensation of personnel, except that this limitation shall not apply to the compensation of personnel for time engaged in conducting or undergoing training programs and specialized personnel performing innovative functions.

(b) Improvement expenditure is the amount by which the proposed operating budget, or the amount by which the proposed operating budget per capita, whichever is greater, of the applicant for law enforcement and criminal justice purposes for the fiscal year for which the grant is sought exceeds the applicant's qualifying expenditure.

(c) Qualifying expenditure is—

(1) 105 per centum of the base expenditure if the application is for funds to be used in the applicant's fiscal year ending in the calendar year 1968;

(2) 110 per centum of the base expenditure if the application is for funds to be used in the applicant's fiscal year ending in the calendar year 1969;

(3) 115 per centum of the base expenditure if the application is for funds to be used in the applicant's fiscal year ending in the calendar year 1970;

(4) 120 per centum of the base expenditure if the application is for funds to be used in the applicant's fiscal year ending in the calendar year 1971;

(5) 125 per centum of the base expenditure if the application is for funds to be used in the applicant's fiscal year ending in the calendar year 1972;

(6) 130 per centum of the base expenditure if the application is for funds to be used in the applicant's fiscal year ending in the calendar year 1973.

(d) Base expenditure is the applicant's operating expenditures or operating expenditures per capita, as the case may be, for law enforcement and criminal justice purposes for the fiscal year completed next preceding January 1, 1968: *Provided, however*, That if the applicant's base expenditure includes substantial and extraordinary amounts and the Attorney General is of the opinion that the requirements of this section constitute an unreasonable restriction on the applicant's eligibility for a grant under this section, the Attorney General may reduce such requirements to the extent he deems appropriate.

SEC. 203. (a) The Attorney General is authorized to make grants to States, units of general local government, or combinations of such States or units for the construction of buildings or other physical facilities which fulfill a significant, innovative function. The amount of any such grant shall not exceed 50 per centum of the cost of such construction.

(b) An applicant shall be eligible for a grant under this section only if such applicant would also be eligible for a grant under section 202.

SEC. 204. (a) The Attorney General is authorized to make grants to an applicant under this title only if such applicant has a file with the Attorney General a current law enforcement and criminal justice plan which conforms with the purpose and requirements of this Act. Each such plan shall—

(1) unless it is not practicable to do so (A) encompass a State, unit of general local government, or combination of such States or units; and (B) be applicable to a population of not less than fifty thousand persons;

(2) incorporate innovations and advanced techniques and contain a comprehensive outline of priorities for the improvement and coordination of all aspects of law enforcement and criminal justice dealt with in the plan, including descriptions of: (A) general needs and problems; (B) existing systems; (C) available resources; (D) purposes for which Federal funds are sought (with specific reference to their sequence, timing, and costs); (E) systems and administrative machinery for implementing the plan; (F) the direction, scope, and types of improvements to be made in the future; and (G) to the extent appropriate, the relationship of the plan to other relevant State or local law enforcement and criminal justice plans and systems.

(b) In implementing this section, the Attorney General shall—

(1) encourage State and local initiative in developing comprehensive law enforcement and criminal justice plans;

(2) encourage plans which encompass the entire metropolitan area, if any, of which the applicant is a part;

(3) encourage plans which deal with the problems and provide for the improvement of all law enforcement and criminal justice agencies in the area encompassed by the plans;

(4) encourage plans which provide for research and development;

(5) encourage plans which provide for an appropriate balance between fund allocations for the several parts of the law enforcement and criminal justice systems covered by the plans;

(6) encourage plans which demonstrate the willingness of the applicant to assume the costs of improvements funded under this title after a reasonable period of Federal assistance; and

(7) encourage plans which explore the costs and benefits of alternative courses of action and promote efficiency and economy in management and operations.

TITLE III—RESEARCH, DEMONSTRATION, AND SPECIAL PROJECT GRANTS

SEC. 301. It is the purpose of this title to encourage research and development for the purpose of improving law enforcement and criminal justice and developing new methods for the prevention and reduction of crime.

SEC. 302. The Attorney General is authorized to make grants to, or enter into contracts with, institutions of higher education and other public agencies or private organizations to conduct research, demonstrations, or special projects which he determines will be of regional or national importance or will make a significant contribution to the improvement of law enforcement and criminal justice.

SEC. 303. The Attorney General is authorized to make grants to institutions of higher education and other public agencies or private nonprofit organizations to establish national or regional institutes for research and education pertaining to the purpose of this Act.

SEC. 304. A Federal grant authorized under section 302 or 303 may be up to 100 per centum of the total cost of each project or institute for which such grant is made. The Attorney General shall require, whenever feasible, as a condition of approval of a grant under this title, that the recipient contribute money, facilities, or services to carry out the purpose for which the grant is sought.

SEC. 305. The Law Enforcement Assistance Act of 1965 (79 Stat. 825) is repealed and superseded by this title: *Provided, however*, That—

(a) the Attorney General may award new grants, enter into new contracts or obligate funds for the continuation of projects in accordance with the provisions of the Law Enforcement Assistance Act, based upon applications received under that Act prior to the effective date of this Act;

(b) the Attorney General is authorized to obligate funds for the continuation of projects approved under the Law Enforcement Assistance Act prior to the effective date of this Act, to the extent that such approval provided for continuation; and

(c) any awarding of grants, entering into contracts or obligation of funds under subsection (a) or (b) of this section and all activities necessary or appropriate for the review, inspection, audit, final disposition and dissemination of project accomplishments with respect to projects which are approved in accordance with the provisions of the Law Enforcement Assistance Act and which continue in operation beyond the effective date of this Act may be carried on with funds appropriated under this Act.

TITLE IV—ADMINISTRATION

SEC. 401. (a) There shall be in the Department of Justice a Director of Law Enforcement and Criminal Justice Assistance who shall be appointed by the President, by and with the advice and consent of the Senate, whose function shall be to assist the Attorney General in the performance of his duties under this Act.

(b) Section 5315 of title 5 of the United States Code is amended by the addition of the following at the end thereof:

"(78) Director of Law Enforcement and Criminal Justice Assistance."

SEC. 402. The Attorney General is authorized to appoint such technical or other advisory committees to advise him in connection with the administration of this Act as he deems necessary. Members of such committees not otherwise in the employ of the United States, while attending meetings of the committees, shall be entitled to receive compensation at a rate to be fixed by the Attorney General, but not exceeding $100 per diem, and while away from home or regular place of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 5703) for persons in the Government service employed intermittently.

SEC. 403. To insure that all Federal assistance to State and local programs for law enforcement and criminal justice is carried out in a coordinated manner, the Attorney General is authorized to request any Federal department or agency to supply such statistics, data, program reports, and other materials as he deems necessary to carry out his functions under this Act. Each such department or agency is authorized to cooperate with the Attorney General and, to the extent permitted by law, to furnish such materials to the Attorney General. Any Fed-

eral department or agency engaged in administering programs related to law enforcement and criminal justice shall, to the maximum extent practicable, consult with and seek advice from the Attorney General to insure fully coordinated efforts.

SEC. 404. The Attorney General may arrange with and reimburse the heads of other Federal departments and agencies for the performance of any of his functions under this Act, and, as necessary or appropriate, delegate any of his powers under this Act with respect to any part thereof, and authorize the redelegation of such powers.

SEC. 405. The Attorney General is authorized—

(a) to conduct research and evaluation studies with respect to matters related to this Act; and

(b) to collect, evaluate, publish, and disseminate statistics and other information on the condition and progress of law enforcement and criminal justice in the several States.

SEC. 406. Payments under this Act may be made in installments, and in advance or by way of reimbursement, as may be determined by the Attorney General.

SEC. 407. Whenever the Attorney General, after reasonable notice and opportunity for hearing to a grantee under this Act, finds that, with respect to any payments made under this Act, there is a substantial failure to comply with—

(a) the provisions of this Act;

(b) regulations promulgated by the Attorney General under this Act; or

(c) the law enforcement and criminal justice plan submitted in accordance with the provisions of this Act; the Attorney General shall notify such grantee that further payments shall not be made (or in his discretion that further payments shall not be made for activities in which there is such failure), until there is no longer such failure.

SEC. 408. Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or other agency of any State or local law enforcement and criminal justice system.

SEC. 409. Unless otherwise specified in this Act, the Attorney General shall carry out the programs provided for in this Act during the fiscal year ending June 30, 1968, and the four succeeding fiscal years.

SEC. 410. Not more than 15 per centum of the sums appropriated or allocated for any fiscal year to carry out the purpose of this Act shall be used within any one State.

SEC. 411. The Attorney General, after appropriate consultation with representatives of State and local governments, is authorized to prescribe such regulations as may be necessary to implement the purpose of this Act, including regulations which—

(a) provide that a grantee will from time to time, but not less often than annually, submit a report evaluating accomplishments and cost-effectiveness of activities funded under this Act;

(b) provide for fiscal control, sound accounting procedures and periodic reports to the Attorney General regarding the application of funds paid under this Act; and

(c) establish criteria to achieve an equitable distribution among the States of assistance under this Act.

SEC. 412. On or before August 31, 1968, and each year thereafter, the Attorney General shall report to the President and to the Congress on activities pursuant to the provisions of this Act during the preceding fiscal year.

SEC. 413. For the purpose of carrying out this Act, there is hereby authorized to be appropriated the sum of $50,000,000 for the fiscal year ending June 30, 1968; and for each succeeding fiscal year such sums as the Congress may hereafter appropriate. Funds appropriated for the purpose of carrying out this Act shall remain available until expended.

TITLE V—DEFINITIONS

SEC. 501. As used in this Act—

(a) "Law enforcement and criminal justice" means all activities pertaining to crime prevention or the enforcement and administration of the criminal law, including but not limited to activities involving police, prosecution or defense of criminal cases, courts, probation, corrections and parole.

Attorney General CLARK. That would certainly be something well worthwhile and we would hope it would be done in the context of title III. We would hope that it would not cause any significant delay in enacting this legislation. Programs under titles II and III have to be coordinated. The research and development grant program provides an anchor and foundation for the action grant program.

Senator KENNEDY. Could I request your comments on those two pieces of legislation. Thank you very much.

Senator MCCLELLAN. Senator Hruska.

Senator HRUSKA. Thank you, Mr. Chairman.

Mr. Attorney General, you gave some figures for overall national expenditure in the police field and you mentioned the figure of $4 billion. What is that for?

Attorney General CLARK. A little over $4 billion is the estimate contained in the National Crime Commission report for all of the processes of criminal justice. Of that, about $2.8 billion is for State, local and Federal police. About $1,030 million is for Federal, State and local corrections—all your prisons, all your jails, all other public involvement in prisons and corrections. Something over $300 million is the gross national expenditure for the criminal aspects of court activities plus prosecution. It is amazing how little it is when you consider the importance of the work.

Senator HRUSKA. Does $50 million go very far against such a corpus?

Attorney General CLARK. It is interesting to see how it goes. Let me skip to 1969, if I might. With a corpus of $4 billion, if you have the 5 percent increase required by the bill (which has been the national average) an increase of $200 million will be required before Federal dollars are available.

If you then have $300 million available for grant purposes on a matching basis, this would involve up to 60 percent to match to $200 million more from the States and local jurisdictions to be added to the $300 million that would mean an increased investment in that year of $700 million to be added to the base of $4 billion. In 1 year the increase would be three and a half times greater than our experience at the present time.

Senator HRUSKA. Was there any thought given to the idea of a Governor's veto over this particular type of Federal grant?

Attorney General CLARK. It is a subject that can hardly escape your attention in this general area today and it was considered. It is our judgment that the justification for that is much more difficult to find in law enforcement than in other areas. And the reason primarily is that law enforcement has been basically a local function. Police expenditures by local governments are about 2½ times police expenditures by States. The average State does not give any financial support to local law enforcement. It has really no experience in local law enforcement. The average State does not have an office to coordinate the activities of local law enforcement. There is no real basis for the Governor of a State in the exercise of his functions to say that a particular program is not sound since he has no experience in the field.

Senator HRUSKA. But are not, the cities and counties and all of their activities, creatures of the State legislature? They obtain their powers, tax bases, and a number of things from the State legislatures. And, of

course, the Governors often play a vital role in these functions. The attorneys general of the States have general supervision of all major criminal prosecutions and the trials. There is a very close supporting relationship between States and cities. For example, how can it be said that New York City is free and clear of State government and does not have any close ties or relationship in law enforcement. I cannot follow that reasoning.

Would you have a comment on this? It is not limited to New York, but, generally, I cannot see any difference between this field and any other fields.

Attorney General CLARK. I guess that police activities were the first function of cities if not of government itself. It has been a function we have left to the cities in this country. New York City provides an illustration. There are 28,000 policemen there. The annual budget of the New York City Police Department exceeds the budget of the U.S. Department of Justice by $400 million. As far as I know the State does not provide any funds for police protection in New York City. They supply no advice. Only last year they established an office in the State government involving one man and one staff assistant. What can they contribute to the mighty police department of New York City, which has protected the people for generations.

As far as the powers of the State attorneys generals are concerned, the average attorney general of a State exercises no significant criminal powers. Many have no legal authority in this area. Those that do have common law powers find it difficult to use them. A rare exception is the State of California where there is a department of justice but its functions, too, are limited. It tends to be on the prosecution side, rather than to involve police protection. And it exercises no control over the local district attorneys in their handling of prosecutions.

Senator HRUSKA. Your bill emphasizes that we are prosecutors of cases.

Attorney General CLARK. Yes.

Senator HRUSKA. Those claiming to be in the law enforcement part of justice make up a very small percentage.

Attorney General CLARK. Yes, very small.

Senator HRUSKA. In many of the Middle Western States the Attorney General prosecutes all appeals from trial courts and in many instances participates in the prosecution of cases and trials in State district courts.

Attorney General CLARK. There would be no need for a Governor veto there because he would be directly involved, presumably.

Senator HRUSKA. Of course, when we experience breakdown in a city police force due to either civil commotion or massive civil disobedience, the Governor steps in, does he not?

Attorney General CLARK. He has to sometimes, unfortunately.

Senator HRUSKA. In thinking of the Governor, I wonder if the fear of bypassing the State in a program of this kind would not grip the heart as much as other programs which they have discussed so vigorously.

Attorney General CLARK. My judgment is that it would not because police departments are old-line agencies with which the Governors have had a very minimal experience, connection, and relationship.

Senator HRUSKA. I do not know if you have convinced me. I just wanted to ascertain from you whether that had received any thought.

Such questioning is going to be raised on the Senate floor because there are many Governors who say you cannot be partners with the Federal Government.

The Federal Government is dealing out this money and after it becomes a substantial amount the municipality is hooked. If municipalities do not substantially comply with the plan, that money can be withdrawn and they have no alternative. They must run that department the way the Attorney General says they must, pursuant to that plan. Control then slips away from the municipality and goes into the Attorney General's Office.

Is that not about the size of it?

Attorney General CLARK. No. Not at all. That would be both a violation of the mandate and spirit of section 408. I think as a practical matter the Attorney General will not run the police department because they will not let him and because he does not want to. He would not even if he could do so.

And the amount of money contributed by the Federal Government will be a small fraction of the total investment and it could hardly be the controlling part.

Senator HRUSKA. You can go as high as 60 percent of these budgets for administrative improvement. The expenditure of 60 percent is a big percentage.

Attorney General CLARK. Sixty percent of the increase above 105 percent the first year, 110 percent the next year, 115 percent——

Senator HRUSKA. It is only to an improvement component which this 60 percent applies?

Attorney General CLARK. That is all.

Senator HRUSKA. Will it not in due time be a sizable amount?

Attorney General CLARK. It will become a large sum in some cases in due time.

Senator HRUSKA. Now you refer to section 408 which states that nothing contained in this act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or agency of any State or local law enforcement and criminal justice system.

That is a most noble statement made in good faith. Yet the preceding section says:

> Whenever the Attorney General, after reasonable notice and opportunity for hearing to a grantee under this Act, finds that, with respect to any payments made under this Act, there is a substantial failure to comply with—
>
> (a) the provisions of this Act—

And (b) and (c).

Considering the vast discretionary power invested in the Attorney General in this act and its overwhelming discretion in connection with this program, any aspect of the plan that has been submitted and approved must be OK'd by the Attorney General. Thus, if he feels it is being maladministered and not substantially complied with, he will say, "Sorry, boys, the show is over. No more money."

Would that constitute control and supervision in your judgment? It is well intended and filled with the spirit of wanting improved law enforcement service and all of its processes, but is it not a pretty compulsive situation?

Attorney General CLARK. No. I think it is necessary to the integrity of the act that its provisions be complied with and its regulations be

complied with and the plans submitted be complied with. Otherwise, the very purposes of the act fail.

Senator HRUSKA. Exactly. As soon as that control is shifted over from the local or State level, it finds its way into the Department of Justice and the purposes of this act would fail; but there they would be controlled and supervised. Apprehensions are being raised about this aspect of it.

Attorney General CLARK. In my judgment, in view of the nature of how police departments function and the extent of the Federal contribution, the fears are unfounded.

Senator HRUSKA. They were not unfounded in a number of Governors this past year in the field of aid to dependent children, a field in which I had 8 years of personal experience.

They were not unfounded in medicare or the administration of the water and sewage for municipalities with their requirement of community planning. And in the field of education, the cry is becoming bigger and more vigorous as time goes on. More and more, the prerogatives of local schools are being taken away from them on the threat that unless they do thus and so, the plan will not be complied with and no more checks from Washington, D.C.

This is not my invention. This record has been made in other committees of this Congress. This is becoming increasingly well known.

I am confident it will not happen with the first $50 million. But what about the $300 million level? How long will that $300 million level obtain?

Attorney General CLARK. In my judgment, it will probably increase if the program is successful as we hope, at least for several years and then level off, and, hopefully, terminate at some time.

Senator HRUSKA. Do you think it will terminate if it reaches as high as $1 billion a year?

Attorney General CLARK. I think that depends on many factors. We cannot meaningfully predict now. In the last analysis, it involves the amount of resources which local and State revenues can contribute to law enforcement.

Senator HRUSKA. There are some 200 Federal aid grant programs now. The history of this country does not record many programs of a comparable nature having gone out of existence.

Would it reach as high as $1 billion in the near future?

Attorney General CLARK. This is speculation, but I think that it is conceivable that it may.

Senator HRUSKA. Then no longer would it be a relatively small percentage of expenditures by the communities.

Attorney General CLARK. It would still be less than that part of the iceberg now above the water.

Senator HRUSKA. But still a part.

Attorney General CLARK. That is State and local governments part.

Senator HRUSKA. That is the part of their's, subject to the winds of political activities and political philosophy.

Attorney General CLARK. Currents of the water are stronger than those of the air.

Senator HRUSKA. Yes; they are.

Now, repeatedly in the bill we do have specific references to section 204(a)(2). These plans shall "incorporate innovations and advanced techniques and contain a comprehensive outline of priorities for the

Attorney General CLARK. It can apply to any need of a police department or a corrections agency or a court.

Senator THURMOND. You have got a bill here then in which any police department of any city in this Nation can ask Washington, our Government, to help to supply uniforms and clothing to their policemen; is that right?

Attorney General CLARK. Well, that is a peculiar way of thinking about it. But they could come out that way. We require, however, that they have spent 105 percent before they are entitled to anything from the Federal Government. We would look at the whole budget together. Why in the world they would take out of all their budget uniforms and put it in the Federal part? Whether they could get the funds when they actually sought them for such a limited purpose or not is another question. But these funds would be available for any need of a police department that met the qualifications.

Senator THURMOND. Would that include shoes, too?

Attorney General CLARK. It could include shoes; yes.

Senator THURMOND. Well now, suppose the Federal Government said to the police departments over the country, suppose your director says, "Now, I think the policemen will look handsomer, better, and appear more disciplined if they all used blue uniforms and black shoes, and we are going to withhold funds unless you buy blue uniforms and black shoes."

Would your director have that authority to do that?

Attorney General CLARK. Well, I think we would start looking for a new director about that time.

Senator THURMOND. I know, but that is not the question. I am visualizing some Attorney General other than Mr. Clark now, someone who might succeed you some day and be arbitrary. Would your director have the right to withhold funds if the police departments did not use the color uniform he wanted or the color shoes or the quality of uniform or shoes that he wanted them to use?

Attorney General CLARK. He has to have broad discretion, and in theory he would probably have that discretion under the bill.

As a practical matter, the opportunity to exercise it would be very limited. The police are an independent type of person, and I just do not think that is a real possibility.

Senator THURMOND. But you think he would have that authority?

Attorney General CLARK. Yes, sir.

Senator THURMOND. Well, then, would your director also have the authority to say that, "We don't think a Colt is a very good pistol. It doesn't get results, and, therefore, we are not going to give any funds unless you buy Smith & Wesson pistols."

Would your director have the authority to withhold funds unless they used Smith & Wesson pistols?

Attorney General CLARK. I think if some police department sought Federal funds for a type of weapon that we thought was dangerous or unreliable or otherwise defective, that we would have a duty to withhold funds.

Senator THURMOND. So the Director would have the authority to withhold funds as to the kind of weapon or the quality of weapon that the city police department or the State law enforcement agency would purchase?

Attorney General CLARK. The probability of an exercise of discretion like that is very, very slight. It depends, unless——

Senator THURMOND. I am not saying how he would use this discretion, Mr. Attorney General. I am just asking, I am trying to get at the authority the bill gives, whether he would have the authority.

Attorney General CLARK. The bill gives broad discretion.

Senator THURMOND. It gives broad discretion.

Attorney General CLARK. Yes.

Senator THURMOND. So your director would have the right to withhold funds if he saw fit unless a policeman used the kind of weapons that he said they must use or use the kind of uniforms that he says they must use or use the kind of shoes that he said they must use.

Attorney General CLARK. No. I think that really is very remote. It is necessary under the bill to give broad discretion. But if it came to the specificity you are talking about, such an exercise of discretion would probably violate section 408 itself. It is so unreal.

Senator THURMOND. It is not contemplated, but is it possible?

Attorney General CLARK. I would say when it reaches the level that you have now reached with shoes and uniforms and guns and all these oher things there would begin to be control of the police department, and there would be a violation of section 408 of the act, and, therefore, it would be in violation of the act.

Senator THURMOND. Well, I took up each one separately, and you said he would have the authority, and then I summarized it and lumped it together, and now you say you do not. What is your position?

Attorney General CLARK. My position is as stated that the case you pose would be clearly arbitrary, when you add them up the way you do—in fact, any one by itself would seem highly arbitrary to me and so unrealistic as to not be a possibility.

Senator THURMOND. Who is going to control whether he is arbitrary or not? He makes the final decision, does he not?

Attorney General CLARK. Well, there are lots of checks and balances that we have in the system, and one is we would hope he would always try to accomplish the purposes of the act, and if he proceeded the way you indicated, I think the act would break down.

Senator THURMOND. That is not the question. I asked you who would call his hand if he became arbitrary.

Attorney General CLARK. Well, perhaps, with you Senators up here, you would help and there would be an Attorney General and other people.

Senator THURMOND. That is not it. I mean in the executive branch. Suppose you had a director under you or some other Attorney General who was arbitrary, and he was trying to bring about conformity in every way, shape and form, just completely arbitrary. Now, who is above him to correct him?

Attorney General CLARK. We worked for these 19 months under the Law Enforcement Assistance Act. There is complete discretion in the director there. He can grant or not grant. There are no criteria or standards set whatever, and we have not had any complaints of any type that you raise.

Senator THURMOND. In other words, he does have the discretion but you do not think he would be arbitrary, is that it?

Attorney General CLARK. I do not think he would be arbitrary, and I think if he endeavored to exercise his discretion as you have indicated he would not last very long.

Senator THURMOND. But he would have the power, he would have the discretion, to act.

Now, would any of this Federal money go to help pay the salaries of law enforcement officers, policemen, and others?

Attorney General CLARK. To their salaries?

Senator THURMOND. Yes.

Attorney General CLARK. Yes. Some of it could go directly into salaries, up to one-third of the Federal funds.

Senator THURMOND. In other words, then if this bill passes, the city of Philadelphia, the city of Chicago or New York, for example, can draw from the Federal Government from the funds that are available up to one-third of the cost of the policemen's salary.

Attorney General CLARK. No, it would not be nearly that much. It would be up to one-third of Federal funds available and granted. The Federal funds——

Senator THURMOND. I say insofar as the funds are available.

Attorney General CLARK. Yes. But you said one-third of the policemen's salaries. You have to start with the base expenditure. You have got to add 5 percent to that. Those are all local payments. Over and above that the Federal match is 60 percent of the increment over 105 percent the first year. Now you are not going to have a very large increment there. But only one-third of that 60 percent could go to the salaries themselves, and that would always be a tiny fraction of the total salary expenditures.

Senator THURMOND. What do you figure that would amount to in the average law enforcement officer's salary?

Attorney General CLARK. Well, we can work a hypothetical if you want to. Let us take a jurisdiction with a 100 base so 90 percent of it is for salaries. That would mean 90 goes to salaries. Let us say that they propose to increase law enforcement expenditures by 10 percent during this year. That first 5 percent has to be their money. Two of the remaining 5 percent has to be their money, so that means 1 percent of the Federal 3 percent could go to salaries. That is 1 percent on a base of 110, which is one one-hundred-and-tenth of the total law enforcement budget.

Senator THURMOND. How is that?

Attorney General CLARK. Assuming that the applicant put his original 90 percent into salaries plus 90 percent of his 7 percent share of the increase in his budget, 1 Federal dollar would go into salaries for approximately every $96 of local money. At the same time the rate of new investment for law enforcement purposes would have been doubled.

Senator THURMOND. So that if a man got $500 salary a month, about $5.50 of that would be from the Federal Government?

Attorney General CLARK. Well, it would all come through the police department. He could not tell which was which.

Senator THURMOND. Yes, I understand. But that is about the contribution that would be made by the Federal Government.

Attorney General CLARK. On this hypothesis, that is right.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the accompanying Brief for Amici Curiae States of New York et al. with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system on January 4, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 4, 2018
New York, NY

/s/ Anisha S. Dasgupta