



Episode 08: Byrne JAG Penalties with Elizabeth Pyke

Release date: October 5, 2021

Spike Bradford: Welcome to the NCJA podcast. This podcast series explores promising practices, provides guidance on strategic planning, and discusses how the Byrne Justice Assistance Grant program or Byrne JAG contributes to improving justice systems across the country. We hope you enjoy it. This episode was produced thanks to the contributions of NCJA members to learn more about becoming an NCJA member visit ncja.org/membership.

Bethany Broida: Welcome to the NCJA podcast. My name is Bethany Broida and I am the director of communications at the National Criminal Justice Association. On today's podcast, we will continue our conversation about the Byrne Justice Assistance Grant or Byrne JAG and discuss the Byrne JAG penalties that are tied to this funding with NCJA's own resident, Byrne JAG expert, and director of government affairs, Elizabeth Pyke. If you've not yet had a chance to listen to our Byrne JAG 101, podcast I invite you to do so to learn about the basics of the program and the role it plays advancing problems and practices. Today's podcast will delve further into how Byrne JAG supports public safety and why these penalties are so detrimental to the program. Elizabeth, thank you for joining us to discuss this issue that is under so much discussion right now and is so often misunderstood.

Elizabeth Pyke : Nice to be doing this with you again, Bethany.

Bethany Broida: So let's get started. What do you mean when you say Byrne JAG penalty or penalties?

Elizabeth Pyke : We mean the mechanism Congress uses to encourage new state or local government policy by threatening the funding of an existing grant program. In this case, Byrne JAG. Because under our system of government, the federal government really can't tell state and local governments how to run their justice systems. They can set standards or expectations, but not really compel them to adopt certain policies or practices. So they can encourage new laws or policy by funding new grant programs, or they can pass legislation telling states what to do and take away existing grant money if they don't do those things. The policing reform bills under discussion in Congress are illustrative of this. Though admittedly, also a little difficult because the Justice in Policing act that passed the house earlier this year, won't be the final bill and we understand more recent negotiations have moved considerably on the treatment of penalties.

Nonetheless, those efforts seek to require states and localities to pass laws and adhere to certain policing practices. And if they don't, they would not be allowed access to their Byrne JAG grant.

Bethany Broida: Have there always been penalties on Byrne JAG?

Elizabeth Pyke : Well, not always, no. Currently there are three penalties attached to Byrne JAG funding, the Sex Offender, Registration and Notification Act or SORNA, and the Prison Rape Elimination Act or PREA were passed about a decade ago. And then there's the more recent Deaths in Custody Reporting Act, which is at the discretion of the attorney general. And together these penalties total about 25% of a state's annual Byrne JAG award.

Bethany Broida: Why is Byrne JAG used as a penalty?

Elizabeth Pyke : Well, that's a really good question, Bethany and has entirely to do with congressional rules. Bills have to be germane within themselves and to each other. So you can't, for instance, penalize a state's transportation highway trust funds for failure to adopt a criminal justice policy. And Byrne JAG's greatest strength is its flexibility, allowing states and localities to make investments across the entire justice system. But that also means it is germane to almost any requirement congress wants to impose on justice practices. Bills are introduced all the time that include a Byrne JAG penalty, but those are the ones that have passed to date.

Bethany Broida: Do penalties work?

Elizabeth Pyke : Well, yes, up to a point. They can definitely be effective for getting the attention of a state legislature or a governor. They're ineffective when the mandate is too costly or complex, when the penalty is out of balance with what is being asked. We know this because we have 15 years of history with the SORNA penalty. That bill passed in 2006 and put requirements on states that were both costly in money and in political capital and the specific actions required were far more detailed than most federal laws. 15 years later, only 18 states have met all the requirements of the act, the remainder take the penalty every year. So that certainly isn't effective, or at least it isn't any longer effective.

Bethany Broida: You noted the three penalties currently on Byrne JAG and the possibility that a final policing bill could add even more. Is there a tipping point beyond which they just can't be effective as a means for encouraging state and local practice?

Elizabeth Pyke : There's no question there's a tipping point. Though we may not know exactly where that point may be, but again, policing reform can be illustrative here because at least those earlier versions would definitely go over a tipping point.

Bethany Broida: Why do you say that?

Elizabeth Pyke : Because of the way the penalties were initially constructed. There wasn't just one, say 25% penalty for complying with the entire bill, rather each of the 10 or so separate mandates, many were very expansive, would be attached to a separate penalty. And many of those penalties would be 100% of the grant and they would stack on top of each other. In the house bill I talked about earlier, the penalties would total 700% of a state's annual Byrne JAG award. That clearly seems to go beyond a tipping point.

Bethany Broida: I see. Well, it seems self-evident, but what would that actually mean for a state and their Byrne JAG funded programs?

Elizabeth Pyke : It's an important question because I don't think the answer actually is self-evident. I think a lot of people think that when they're penalizing Byrne JAG to in case incentivized policing reform, the penalty is only on the police. But as we discussed in the earlier podcast, states and local governments invest Byrne JAG dollars in programs and initiatives across the entire justice system. So when the grant is penalized, those programs lose their funding too. Those hundreds of Byrne JAG funded programs, the special courts, law enforcement led diversion, reentry programs, they would all be impacted or even completely wiped away also.

Bethany Broida: So that goes back to the point you raised earlier. People talk about grant conditions as incentives, but it sounds like you don't think they are an incentive or at least enough of an incentive.

Elizabeth Pyke : Usually when we think of incentive, we think about getting something added, some benefit for doing what is being asked. But unless Congress were to grow the overall pot for Byrne JAG or other justice grants and provide new money specifically for a new policy, one state's gain will just take away from another state. So it's still just a penalty. The other thing is Byrne JAG plays a really substantial, meaningful role in the criminal justice reform movement, as we talked about in the first podcast, but it's still just a very small amount of money, not nearly enough to incentivize anything that costs a lot of money to comply with.

Bethany Broida: How do you mean?

Elizabeth Pyke : Most people are pretty shocked to learn that Byrne JAG contributes less than one quarter of 1% to what states and localities spend on policing let alone wider public safety. Honestly, I was pretty shocked when I saw the data. But I guess when you think that NYPD's annual budget is what five billion while Byrne JAG nationwide is only 350 million, it does make sense. And Byrne JAG reaches fewer than 1500 of the nation's 18,000 local law enforcement agencies. And most of the grants to police agencies are just a few thousand or a few tens of thousands of dollars. So these penalties provide no leverage or very weak leverage over the majority of local law enforcement agencies.

Bethany Broida: So with a matter of scale.

Elizabeth Pyke : Yes, exactly. You have to compare it to the cost of what is being asked. Again, thinking about the policing bills, the congressional budget office estimates that just the data reporting provisions alone would cost several hundred million dollars. So yes, it's a matter of scale, the penalty compared to the magnitude of the task of compliance. Now, if the cost of compliance is minimal, then the potential that a penalty will be effective is stronger.

Bethany Broida: Do you know of any other federal grant programs that use penalties the way they're used for Byrne JAG?

Elizabeth Pyke : Very few. There are some conditions on the cops hiring program, and there is one different model in the Juvenile Justice and Delinquency Prevention Act for example, standards are set in the program and those same dollars are penalized or shifted in how they must be used. It doesn't penalize a different grant program though the way this would.

Bethany Broida: So what can Congress do to encourage states to do these things?

Elizabeth Pyke : Well, first of all, they should and could cover the costs preferably by formula so that all states and localities can access the funds. And they can and should provide technical support to ease the burden of complying. This is really important and often very overlooked. None of these things are easy to do. DOJ should help state and local law enforcement, and they do help them through training, off the shelf software, or other supports. And to make sure to do research and issue clear guidance on what constitutes compliance before grantees are expected to comply, because no one should have to reinvent the wheel, particularly small and rural communities who just don't have the capacity to assume the burden of complex new requirements or the resources to apply for federal grants to do so. But also it should be noted that any penalties can be more narrowly target. Currently, particularly in how they're being considered in policing reform, the penalties are a pretty blunt instrument. Congress instead could be much more targeted or surgical in their approach, which would have fewer unintended consequences and actually be a lot more effective.

Bethany Broida: Is there anything else we haven't covered?

Elizabeth Pyke : Well, I would just let like to add one thing. I've talked a lot about the efficacy of penalties using policing reform as the example, because as you said at the beginning, those bills are being negotiated right now and are so illustrative of the challenge of Byrne JAG penalties. But I want to be clear that doesn't mean that we at NCJA are opposed to those underlying policies of policing reform, or an error, or per year death in custody or any others that might yet come. In fact, it's quite the opposite. We just want whatever Congress passes to work. And we know that penalties that far exceed the cost of compliance just can't work as intended.

Bethany Broida:

I think we will need to leave it there. There are so much more to discuss though about the mechanics of the Byrne JAG program. And I hope we will on future podcasts. In the meantime, I want to thank everyone for listening. To learn more about the Byrne JAG program at any time, we invite you to visit the NCJA website at ncja.org and visit the investing Byrne JAG section. Thank you for joining us. And we will see you next time.