

**STATEMENT OF**  
**BILL PIPER**  
**DIRECTOR OF NATIONAL AFFAIRS**  
**DRUG POLICY ALLIANCE**  
**BEFORE THE**  
**U.S. HOUSE SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND**  
**SECURITY**  
**HEARING ENTITLED**  
**“THE DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS OVERSIGHT”**  
**SEPTEMBER 18, 2008**

**Introduction**

The Edward Byrne Memorial Justice Assistance Grant Program was created in 1988 in a slightly different form, and under a slightly different title, to provide federal crime prevention grants to states. It was named in memory of Edward Byrne, a New York City police officer gunned down by thugs. The program has provided billions of dollars to local and state law enforcement, as well as drug courts, juvenile justice programs, and other crime prevention initiatives. In recent years, however, the Byrne Grant Program has been criticized from groups across the political spectrum.

Sentencing reform advocates have accused it of fueling the rapid growth in the number of nonviolent Americans behind bars, and note that as long as states do not have to pay the full cost of their criminal justice system they will never have to consider alternatives to incarceration. Civil rights leaders warn that the Byrne Grant Program is perpetuating racial disparities and civil rights abuses. A growing number of critics on both the left and right question why the federal government is paying for day-to-day local law enforcement activities that states could pay for themselves while other federal needs, such as health care and border security, go underfunded.

Dozens of civil rights and criminal justice reform groups have urged Congress to reform the Byrne Grant Program, including the ACLU, the Brennan Center, the National Association of Blacks in Criminal Justice, the National Black Police Association, NAACP, and National Council of La Raza. At least four leading conservative organizations want to go further and completely eliminate the program, including the American Conservative Union, Americans for Tax Reform, Citizens against Government Waste, and the National Taxpayers Union.

The Bush Administration has been extremely successful in cutting funding to the program, slashing it by hundreds of millions of dollars. There is a bipartisan consensus in Congress, however, that these cuts have been far too steep and come far too quickly, and momentum is building to completely restore funding to the program. Given the state of the federal budget, it may be impossible to significantly increase funding to the program any time soon. In any event, it is imperative that Congress pass legislation fixing the program's many faults. Because of the size of

the Byrne Grant program and the number of local and state law enforcement agencies that depend on it, Congress has an enormous opportunity to use the program to bring about change across this country.

### **General Problems with Federal Law Enforcement Subsidies to the States**

Some of the Byrne Grant Program's problems stem from inherent problems with federal subsidies to local and state law enforcement. For instance, a recent report by the Justice Policy Institute (JPI), titled "The Vortex: The Concentrated Racial Impact of Drug Imprisonment and the Characteristics of Punitive Counties", found that the more money counties had to spend on law enforcement the more nonviolent drug offenders they imprisoned, and the more likely it was that those imprisoned were disproportionately people of color.

Greater county jail admission rates for drug law offenses were associated with how much was spent on policing and the judicial system, higher poverty and unemployment rates, and the proportion of the county's population that is African American. These relationships were found to be independent of whether the county actually had a higher rate of crime or drug use. For example, although Rockingham County, NH, has a larger percent of its population reporting illicit drug use, Jefferson Parish, LA, sent more people to prison for a drug offense at a rate 36 times that of Rockingham.

Phillip Beatty, co-author of the JPI study, concluded: "Laws—like drug laws—that are violated by a large percentage of the population are particularly prone to selective enforcement. The reason African Americans are so disproportionately impacted may, in part, be related to social policy, the amount spent on law enforcement and judiciary systems, and local drug enforcement practices."

The United States ranks first in the world in per capita incarceration rates, with 5% of the world's population but 25% of the world's prisoners. The U.S. locks up more of its citizens on a per capita basis than China, Cuba, Mexico, Russia or any other country in the world. The racial disparities are even more startling. Black Americans are incarcerated at a rate approximately six times greater than that of whites. The U.S. now incarcerates more black men on a per capita basis than South Africa at the height of Apartheid. Congress should have hearings examining what role, if any, federal funding has played in driving overincarceration, and how federal grant programs can be used to encourage alternatives to incarceration and reduce racial disparities.

### **Structural Problems with the Byrne Justice Assistance Grant Program**

There are at least three structural and institutional problems with the Byrne Grant Program:

#### *Creating an Unhealthy Culture of Dependence*

The program was established to provide four-year grants to encourage innovation. For example, Dallas' first drug court was paid for with a Byrne grant; then the county took over the funding of the program when the grant ran out. Narcotics task forces, however, were never subject to the four-year limit, and the limit was eliminated for all programs in the last Congress. It is worth investigating whether that was a good idea. Criminal justice decisions on which crimes to prioritize and which crime prevention strategies to utilize should be based on what is best for public safety and not what is needed to continue receiving federal money.

## *Rewarding Failure*

Byrne grants are distributed to states, in part, based on whether or not crime rates are increasing. This has intuitive appeal because it is based on need, but it turns merit on its head. States that fail to enact effective crime prevention policies are rewarded with more money, while states that adopt effective policies that reduce crime are punished by losing federal aid.

## *Perpetuating Poor Performance Measures*

The performance measures the Office of Justice Programs uses to judge the Byrne Grant Program are troubling and in many ways counter-productive. Some make sense, like computing how many offenders successfully complete alternative to incarceration programs. Most, however, measure bureaucratic statistics like how many new gang units are in operation, how many warrants are being served, and how many people are being arrested. These criteria not only fail to measure effectiveness, they provide dangerous incentives for states to play a numbers game.

This is especially the case when it comes to drug law enforcement. Because the amount of funding that narcotics task forces receive is often formally or informally based on how many people they arrest, individual officers are under enormous pressure to make a large number of arrests, even if they are just for minor offenses. In fact, narcotics task forces that focus on major traffickers actually risk losing federal funding because they have fewer arrests to report than those that focus on low-level offenders who are easier to catch and far more plentiful.

The FBI's 2007 Crime in the United States Report, released this week, found that law enforcement made more than 1.8 million drug arrests last year. 83% of those arrests were for simple possession. 775,000 were for nothing more than possession of small amounts of marijuana for personal use. These arrests pad the official reports, but do nothing to stop major traffickers or reduce the problems associated with substance abuse.

This perverse incentive structure also encourages law enforcement officers and informants to cut constitutional corners. We see in scandal after scandal good officers doing bad things to meet warrant and arrest quotas. Fabricating informants, raiding homes on false evidence, lying to judges, and planting evidence - anything to increase the numbers.

For instance, look at the recent shooting death of 92-year-old Kathryn Johnston in Atlanta. Blinded by misinformation that her house contained illegal drugs, police officers fabricated evidence to obtain a warrant, shot and killed her in a botched military-style raid, and then planted drugs when they realized she was innocent. Federal prosecutor David Nahmias told *The New York Times*:

“The [Atlanta] officers...were not corrupt in the sense that we have seen before. They are not accused of seeking payoffs or trying to rob drug dealers or trying to protect gang members. Their goal was to arrest drug dealers and seize illegal drugs, and that's what we want our police officers to do for our community. But these officers pursued that goal by corrupting the justice system, because when it was hard to do their job the way the Constitution requires, they let the ends justify their means.”

Corrupting the justice system, however, is what happens when policymakers tie budgets, promotions, and salaries to statistics like arrests and seizures. As the plea agreement in this case made clear, the Atlanta officers cut corners in order to "be considered productive officers and to meet [the agency's] performance targets." This is a story one hears in state after state. It is not publicly known if Atlanta used federal Byrne Grant money to pay for the raid, but bad performance measures have become widespread and are generally instituted from the top down.

### **Regional Narcotics Task Forces**

In addition to looking at structural problems with the Byrne Grant Program, Congress should look at the problems associated with some of the entities it funds. In particular, it should hold hearings on the program's funding of hundreds of regional narcotics task forces around the country. These task forces, which lack very little state or federal oversight and are prone to corruption, are at the center of some of our country's most disturbing law enforcement scandals. Connecting these task forces to HIDTAS or other regulated entities might significantly reduce the problems associated with them.

The most notorious Byrne-funded scandal occurred in 1999 in Tulia, Texas where dozens of African-American residents (representing nearly half of the town's adult black population) were arrested, prosecuted and sentenced to decades in prison, even though the only evidence against them was the uncorroborated testimony of one white undercover officer with a history of lying and making racial epithets. The undercover officer worked alone, and had no audiotapes, video surveillance, or eyewitnesses to corroborate his allegations. Suspicions arose after two of the defendants were able to produce firm evidence showing they were out of state or at work at the time of the alleged drug buys. Texas Governor Rick Perry eventually pardoned the Tulia defendants (after four years of imprisonment), but these kinds of scandals continue to plague the Byrne grant program.

In another Byrne-related scandal, a magistrate judge found that a regional narcotics task force in Hearne, Texas routinely targeted African Americans as part of an effort to drive blacks out of the majority white town. For the past 15 years, the Byrne-funded task force annually raided the homes of African Americans and arrested and prosecuted innocent citizens. The county governments involved in the Hearne task force scandal eventually settled a civil suit, agreeing to pay financial damages to some of the victims of this discrimination.

While both of these Texas scandals are somewhat dated, they remain powerful symbols of a failed system that has yet to be reformed. They are also both subjects of major motion pictures that will soon be in theaters across the country. Oscar-winning actress Halle Berry is starring in a feature film based on the Tulia, Texas scandal, currently being produced by Lionsgate Films. Uncommon Productions recently completed a feature film titled "American Violet" that is loosely based on the Hearne scandal, and stars Oscar-nominated Alfre Woodard.

These scandals are not the result of a few "bad apples" in law enforcement; they are the result of a fundamentally flawed bureaucracy that is prone to corruption by its very structure. Byrne-funded regional narcotics task forces are federally funded, state managed, and locally staffed, which means they do not really have to answer to anyone. In fact, their ability to perpetuate themselves through asset forfeiture and federal funding makes them unaccountable to local taxpayers and governing bodies.

The Criminal Jurisprudence Committee of the Texas House of Representatives is one of the few governing bodies to examine Byrne-funded regional narcotics task forces and why they are so engulfed in scandals. After comprehensive hearings, the Committee concluded that the state should cut off all state and federal funding to the task forces because they are inherently prone to corruption. The Committee reported, "Continuing to sanction task force operations as stand-alone law enforcement entities - with widespread authority to operate at will across multiple jurisdictional lines - should not continue. The current approach violates practically every sound principle of police oversight and accountability applicable to narcotics interdiction."

A 2002 report by the ACLU of Texas identified seventeen scandals involving Byrne-funded anti-drug task forces in Texas, including cases of falsifying government records, witness tampering, fabricating evidence, stealing drugs from evidence lockers, selling drugs to children, large-scale racial profiling, sexual harassment, and other abuses of official capacity. Recent scandals in other states include the misuse of millions of dollars in federal grant money in Kentucky and Massachusetts, false convictions based on police perjury in Missouri, and making deals with drug offenders to drop or lower their charges in exchange for money or vehicles in Alabama, Arkansas, Georgia, Massachusetts, New York, Ohio, and Wisconsin.

### **The Texas Reform Initiative**

In the wake of numerous Byrne-related scandals, the Texas Legislature and Texas Governor Rick Perry (R) implemented a set of reforms that are reducing racial disparities, police corruption, and the number of nonviolent offenders behind bars, while attacking major crime and making Texas safer. The state banned racial profiling, reformed its asset forfeiture laws, established alternatives to incarceration, eliminated Byrne Grant funding to regional narcotics task forces, passed legislation prohibiting anyone from being convicted of a drug law offense based solely on the uncorroborated word of an undercover informant, and adopted new statewide performance measures for judging the effectiveness of drug law enforcement.

Instead of grading narcotics officers on how many warrants they serve and how many people they arrest, the Perry Administration is grading them on how well they disrupt and dismantle dangerous crime organizations. Gathering intelligence and building connections takes precedent over arresting low-level offenders. Drug arrests have fallen by more than 40%, but drug seizures have more than doubled. The state is reportedly moving closer to its goal of taking down the top Texas "gatekeepers" to the major drug cartels.

Testifying in front of this subcommittee in 2007, Texas Department of Public Safety representative Patrick O'Burke described the Texas Reform Initiative this way: "To define success by measuring only the sheer volume of arrests would mean that more arrests would equate with greater achievement. This clearly does not move towards the goal of crime reduction. Arrest numbers also do not attach any quality to that work product when the arrest of one drug user equals the arrest of one drug 'kingpin.'"

The new drug law performance measures adopted by the Perry Administration are relatively simple. The state defined a drug trafficker as a person who works to illegally sell drugs with profit or income as the primary motivation. A Drug Trafficking Organization (DTO) was then defined as five or more drug traffickers who work to illegally sell drugs outside of their immediate conspiracy.

Narcotics officers are required to assess the number of DTOs working in their area and are then graded on the number of DTOs that are dismantled.

Texas narcotics officers are also required to compute the percentage of arrests that are “End Users”, defined as a person who is the intended user of illegal drugs and generally motivated by addiction. Under the Perry Initiative, impacting the behavior of an End User may involve law enforcement activities, but it is generally assumed that treatment and mental health services are better equipped to deal with those problems. As such, narcotics officers that waste time and resources investigating and arresting drug users are negatively graded.

## **Federal Reform**

The Texas Reform Initiative is a good model for federal reform.

First, Congress should pass H.R. 253, the No More Tullias: Drug Law Enforcement Evidentiary Standards Improvement Act of 2007. This legislation, introduced by Rep. Sheila Jackson Lee, would use the Byrne Grant program to encourage states to emulate many of the Texas reforms. It would prohibit states from funding regional narcotics task forces with Byrne Grant money unless they have enacted a law preventing people from being convicted of a drug law offense based solely on the uncorroborated eyewitness testimony of just one law enforcement officer or informant. This protection has prevented numerous innocent people from being wrongly convicted in Texas.

The No More Tullias Act would also require local and state law enforcement agencies receiving federal Byrne Grant money to document their arrests by race and ethnicity. This provision is essential to ensuring that federal money is not being used to facilitate racially disparate enforcement. The Drug Policy Alliance recommends expanding this provision to also require the documentation of traffic stops and searches by race and ethnicity. Such information should be available to Congress, the U.S. Attorney General and the public.

Congress should also pass legislation setting new performance measures for the Byrne Grant Program and state and federal drug law enforcement in general. The groundbreaking performance measures adopted by Texas are a good place to start. Drug law enforcement agencies should be graded on their ability to break up crime networks and apprehend violent offenders. Arrests and seizures should be strategies for achieving these goals, not measurement criteria to judge success or failure. A recent book by the American Enterprise Institute explains this strategy:

“Retail-level drug enforcement should focus on what it can accomplish (reducing the negative side effects of illicit markets) and not on what it can’t achieve (substantially raising drug prices). Thus, instead of aiming to arrest drug dealers and seize drugs – the mechanisms by which enforcement seeks to raise prices – retail drug enforcement should target individual dealers and organizations that engage in flagrant dealing, violence, and the recruitment of juveniles. Arrests and seizures should not be operational goals, but rather tools employed, with restraint, in the service of public safety.” (*An Analytic Assessment of U.S. Drug Policy*, February 2005)

Instead of grading law enforcement operations on how many search warrants were issued, how many arrests were made, how many officers were solely dedicated to gang interdiction activities, and other Vietnam-like “body count” performance measures currently utilized by the Office of

Justice Assistance, Congress should establish more meaningful criteria. Such criteria could include whether or not local crime rates are falling because of effective policies or how close law enforcement agencies are to dismantling major crime syndicates.

The formula by which Byrne Grant funding is distributed should also be changed. At a minimum, the Office of Justice Programs should prioritize funding according to demonstrated reductions in crime. Cities and states that adopt effective policies should be rewarded, not punished. The Byrne Grant Program should be used to promote evidence-based crime prevention strategies, not to fund cities and states year after year.

One tool that would enhance the ability to measure performance and increase transparency would be the creation of a searchable public database that lists where Byrne Grant money is going and what it is being used for. This database would not only be invaluable to Congress, it would aid efforts by researchers and criminal justice experts to document ineffective spending and determine where Byrne Grant money is tied to corruption. It could be similar to the public database that tracks earmarks.

Finally, Congress should pass legislation setting a new bottom line for U.S. drug policy more generally. The failed drug war policies of the last 30 years persist in part because of ineffective evaluation and assessment. There are three problems. First, the key measurements – drug seizures, arrests and annual surveys of drug use – tell us little of importance and mostly distract from more important criteria. Second, the Office of National Drug Control Policies (ONDCP) is statutorily obligated to set objectives for reducing drug use and availability, but not obligated to set objectives for reducing the public health threats associated with drug abuse (overdose fatalities, the spread of HIV/AIDS), or the harms associated with the war on drugs (the number of nonviolent Americans behind bars, racial disparities in the criminal justice system). Finally, drug war programs persist even in the face of overwhelming evidence that they are failing to meet their own stated objectives.

Legislation to set a new bottom line in U.S. drug policy could take many forms. It might take the form of requiring the Office of National Drug Control Policy (ONDCP) to report annually on the impact of federal policies on the number of nonviolent drug offenders in prison, HIV transmission rates, and overdose fatalities, and to commission independent cost-benefit analyses of federal drug policy expenditures. Or requiring federal agencies to provide annual reports on how many people are penalized by federal drug policies, such as the number of people denied student loans, housing, food stamps, and the right to vote because of a drug conviction.

At a minimum, federal agencies should be required to set short- and long-term goals for reducing the problems associated with both drugs and punitive drug policies. ONDCP is already statutorily required to set national goals for reducing drug use and drug availability. Why not also require the agency to set goals for reducing overdose deaths, the spread of HIV/AIDS from injection drug use, racial disparities in the criminal justice system, the number of Americans who cannot vote because of a felony conviction.

The urgent need to overhaul the Edward Byrne Memorial Justice Assistance Grant Program provides Congress with a great opportunity to evaluate drug and crime prevention more broadly.