



Written by [Michael Tennant](#) on August 14, 2013

Holder Plans to Reduce Federal Prosecutions and Drug Sentences

“Too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason,” declared [Attorney General Eric Holder](#) (shown) — and he aims to do something about it, he told the American Bar Association (ABA) Monday.

“Although incarceration has a significant role to play in our justice system,” Holder said, “widespread incarceration at the federal, state, and local levels is both ineffective and unsustainable. It imposes a significant economic burden — totaling \$80 billion in 2010 alone — and it comes with human and moral costs that are impossible to calculate.”



One would be hard-pressed to disagree given the statistics cited by the attorney general. The federal prison population, he said, has grown by nearly 800 percent since 1980, in contrast to population growth of about 33 percent. The United States has just five percent of the world’s population but almost a quarter of its prisoners. There are over 219,000 federal inmates, nearly half of whom are imprisoned for drug-related offenses. Another nine million to 10 million people go through local jails annually. And about 40 percent of former federal prisoners and 60 percent of former state prisoners end up back in the justice system within three years of their release.

To remedy this, Holder announced [new Justice Department policies](#) aimed at reducing the number of federal prosecutions and the severity of the charges brought under them.

First, because “some issues are best handled at the state or local level,” Holder said, he has directed U.S. attorneys “to develop specific, locally-tailored guidelines — consistent with our national priorities — for determining when federal charges should be filed, and when they should not.”

While this may be a worthwhile undertaking, no one should mistake it for genuine federalism. Holder is not proposing that the countless unconstitutional federal criminal statutes be repealed or simply not enforced. Indeed, the fact that he subsequently touts a variety of federal initiatives — such as the Community Oriented Policing Services (COPS) program, which sends federal dollars to local police departments — shows that he is not genuinely concerned with keeping Uncle Sam in his proper place.

Holder’s second major policy change could prove more significant, and it will surely be more controversial.

“As the so-called ‘war on drugs’ enters its fifth decade, we need to ask whether it, and the approaches that comprise it, have been truly effective,” he stated. The implied response, of course, was that the war on drugs has been a failure. That, too, is [hardly debatable](#).

Holder did not, unfortunately, propose doing away with the unconstitutional federal war on drugs. How



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could he when the Obama administration “has waged the war on medical marijuana with more ferocity than even former President George W. Bush” (as *The New American’s* [Alex Newman](#) put it), [warned](#) that federal marijuana laws will be enforced in states that have legalized cannabis, and [criticized other countries](#) for even considering drug decriminalization?

He did, however, suggest “fundamentally rethinking the notion of mandatory minimum sentences for drug-related offenses.” Such laws, he argued, “breed disrespect for the system” by imposing “unfairly long sentences.” Moreover, he said, “they do not serve public safety” and “are ultimately counterproductive.”

To reduce the likelihood of triggering mandatory minimum sentences, Holder said he had ordered a change to Justice Department policies “so that certain low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with offenses that impose draconian mandatory minimum sentences.”

Specifically, reports the [New York Times](#):

Under a policy memorandum being sent to all United States attorney offices on Monday, according to an administration official, prosecutors will be told that they may not write the specific quantity of drugs when drafting indictments for drug defendants who meet the following four criteria: their conduct did not involve violence, the use of a weapon or sales to minors; they are not leaders of a criminal organization; they have no significant ties to large-scale gangs or cartels; and they have no significant criminal history.

In other words, prosecutors are going to withhold some of the facts of the case in order to circumvent the law (although the *Times* points out that “the quantity would still factor in when prosecutors and judges consult sentencing guidelines”).

Holder likened his new policies, which also include “compassionate release” for nonthreatening elderly inmates, to those being tried in several states to reduce both prison populations and recidivism. “Still,” remarked the *Times*, “in states that have undertaken prison and parole overhauls, the changes were approved by state lawmakers. Mr. Holder’s reform is different: instead of going through Congress for legislation to modify mandatory minimum sentencing laws, he is invoking his power of prosecutorial discretion to sidestep them.”

Curiously, in the same speech Holder reminded his audience of the Obama administration’s successful collaboration with Congress to reduce “the unjust 100-to-1 sentencing disparity between crack and powder cocaine.” He also threw his support behind “promising legislation aimed at giving federal judges more discretion in applying mandatory minimums to certain drug offenders.” Why, then, is he choosing to “sidestep” the law rather than following the constitutionally prescribed means of changing it?

The *Times* blames Holder’s questionable approach on “Congress, which the White House sees as bogged down by Republican obstructionism” — that is, a refusal by the opposing party to ask, “How high?” when Obama commands them to jump.

Future of Freedom Foundation president [Jacob Hornberger](#), on the other hand, views the move as simply the latest expression of the imperial presidency. After criticizing the attorney general for “engag[ing] in legal trickery designed to avoid the application of the law” rather than working with Congress to change it, he observed: “In an era in which the executive branch is the law and makes the law, it’s not surprising that Holder would adopt such a policy.”



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Holder's instincts, if not his methods, seem to be moving in the right direction. But considering that it has taken him four-and-a-half years to come to these realizations, his motive for doing so is somewhat suspect, with even the Obama-friendly *Times* noting that the changes "appear to be part of Mr. Holder's effort, before he eventually steps down, to bolster his image and legacy" in the wake of the Fast and Furious scandal and — to put it mildly — "the department's aggressive tactics in leak investigations."

Still, any recognition that, as Holder told the ABA, "we cannot simply prosecute or incarcerate our way to becoming a safer nation," is welcome, as are hints of federalism and a rolling back of the drug war. But the best way to ensure that the federal government prosecutes and imprisons fewer people is not to rely on the benevolence of the attorney general but to repeal the multitudinous unconstitutional federal laws and to shrink the Justice Department — and its budget — down to the minuscule size necessary to enforce the few remaining statutes.

Photo of Attorney General Eric Holder: AP Images



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