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## Where is the Federal Government Going in Criminal Enforcement?

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August, 2009

CRIMINAL JUSTICE

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### *Introduction*

The Obama Administration has not been reticent about announcing changes in policy. In the area of criminal law enforcement, some changes have been direct, some more subtle and others are still emerging. In this month's *Criminal Justice* column, we will look where federal criminal law and practice is headed.

Attorney General Eric Holder addressed the American Bar Association Conference in Chicago in August indicating that the Department of Justice as a whole will be considering several of the things we have been discussing in the column over the last couple of years. Secretary of Homeland Security, Janet Napolitano, addressed the Ninth Circuit Judicial Conference in Monterey in late July, as did George Cardona, Chief Assistant United States Attorney for the Central District of

California. So, listening to what they said and reading between the lines, where are we and where are we going?

### *Where we are*

Over the last couple of years in this column, we have explored some of the problems with the criminal justice system including, overcriminalization, the need for sentencing reform, overcrowded prisons, ineffective fighting of the war on terrorism and drugs and the problems with junk science, including the National Academy of Science's recent report on that subject.

*Overcriminalization:* Federal criminal law has become so diverse and diffuse that practically anyone might be guilty of some federal criminal offense. Ninth Circuit Chief Judge Alex Kozinski authored a chapter entitled, "You're (Probably) a Federal Criminal," published in a book out June of this year. He contends rather convincingly that such ubiquitous allegations as wire and mail fraud and false statements to a federal officer - when applied technically as they often are -- potentially criminalize common business practices and trivial violations and that prosecutions for minor, unintentional regulatory matters and minor drug offenses are over-inclusive.

*Overcrowded Prisons:* The federal prisons currently hold 207,424 inmates. There are 92 federal prison locations around the country, many with more than one facility. In addition the Bureau of Prisons contracts with private prisons in 12 locations. In our own state a three judge panel just ordered the release of 44,000 inmates from the state prisons due to overcrowding. One out of every one hundred adults in this country are currently in federal custody.

*War on Terror/War on Drugs:* These are two "programs" which have taken on lives of their. Neither has been particularly successful but both are draining resources from the criminal justice system. Prevention, rehabilitation and treatment has gone underfunded while the cost of warehousing people, both from an economic and social standpoint, has been underappreciated.

*History of Convicting the Innocent:* 135 people were wrongfully convicted and sentenced to death in this country and over 100 more in non-capital cases only, sometimes years later, to be found innocent. While they were being prosecuted and while they languished in prison, the real killers were still unapprehended. Several of these tragic convictions were based on junk science.

### ***Where we are going***

Attorney General Holder addressed the House of Delegates of the American Bar Association on August 3, 2009, and took on these fundamental issues. While short on specifics to carry out some of the reforms, it was clear that he understood and intended to deal with the underlying problems. He was countering the recent politics in this country of fear and hatred where the easy appeal was to be “tough on crime.”

The Attorney General said that, instead, we have to get “smart on crime,” which requires “. . . talking openly about which policies have worked and which have not. And we have to do so without worrying about being labeled as too soft or too hard on crime. Getting smart on crime means moving beyond useless labels and catch-phrases, and instead relying on science and data to shape policy. And getting smart on crime means thinking about crime in context - not just reacting to the criminal act, but developing the government’s ability to enhance public safety before the crime is committed and after the former offender is returned to society.” This strongly suggests a shift toward crime prevention and, after the fact, rehabilitation rather than warehousing.

Homeland Secretary Napolitano was more nuanced - and more conservative - in her remarks. But she emphasized that the overall goals of her Department would be to be effective without being excessively punitive. Chief AUSA Cardona specifically stated that his office intended to reorganize its priorities. He said that a majority of its resources and that of the FBI had been dedicated to “anti-terrorism” since September 11. He said that they were going to return the focus to “more traditional” criminal prosecutions. He included in that fraud, other white collar matters, environmental and immigration crimes.

Despite the return to traditional prosecutions, Attorney General Holder noted that the prosecution of people for non-violent drug offenses is both costly and non-effective. Holder recognized the benefits of treatment program in actually significantly reducing criminal activity over time while still not giving a drug offender a “free pass.” We all know that, and now our United States Attorney General is willing to announce it as a matter of policy.

He has also endorsed a policy of sentencing reform and a group in his Department has commenced a study. He said, “Specifically, the group is examining the federal sentencing guidelines, the Department’s charging and sentencing advocacy practices, mandatory minimums, crack/powder cocaine sentencing disparities, and racial and ethnic disparities in sentencing. The group is also studying alternatives to incarceration, and strategies that help reduce recidivism when former offenders reenter society.” This kind of systemic reform is long overdue at the federal and state levels to deal with the systemic flaws of a long history of patchwork “tough on crime” legislation.

Attorney General Holder also talked about his efforts to ensure the duty of the United States government and his Department to ensure that indigent defendants have adequate counsel that is adequately supported. In addition to the constitutional burden to do so, he recognized the extreme cost in not doing so, including costly retrials and wrongful convictions. He also acknowledged that the policies and procedures relating to forensic sciences had to be revisited. He acknowledged the NAS report by name, echoed its concerns about flawed “science” in law enforcement and the courts and vowed to work to meet those concerns.

The Attorney General and Chief Deputy United States Attorney Cardona indicated that there would be an increased emphasis on economic and internet crime. The federal prosecutors are going to spend additional time and resources to detect and combat financial offenses on-line. They also indicated an intention to pursue more vigorously some of the more traditional kinds of fraud, including, for instance Medicare fraud and other offenses where the government is the victim.

Attorney General Holder concluded that we have to move the paradigm of law enforcement away from incarceration. He said, “We no longer must choose between more prisoners or more crime: we can reduce our dependence on incarceration and

we can reduce crime rates.” This is not new, we have said it here. Our own Sheriff Bill Brown has said it. But the chief law enforcement officer in the United States has now said it.

### *Conclusion*

The Attorney General, the Homeland Security Secretary and the Chief AUSA for the Central District can make significant policy changes in the way that criminal laws are enforced and punishment imposed. I expect that these leaders will implement changes that are long overdue impacting the fairness of the system, the allocation of enforcement resources and incarceration. I also expect that we will see a shift back to more traditional criminal investigation which may well result in an increase in prosecutions in some areas like financial and on-line crimes.

The long term question, for our state and federal government, is: Will the politicians stop using the politics of fear and hatred to gain election and re-election and to consolidate their power? If they stop or the people stop being scared by them, maybe we can spend money on education of all of our children and prevention, rehabilitation and treatment for those at risk, rather than spending the money to incarcerate, as we do now.