



PRACTICAL LEGACY OF ERIC HOLDER



By W. Kelly Johnson

When Eric Holder announced his resignation as Attorney General in September, commentators began to discuss the legacy of his nearly six-year tenure as the United States' first African American Attorney General.

Among the topics discussed was his decision not to defend the Defense of Marriage Act, his challenges to discriminatory voting restrictions for the 2012 election and the directive to federal prosecutors to be more lenient toward low-level drug offenders. While these achievements may have grabbed headlines, his very pragmatic changes to criminal practice including the requirement that Department of Justice (DOJ) investigators record defendants' statements and the end of the adoption of state initiated forfeitures, may have had a more significant impact on the practice of most federal criminal attorneys.

Holder Announces Requirement of Electronic Recording of Defendants' Statements.

On May 22, 2014, Attorney General Holder announced a new policy requiring that statements made by individuals in custody of DOJ investigations be electronically recorded.¹ This announcement ended the long-time policy of the DOJ in which statements made by criminal defendants were not electronically recorded. Beginning on July 11, 2014, the new policy establishes a presumption that the FBI, Drug Enforcement Administration (DEA), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and the United States Marshal Service electronically

record all statements by persons in federal custody made prior to their initial appearance in court. The policy also required that the electronic recording equipment "must capture the entirety of the interview."

In announcing the policy, Attorney General Holder cited public confidence and transparency as the basis for recording. Holder stated that:

"creating an electronic record will ensure that we have an objective account of key investigations and interactions with people who are held in federal custody. It will allow us to document that detained individuals are afforded their constitutionally-protected rights."

It will also provide law enforcement with a "backstop," so that they have clear and indisputable records of important statements and confessions made by individuals who have been detained.

The new policy requiring recording of detained individuals' statements replaces an antiquated, and much maligned policy, in which DOJ investigators relied upon written notes of interviews, as opposed to electronic recordings. Many state and local investigators have for years recorded such statements. The new policy allows a criminal defendant to speak through his own words, and not through the filter of the agent.

New Policy Prohibits Federal Adoption of Assets Seized by State and Local Law Enforcement Agencies.

On January 16, 2015, Attorney General Holder, in conjunction with a companion policy change by the United States Department of Treasury, issued an order prohibiting DOJ agencies from adopting forfeiture of assets seized by state and local law enforcement agencies.² The new policy, which was effective immediately, prohibits the adoption of the forfeitures except when the property is directly related to public safety concerns, involving firearms, ammunition, explosives and property associated with child pornography. The prohibition on DOJ adoption included seizures of vehicles, valuables, cash and other monetary instruments.

The DOJ began the policy of adopting seizures in the 1980's. At the time that these policies were adopted, few states had forfeiture statutes allowing the seizure of property involved in crime. Consequently, when state and local law enforcement agencies seized criminal proceeds and property used to commit crimes, they often lacked the authority to forfeit the seized items.

In the DOJ announcement, Holder reported that now every state either has civil or criminal forfeiture laws which allow them to seize and forfeit property associated with a crime. The state forfeiture laws make federal adoption less necessary. Holder said that since 2010, adoption of state forfeitures accounted for approximately 3% of the value of assets in the Department of Justice Asset Forfeiture Program. The new policy applies only to adoptions and not to seizures resulting from joint operations involving both federal and state authorities or to seizures pursuant to warrants issued by federal courts.

The policy of adopting state seizures for federal forfeiture action has come under increasing attack in the past ten years. News outlets, ranging from the New York Times to the John Oliver Show, have characterized the seizure of assets as a "money grab." Pursuant to the DOJ policy, a significant portion of the value

of the adopted seized property is awarded to local law enforcement agencies, who utilize the seized funds for a variety of purposes, including purchasing helicopters and armored personnel carriers, outfitting musical bands or funding special projects for local law enforcement.

Conclusion.

The lasting legacy of Attorney General Holder is unknown at this time. The very practical changes that he made, by requiring agents to record statements made by detained persons, and eliminating the adoption of state and local seizure of assets, has increased transparency and eliminated two policies that could not be justified in 2015.

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- 1 DOJ Press Release, May 22, 2014 Link <http://www.justice.gov/opa/pr/attorney-general-holder-announces-significant-policy-shift-concerning-electronic-recording>
- 2 DOJ Press Release, January 16, 2015 Link <http://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law>