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PERSPECTVE

New DOJ recording policy a small step

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Last week, Attorney General Eric Holder announced a new set of guidelines for the Department of Justice, creating "a presumption that interviews of federally detained persons will be electronically recorded." While this is a welcome, small step in the right direction, the new policy begs the question of just how far it actually goes to protect an accused's rights. The answer leaves much to be desired.

Prior to the announcement of this policy shift, the DOJ has long advocated — for decades — against electronically recording interviews in any way, stating that doing so would undermine agents' rapport-building interview techniques, discourage detainees from talking, and cause laymen jurors to have unfavorable impressions of agents in light of interrogation techniques they may use.

Instead, the standard federal practice has been to conduct interviews of detained persons with two federal agents, one asking the questions, the other handwriting down the substance of the conversation. A typed-up report summarizing those notes, often made days or even weeks later, then became the official report. That official report was then used to influence criminal charging decisions, plea offers made to defendants, and the ultimate sentences meted out.

Criticisms of this archaic anti-recording practice, particularly in comparison to the benefits of electronic recording, have been voiced by civil rights groups, the defense bar and even U.S. attorneys. This federal practice has stood in stark contrast to many states' policies, where mandatory electronic recording of law enforcement interviews has increasingly become the norm, including in Illinois, New Jersey, Oregon and North Carolina, among others.

The reason for this pro-recording norm is simple. Video recording, or at a minimum audio recording, creates greater transparency and provides a clear record of what occurred and was said during an interview. Video recording captures the questions asked as well as the answers given. It conveys the tone of the question (e.g., whether the questioner screamed or politely asked the question); the sequence and wording of questions (e.g., whether the defendant had to be asked the question multiple times or answered it immediately the first time); and the bodily reactions to the question (e.g., whether the defendant displayed signs of evasion or truthfulness). Too often, federal agents' "official report" would make it seem like a defendant volunteered an entire answer when the actual response to a long, leading question was "yeah, maybe" or a shrug of the shoulders. Where written reports may result in factual inaccuracy or disagreements between the defendant and the agent over what was said, a video, or even audio, record provides an objective, accurate account that is beyond dispute.

> Why not establish a 'presumption' of electronic recording in all interviews between federal law enforcement and citizens?

In announcing the new policy, Holder noted the many benefits of creating an electronic record of interviews, including increased accuracy and greater safeguards for the protection of constitutional rights. Holder also acknowledged that the use of electronic recording would not hinder law enforcement in any way, nor would it impair national security efforts. Indeed, a more accurate record of what was said promotes justice and helps protect federal agents from accusations that they have lied or misstated the contents of the interview.

In light of such pronouncements, one might expect a vibrant, sweeping policy, guaranteeing a right to electronic recording for all citizens in all of their interactions with federal law enforcement, both in and out of detention. That is, unfortunately, not the case.

In a memorandum titled, "Policy Concerning Electronic Recording of Statements," the new DOJ policy is laid out in greater detail. As an initial matter, the policy goes out of its way to make clear that it is not meant to, nor does it, establish any rights for a detained person. Although there is a "presumption" of recording, the DOJ wants to make sure that no one can do anything about it if no recording actually occurs. Even the word "presumption" immediately makes clear that this policy is not a requirement.

The policy creates a very limited "presumption" that only certain federal law enforcement interviews of individuals in custody in a "place of detention," will be recorded. Additionally, the DOJ policy does not apply as a blanket one to all federal law enforcement entities outside of the DOJ. Noticeably absent from the list are the Internal Revenue Service and the U.S. Secret Service (both part of the Department of the Treasury) and Immigration and Customs Enforcement (part of the Department of Homeland Security) — none of which have joined the DOJ's new policy.

Of course, even this limited "presumption" is rife with exceptions. For instance, no "presumption" occurs (1) when the interviewee agrees to not be recorded; (2) when the purpose of the interview is to obtain public safety or national security information; (3) where recording is not "reasonably practicable"; and (4) where "suitable recording equipment" is not available. Finally, there is also a "residual exception" to the "presumption" that can be invoked when the special agent in charge and U.S. attorney agree that a "significant and articulable law enforcement purpose" requires it.

The shortcomings in this policy shift are manifest. The bulk of interviews conducted by federal agents do not occur in "places of detention" but happen outside such detention facilities during the investigations conducted by the agents. These interviews are not just of the defendants but of witnesses and subjects of the investigation — all of which will form the evidence to be used against the defendant. The places of these interviews can be at one's home before going to work in the morning, at one's business place during the work day, at a Starbucks, or at the agents' office. If Holder's own admission is correct that electronic recordings provide a more accurate record that helps to curb law enforcement abuse of constitutional rights, then why set up an artificial divide between interviews conducted outside of detention facilities and those taken inside? Does the agents' handwritten note-taking during a noncustodial interview somehow become more accurate and then magically becomes untrustworthy once the cell door closes?

Given the benefits of electronic recording and the prevalence of recording technology, like any smartphone, available to federal agents, why not establish a "presumption" of electronic recording in all interviews between federal law enforcement and citizens?

The new policy also creates a perverse incentive by excepting from the "presumption" situations where the interviewee agrees not to be recorded. This exception encourages law enforcement to lean on an interviewee to agree not to be recorded since such agreement will not be required under the new policy to be electronically recorded itself. The ability to do this is made all the easier by the fact that the "presumption" does not kick in until the interviewee is in an interrogation room. From the time an individual is arrested to the time they are put in such a room, any number of conversations can take place, none of which fall under the recording "presumption." Even if no untoward law enforcement actions occur, statements made in that interim period could be misremembered or taken down in handwriting inaccurately; problems that could easily be solved if the presumption was to electronically record in all instances, not just in custodial ones.

For the little benefit this policy does provide, the exceptions swallow the rule. When exceptions exist for national security, undefined circumstances causing recording to not be "reasonably practicable," and any other excuse intrepid agents and attorneys can come up with, there seems to be little actual reason to electronically record when the government does not want to. Which is exactly when the need to record is greatest.

While this policy is one small step in the right direction, its limited scope and numerous exceptions make clear that one giant leap forward is still needed to protect the rights of those targeted and detained by the federal government.

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