

What's Behind California's Hiring Eric Holder?

By Richard Schulman

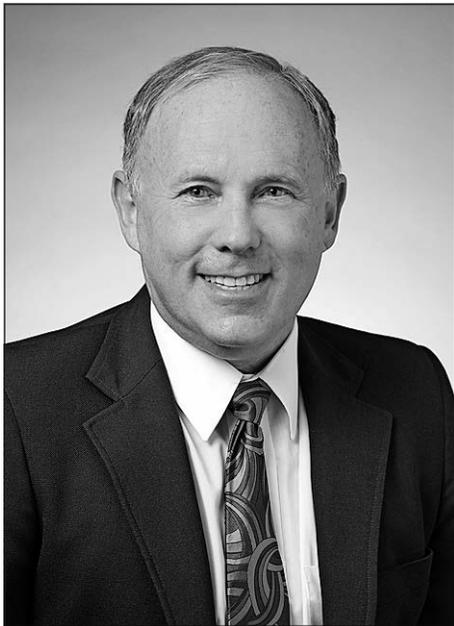
The Legislature's recent hiring of Eric Holder to advise it on dealing with Donald Trump's incoming presidential administration has been the subject of a great deal of commentary. On the whole, the commentary has focused on secondary issues. The real issue is that Holder was retained to help the state evade federal law.

The U.S. Constitution recognizes the independent sovereignty of the states. Article IV is about states. States elect senators, and the Tenth Amendment reserves to states the rights not expressly taken by the federal constitution.

The boundary between a federal issue and a state issue has always been a bit fuzzy. Although "state's rights" may be best known as the battle cry of a defeated, racist South, in fact states historically have claimed the right to nullify all sorts of federal legislation, such as tariffs.

Nonetheless, there are subjects over which the U.S. Constitution clearly gives the federal government complete control, such as immigration.

Sometimes California's Legislature will take advantage of explicit permission in federal law to take a different approach. For example, federal law prohibits providing benefits to those not in the country legally, but allows a state to grant those benefits by explicit rule. Thus, the



RICHARD SCHULMAN

California Legislature more-or-less expressly allows the undocumented to pay in-state-resident tuition at state colleges and universities.

More often, though, California depends on creative legal strategies in court. I practice mostly land use (zoning, environmental impacts reports) law, so I'll focus on examples from that field. Given California's weighty regulatory system, land use is unusually useful for demonstrating how this works, but I've seen these strategies in other contexts as well.

Both the U.S. and California Constitutions prohibit government from taking private property without compensation. (The "taking" is not what's prohibited. It's just that the taking has to be accompanied by compensation.) Here are some of the legal developments in the field over the last (roughly) thirty years:

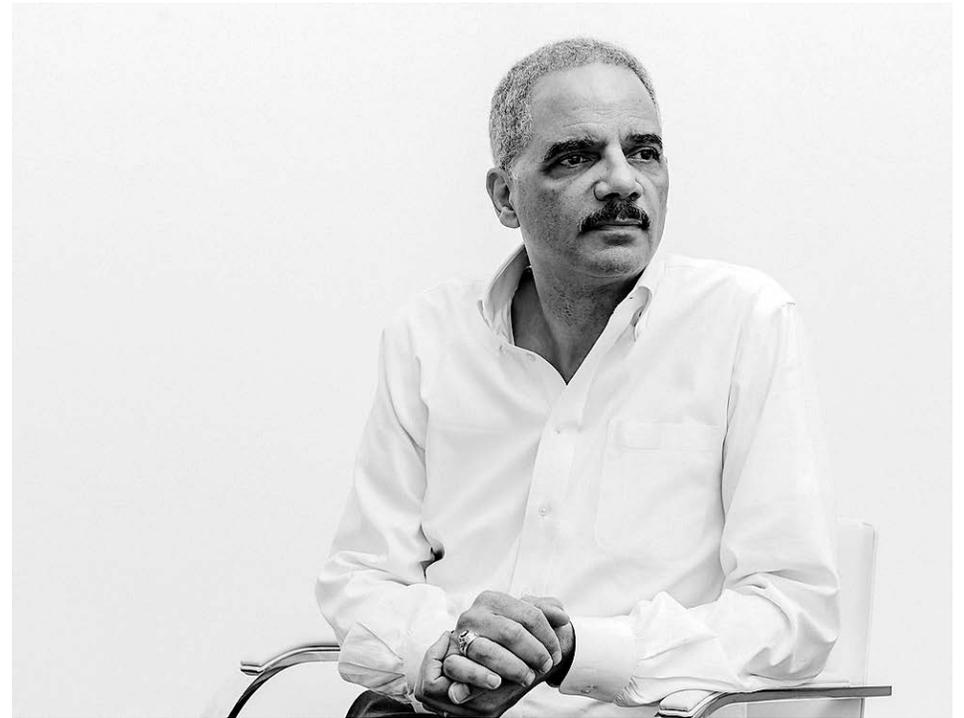
- California's judges said that there was no such thing as a "temporary" taking. The U.S. Supreme Court overruled that. In the same case (sometimes called "First Church") in which they had been overruled, California's judges then found there had been no taking because the regulatory action was a sound police power move.

- The state's judges now require that property owners challenge the government's action in a special type of lawsuit before they may claim that a taking occurred. It is an interesting, in the law school phrase, trap for the unwary. The statute that defines this type of lawsuit sets a very short (90-day) deadline to sue and does not mention a constitutional taking/compensation issue. (Ironically in light of their earlier position, courts justify this as giving an agency the right to turn the taking into a temporary one.)

- Another U.S. Supreme Court decision noted that reasonable processing delays were not a temporary taking. The state Supreme Court exploited that loophole to hold that two years lost to interference by a state agency that did not even have jurisdiction was a reasonable processing delay.

- California used to allow government to impose a condition on development whenever the agency had what people called a "hook," i.e., a discretionary governmental review. The U.S. Supreme Court overruled that, requiring that the development cause a problem that the condition would mitigate.

- The state's Supreme Court then characterized a requirement imposed on developers



Jared Soares/The New York Times

California has hired former U.S. Attorney General Eric Holder as a legal bulwark against the Trump administration.

– and only on new developments – as an economic regulation, rather than as a development condition.

California's system of resistance and subversion works well because of the slow and often-discretionary way judges deal with cases. It can take years, or decades, for cases to be resolved, during which time the state gets its way. Also, supreme courts do not have to take every case that comes their way, and the U.S. Supreme Court has other things to do with its time than overrule California land use decisions.

So why did the Legislature hire Eric Holder? To help it come up with strategies and arguments to evade federal law. If President Trump and the Republican Congress, say, withhold grants from cities that refuse to cooperate with federal immigration agents, Holder may help think of a theory to justify the cities' refusal, or at least to tie it up in court for years. If President Trump's appointees to the Federal Energy Regulatory Commission, say, issue a regulation directing electricity supplies away from states that obstruct the construction of new power plants or refineries, Holder may be able to come with a theory to preserve California's obstructions.

Most of the commentary about Holder has been the usual partisan nonsense, but regardless of which political party one prefers, or what Holder did or did not have to do with Mexican gun sales, isn't the issue. Laws governing immigration and energy will change because neither party will hold the White House or Congress forever. The bigger problem in the long run is a corollary of why the Legislature hired Holder. The "rule of law" does not mean that no one fights or argues. By that standard, Mao's China and Stalin's Soviet Union operated under the rule of law even though their internal peace was a result of fear. No, the "rule of law" means that there are laws that all can see and that our government representatives – police, judges, legislators, DMV clerks – honor and enforce consistently. There is something sad about a state whose government keeps trying to figure out how to evade federal law.

Richard Schulman is an attorney with Hecht Solberg Robinson Goldberg & Bagley LLP (HechtSolberg) in San Diego, specializing in land use and municipal law. His views and opinions expressed in this commentary are not official views or opinions of the firm.

Small business owners subscribe to The Daily Transcript.

YOU SHOULD TOO.

News you can use

- Latest in real estate, development and construction
- Analysis by industry leaders
- Corporate profiles
- Foreclosure listings
- Grant deed listings
- Public notices

The Daily Transcript

Subscribe Today!

CALL (866) 531-1492