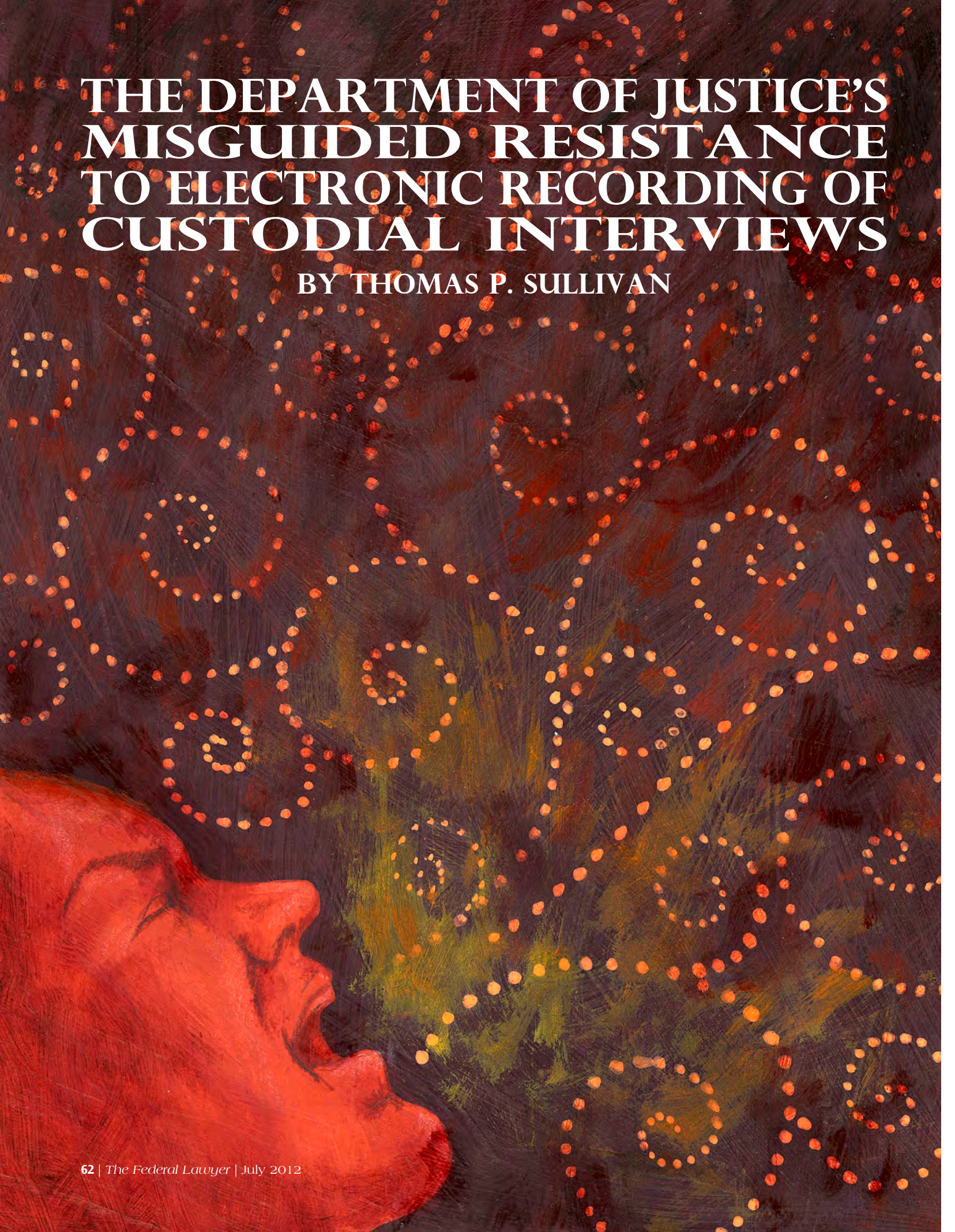
THE DEPARTMENT OF JUSTICE'S MISGUIDED RESISTANCE TO ELECTRONIC RECORDING OF CUSTODIAL INTERVIEWS

BY THOMAS P. SULLIVAN



"… I am deeply disturbed that the FBI continues its incomprehensible policy of not recording interviews. … It makes no sense. It gives the Bureau unfair advantage. … You have an undercover operation, you wire the informant for every single drug transaction. Why do you do it? Best possible record. … But you get in an interrogation room with nobody else except a 20 year old defendant and … your Bureau sees fit at that moment, the most crucial moment of any investigation, not to record what he says and what you say … that's shameful. It's intolerable in a society under any government that values the rights of its citizens to a fair trial. … It's not playing fair. I expect more from our government law enforcement agents. … Shame on the Bureau, and tell them I said so. Tell them they can do better."

—District Judge James G. Carr, Northern District of Ohio[1]

Introduction

The three chief investigative agencies of the Department of Justice (DOJ)—the Federal Bureau of Investigation (FBI); the Drug Enforcement Administration (DEA); and the Bureau of Alcohol, Firearms, Tobacco, and Explosives (ATF)—rarely make electronic recordings to memorialize custodial interviews of suspects in felony investigations. Instead, the DOJ refuses to lay aside its outmoded method of making handwritten notes, later reduced to typewritten reports.[2] In light of modern technology, which these agencies use on a daily basis in other important respects, why do they not make exact, unimpeachable electronic recordings when their agents interview suspects in detention centers? Why persist in a method that is obviously not as accurate and complete as an electronic record, which distracts agents from suspects' reactions and diminishes the agents' ability to concentrate on the interviews? Let's look at the facts.

The Experiences of State Legislatures, Local Police, and Sheriffs' Departments

For the past eight years, my associates and I have spoken with and received written survey forms from more than 1,000 state and local detectives and their supervisors–from large, medium, and small departments located in every state—who make it a practice to make audio or audiovisual recordings of their interviews of felony suspects. We have identified more than 500 police and sheriffs' departments that record custodial interviews in various felony investigations pursuant to state statutes or rulings by the state supreme courts, as well as more than 500 departments that do so on a voluntary basis.[3] I believe there are thousands more.

We have yet to encounter one law enforcement officer who desires to return to nonrecorded interviews. Law enforcement officers describe the many benefits that result from recordings, compared to taking notes and later preparing typewritten reports. Moreover, other federal investigative agencies have adopted the practice of recording custodial interviews of felony suspects, and it has been endorsed by the Federal Commission on Military Justice, the National District Attorneys Association, and the International Association of Chiefs of Police.

There are many reasons why recording of full custodial interviews has received such strong support, including the following:

- Agencies can save time and money, because pretrial motions to suppress custodial statements diminish and guilty pleas increase when defendants are faced with unassailable recordings of confessions or false exculpatory statements.
- Police and prosecutors no longer have to prepare and present testimony at pretrial hearings and trials as to what occurred.
- Post-trial challenges to convictions and civil damage litigation are diminished.
- Recordings have proven to be excellent tools for self-evaluation and training of detectives.

The benefits of recording custodial interviews also extend to suspects, who are assured of receiving *Miranda* warnings and are protected from improper police behavior during post-*Miranda* questioning. The judiciary is assisted as well, because trial judges are not called upon to listen to disputed testimony and make credibility decisions as to what occurred behind closed doors, and reviewing court judges do not need to read transcripts of contradictory testimony. Perhaps of primary importance, the practice greatly enhances accuracy in the pursuit of justice and public confidence in our law enforcement agencies and legal systems.

Thus, during the past decade, the law enforcement, defense communities, and courts have become fully aware of the benefits to all concerned that are achieved from recording custodial interrogations from the *Miranda* warnings to the end.

State Statutes and Court Rulings Requiring Recording of Custodial Interrogations

During the past decade, members of state legislatures throughout the country have also come to recognize the value of recording custodial interviews. Statutes in 11 states and the District of Columbia, as well as rulings by four state supreme courts, currently mandate electronic recording of custodial interrogations from the time the *Miranda* warning is issued to the end of the interrogation. The statutes and rulings vary as to the crimes under investigation that trigger recording requirements, circumstances that excuse recordings, consequences for unexcused failures to record interrogations, and related matters. The following states require recording of custodial interviews, and only two of them had the requirement in place prior to 2003:

Statutes:

State	Date Passed
Illinois	2003
Wisconsin	2005
Maine	2006
New Mexico	2006
District of Columbia	2006
Maryland	2008
Nebraska	2008
Missouri	2009
Montana	2009
Oregon	2010
Connecticut	2011
North Carolina	2011

State Supreme Court rules and rulings:

State	Date of Ruling
Alaska	1985
Minnesota	1994
New Jersey	2005
Indiana	2009

Other states are considering mandatory recording:

- Arkansas, Florida, New York, North Dakota, Pennsylvania, Rhode Island, and Vermont: Committees appointed by the legislatures or Supreme Courts have made (in the case of Florida, will soon make) recommendations concerning electronic recording of custodial interrogations.
- Michigan and South Carolina: Bills are pending before the legislatures patterned on the uniform act related to electronic recording that was drafted by the National Conference of Commissioners on Uniform Statute State Laws, which offers a well-balanced statute designed for passage in every state.
- Iowa, Massachusetts, New York, and Utah: Statewide directives—variously called recommendations, guidelines, or best practices—urge law enforcement officers to record custodial interrogations of felony suspects. Although these are steps in the right direction, they are exhortations; they lack the force of law, contain no methods for requiring or verifying compliance, and provide no consequences for unexcused noncompliance. The January 2012 report of the New York State Justice Task Force—appointed by the chief judge of the state—explains why legislation is necessary to insure compliance: "[T]he Task Force ultimately determined that electronic recording of custodial interrogations was simply too critical to recommend as a voluntary, rather than mandatory, reform. The Task Force therefore chose to recommend legislation … ."

Thus, more than half the states in the country have adopted or are considering adopting some form of statewide requirement that custodial interrogations of suspects in felony investigations be electronically recorded. Other states are likely to follow suit, especially in light of the action taken by the prestigious Conference of Uniformed Law Commissioners.

- Texas, New Hampshire, and Ohio: Texas' state statute is not included in this discussion because of its unique provisions and judicial interpretations.[4] A ruling by the New Hampshire Supreme Court[5] and an Ohio statute[6] deal with recording custodial interrogations but are not included, because they lack any meaningful requirements that custodial interrogations be recorded.

Judicial Criticism of Federal Agencies' Refusal to Record Custodial Interrogations

For more than 15 years, federal judges have been upbraiding the federal investigative agencies—principally those in the Department of Justice—for not making electronic recordings of their custodial interrogations. Judge Carr's comment, quoted in part above, is the most recent example that has come to my attention. There are many more, and they appear below in chronological order.[7]

"This is another all too familiar case in which the F.B.I. agent testifies to one version of what was said and when it was said and the defendant testifies to an opposite version or versions. Despite numerous polite suggestions to the F.B.I., they continue to refuse to tape record or video tape interviews. This results, as it has in this case, in the use, or more correctly, the abuse of judicial time, both from the U.S. Magistrate Judge and from the U.S. District Court, which should not occur. … All jails in larger towns and cities in South Dakota video tape people arrested and brought to the jail. There is no good reason why F.B.I. agents should not follow the same careful practices unless the interview is being conducted under circumstances where it is impossible to tape or record the interview. These disputes and motions to suppress would rarely arise, given careful practices by F.B.I. agents. The present practice of the F.B.I. enables the agent to take notes and then type a Form 302, a summary of the interview, written entirely by the agent. The agent chooses, in some cases, the proper adjectives. The F.B.I. agent knows in advance of his or her plans to interview a criminal suspect and thus has full opportunity to prepare for the interview. The prosecutor then questions the defendant at trial by showing the defendant a copy of the 302, a document that is unsigned by the defendant and not written by the defendant. The prosecutor then attempts to show that the 302 is equivalent to a statement given by the defendant. It is not equivalent, of course. Both Chief Judge Piersol and this Court have repeatedly expressed our displeasure with F.B.I. tactics as to not taping or otherwise recording statements. Chief Judge Piersol has even spoken with F.B.I. Director Freeh about the problem and the Director was unaware of any such F.B.I. 'policy'. … Tapes cost very little, given all the money spent on law enforcement activities by the federal government. In addition, justice requires the practice whenever possible and cost should not determine the measure of justice and fair treatment of all persons accused of a crime."

—District Judge Charles B. Kornmann, District of South Dakota, 1999[8]

"This writer feels there is little doubt that accurate, contemporaneous recording of custodial statements would facilitate the truth-seeking aims of the justice system, and it would also facilitate review on appeal. Given the inexpensive means readily available for making written, audio, and video recordings, the failure to use such devices may raise some interesting issues."

—Chief Judge Juan J. Torruella, Court of Appeals, Sixth Circuit, 2000[9]

"This motion to suppress reminds the court of one of Akira Kurosawa's classic films, *Rashomon*, where the director takes an apparently simply story and complicates

it by filtering it through the perceptions of four different witnesses … [and the defendant's as to] the events surrounding the defendant's being informed of his [*Miranda*] rights. ... Resolution of this factual conflict, indeed the entirety of the motion to suppress, would be unnecessary if the officers had videotaped or otherwise recorded their interaction with the defendant. … Their failure to videotape the events surrounding the interrogation of the defendant was done pursuant to an edict of the United States Drug Enforcement Agency which proscribes its officers from recording the questioning of suspects.

* * *

"The continued failure of federal law enforcement agencies to adopt a policy of videotaping or otherwise recording interviews leads invariably to the proliferation of motions such as the one currently pending before the court. …

* * *

Footnote 2: "As explained by Officer Cheshier, the DEA believes that because not all questioning that occurs in the field can be recorded or videotaped then no interrogations should be videotaped. This explanation is at least suspicious and at worst ludicrous. … There is simply no good reason why DEA agents could not make audio or video recordings of virtually all interrogations that occur. … Indeed, Officer Fellin actually used the audio video monitor in the interview room here to watch portions of the interrogation but simply elected not to use it to record the interrogation. Thus, left with no rational explanation for the DEA's policy against videotaping or recording of interrogations, the court is left with the inescapable conclusion that DEA's offered reason for not videotaping or recording statements is totally pretextual."

—Chief District Judge Mark W. Bennett, Northern District of Iowa, 2000[10]

"The Court notes that neither the interrogation nor confession were audio or video taped. While electronic recording is not a constitutional requirement, there is a 'heavy burden' on the government to show a suspect's waiver of rights was knowing and intelligent. [Citing *Miranda*.] To that end, several jurisdictions in the United States have instituted mandatory taping of confessions, waivers of *Miranda* rights, and interrogations … while many more tape voluntarily. It certainly harms the prosecution in a close case when the court cannot evaluate the actual confession. The Court recommends that the DEA electronically record future interrogations and confessions so a reviewing court can fully evaluate whether a confession violates Fifth or Fourteenth Amendment."

—District Judge Arthur J. Tarnow, Eastern District of Michigan, 2001[11] (ruling that a confession was involuntary and must be suppressed)

"I came to the bench three years ago after 29 years in civil practice. I find it ironic that if the cost of repairing a car is at stake in a civil case, the defendant's account of the matter (i.e., his deposition) is meticulously recorded, but agencies with ample opportunity and resources to do so fail to record statements where liberty or perhaps even life is at stake."

—District Judge S. P. Friot, Western District of Oklahoma, 2004[12]

"While video equipment and audio cassette equipment was available at the DEA headquarters, as a matter of policy interviews such as those which occurred on June 5, 2003 are not recorded.

* * *

"The notion of recording interrogations is not new, nor is it uncommon. Indeed, less than a decade after *Miranda* the American Law Institute proposed recording of interrogations as a way to eliminate disputes over statements made during interrogations. [Citation.]

* * *

"... Additionally, the American Bar Association unanimously accepted a resolution in early 2004 that urges law enforcement agencies across the country to videotape interrogations. [Citation.] On a global scale, Great Britain, Canada, and Australia all require either audio or video recordings of interrogations. [Citation.] ...

"Affording the Court the benefit of watching or listening to a videotaped or audiotaped statement is invaluable; indeed, a tape-recorded interrogation allows the Court to more accurately assess whether a statement was given knowingly, voluntarily, and intelligently. One legal commentator has noted that 'some of the most detailed assessments of voluntariness have come in cases of recorded interrogations, which permit judges to parse implicit promises and threats made to obtain an admission.' [Citation.] 'Taping is thus the only means of eliminating "swearing contests" about what went on in the interrogation room.'"

—District Judge Avern Cohn, Eastern District of Michigan, 2005[13]

"Courts and commentators have consistently struggled to understand the resistance of some in law enforcement to certain practices that offer the possibility of increasing the reliability of evidence in criminal cases. [Citations.]

* * *

"Where simple and efficient reforms of the investigative and information-gathering stages offer the possibility of increasing the accuracy of criminal convictions, law enforcement agencies should move swiftly toward their implementation. Failure to take action effectively pits these agencies against the truth-seeking process, imperils an already vulnerable criminal justice system and will be met with corrective action by this Court."

—District Judge William E. Smith, District of Rhode Island, 2007[14] (Even though Judge Smith was dealing with local officers, in ruling on the defendant's motion to suppress he sent a message to federal, state, and local law enforcement personnel.)

"Over the last several years, since the *Mason* case, I have begun to use a jury instruction that essentially tells the jury that statements from law enforcement officers regarding defendant's statements, which are not recorded

when recording equipment is available, must be viewed with particular caution. ... I have let it be known that in due course I am going to move to a stronger instruction which includes that language that agencies have refused to adopt a policy of recording in spite of strong encouragement by the court to do so. ... I continue to believe that federal trial judges will have an important role in influencing the DOJ and the agencies to move in the right direction on this issue."

—District Judge William E. Smith, District of Rhode Island, 2009[15]

Judge Carr: "Twice in my career I'm faced with the fact that had the Bureau recorded the conversation, we wouldn't be here. ... I find it a shabby and unjustified practice. Recording is ubiquitous."

Assistant U.S. Attorney: "You're preaching to the choir. But, that having been said, this is a procedural thing that the government—when I say "the government," I mean my office has no control over [it]."

Judge Carr: "I understand that. Somebody has to tell the Bureau, enough is enough. This kid is looking at 15 years, if I understand correctly. A 20 year old eagle scout. ... I'm sitting here listening to that kid and wondering, you know, maybe he's telling the truth. Implausible as it seems. … It's not necessary for us and the jurors and everybody else to take the time and money when the Bureau, as far as I'm concerned, has absolutely no reason not to do it. It gives the Bureau an edge. These guys come in here with their badge, their experience, their professional demeanor in testifying, and it's impossible not to believe them."

Assistant U.S. Attorney: "So you're doing this in order to get them to change their policies?"

Judge Carr: "No, I'm doing it because it's fundamentally unfair. It is fundamentally unfair. They do it deliberately because they know it gives them an edge. And that's not right. It's not the way the government should function. It recorded … hundreds of hours of ... the plant in the terrorism case. Hundreds of hours. Peep hole cameras, gym bags; they can do it. There's no excuse not to. Highway patrol does it. I'd be willing to bet every major police department in this state does it. There's no excuse.

"This is 15 years of the kid's life. He may deserve it. ... And we could know one way or another what the truth was about what happened in that closed interrogation room. I don't like thinking that an FBI agent might lie, but there's a sure and certain way I would know whether that's true or not. This case wouldn't be here [if] they had a recording; [the defense lawyer] would have pled, or you wouldn't have indicted.

* * *

"... And we all know and the last five years have shown us there are plenty of false confessions. People who are totally innocent. Has it happened in this case? Who knows. That's for the jury to decide. But I am sick and tired of the Bureau coming in here and taking that edge. It's a violation of fundamental due process as far as I'm concerned.

* * *

"... I paused for a moment and said, you may step down. At that moment I thought about saying, well, agent, you didn't record it, did you? No. Why not? Bureau policy. Does the Lima P D record? Does the Allen County sheriff? Do you know whether the Toledo police department records? The Ohio state patrol when they have a traffic stop?

* * *

"... I am deeply disturbed that the FBI continues its incomprehensible policy of not recording interviews. We spent this week for one reason and one reason only in this case, because the Bureau does not record interviews. Shame on the Bureau. It makes no sense. It gives the Bureau an unfair advantage. You come in here in your coat and tie and say I'm from the FBI and I do not lie, and everybody believes it. You already come in with an overwhelming advantage because of the Bureau you work for and the esteem and respect in which we all hold it, myself included. I've worked with your agents for more than 30 years. And quite candidly, rarely, if ever, have I had a question about their veracity. But it enhances the advantage you already have and the government already has not to record interviews. … You have an undercover operation, you wire the informant for every single drug transaction. Why do you do it? Best possible record. That's why. But you get in an interrogation room with nobody else except a 20 year old defendant, and your Bureau sees fit at that moment, the most crucial moment of any investigation, not to record what he says and what you say … And that's shameful. It's intolerable in any society under any government that values the rights of its citizens to a fair trial. … But quite simply, somebody has to tell the Bureau, there's at least one federal judge in whose estimation the FBI diminishes when it comes in the courtroom and it says, we didn't record the statement. I was tempted to ask the simple question, what would have been the indisputable proof of what was said in that room? And you would have had to answer, a recording. I was that close to doing it. But I decided not to put my thumb on the scales. I'm not so sure next time it happens I will be quite so discreet. This young man is looking at 15 years in prison if he gets convicted. If he did what he [is charged with] he deserves to go to prison. But he also deserves the fairest possible trial our government can give him. And every time the FBI does not show up with a recording device, it cheats that suspect and ultimately that defendant. It's not playing fair. I expect more from our government law enforcement agents. You send in undercover agents, peephole cameras, you wire rooms, you record by law every conversation that's heard on a Title III. But it comes to the occasion when most cases are determined, namely when you sit down in a closed interview room with a suspect. That is the most crucial moment of almost every case in an investigation, the one-on-one interrogation. And you take advantage of that by not recording it. Shame on

the Bureau, and tell them I said so. Tell them they can do better. We deserve better.

* * *

"... I will not tolerate the fundamental unfairness of what the FBI does day in and day out, trial in and trial out, interrogation in and interrogation and interrogation after another. It is unpardonable. In this courtroom in front of this judge it is unacceptable. And it will not happen again, or if it does I will give a strongly worded instruction. I will exercise my right to question the agent. And I will also exercise my right to comment on the evidence. Enough said."

—District Judge James G. Carr, Northern District of Ohio, 2011[16]

DOJ's Perplexing Resistance to Recording Custodial Interviews

Federal agents and prosecutors are very well aware of the value of electronic recordings to perpetuate what was said and done, as several federal judges have observed in the quotations set forth above. I trust that their very emphatic remarks have been brought to the attention of the top levels of the Department of Justice and the three agencies whose policies have been so severely criticized.[17]

Perhaps those in the DOJ hierarchy have not changed its long-standing policy for two reasons: either they believe it unnecessary, because judges and juries continue to accept agents' testimony at face value without recordings, or they prefer to permit agents to engage in practices they do not want revealed by recordings. But for an agency entitled Department of Justice, whose mission is to do justice, not just convict individuals accused of crimes, these would be unworthy motives. There may be a principled reason for the department's opposition to recording custodial interrogations, but it does not occur to me after giving years of thought to the issue. Nor, apparently, has it occurred to the federal judges quoted above or to the many federal prosecutors who prefer that all federal investigative agencies make recordings of complete custodial interviews.

The best evidence of the DOJ's acknowledgment of the superiority of recordings is its agents' frequent use of recordings in many aspects of the agencies' most significant investigations. When seeking to obtain evidence during investigations, DOJ agents make extensive use of secreted recording devices in telephones, automobiles, offices, and homes of suspected criminals as well as recording devices hidden on cooperating individuals. DOJ agents use sophisticated machinery to record through walls, across streets, and from the air. The results have become the centerpieces of numerous highly publicized federal prosecutions, usually leading to convictions through guilty pleas.

An FBI agent wrote the following about recording custodial interviews in an article that he co-authored that was published in an official FBI publication six years ago:[18]

> Testimony regarding what transpired inside the interrogation room can become tainted if only the participants witnessed what occurred. Conflicting statements by the police and defendant regarding the presentation and waiver of *Miranda* warnings, requests for an attorney, the use of coercive tactics, and the mere presence of a confession expose the spectrum of issues that can arise. ...
>
> * * *
>
> Many law enforcement agencies and courts have recognized and accepted electronic recording as a just and viable manner to collect and preserve confession evidence, the single most valuable tool in securing a conviction in a criminal case. …
>
> * * *
>
> … As the most accurate and efficient method of collecting and preserving confession evidence, the benefits of recording to the criminal justice system and community are unequivocal.

The value of electronic recordings has been widely written about in federal law enforcement journals. The equipment is showcased at law enforcement trade shows and lauded in official publications. But in this one area alone, where the use of the devices is simple because the conversations occur in detention facilities—with no one present other than the suspects and the agents—no recordings are made! The department's rationale for not recording the interviews appears to be lacking in principle as Judge Carr suggested, and as pretextual as Chief Judge Bennett concluded. This approach is unacceptable in a cabinet department that has the word *Justice* in its name.

DOJ's Reasons for Refusing to Require Electronic Recordings of Custodial Interviews

How then do DOJ officials attempt to explain their practice of **not** recording all custodial interviews of felony suspects, with appropriate exceptions as found in state legislation and court rulings? Six years ago, in response to an official inquiry, the FBI, DEA, and ATF put in writing the reasons for their opposition to electronic recording. In light of what my associates and I have learned from hundreds of experienced police and sheriffs during the past decade, I submit that not a single one of their reasons has merit, and in several instances, they are based on rationales that appear to conflict with the ethical obligations of law enforcement officers and their lawyers.[19]

Reason 1: In the past, agents' testimony has been accepted by judges and juries based on nonrecorded recollections and reports.

As Judge Carr stated, federal agents' testimony concerning the content of custodial interviews has usually been given more credit than defendants' testimony. But that situation is rapidly changing; federal judges are becoming increasingly vocal in their criticism of federal agencies' opposition. Jurors are also beginning to expect verifiable electronic recordings when circumstances permit. Jurors are well aware that low-cost electronic equipment is readily available and that the media commonly portray law enforcement agents using recording devices during investigations.[20] As an experienced detective with a Sheriff's

Department in Arkansas recently wrote,[21]

> … with easier to operate and less expensive recording equipment we have come to expect more evidence to support our allegations. It is becoming less and less common to see a court case tried on witness testimony alone. Our juries want to see DNA, fingerprints or a video confession. Without one of these, the case is substantially weakened. Twenty years ago the testimony of an articulate Investigator was enough to secure a conviction. It seems a higher burden of proof is required now than ever before.

Back in 1996, the Office of the FBI General Counsel acknowledged this phenomenon:[22]

> [A]gents testifying to statements made by criminal defendants have increasingly faced intense cross-examination concerning this policy [of not permitting recording without advance supervisory approval] in apparent efforts to cast doubt upon the voluntariness of statements in the absence of recordings or the accuracy of the testimony regarding the content of the statement. Furthermore, in some task force cases that result in state prosecution, FBI state or local partners have been precluded from using FBI agent testimony of the defendant's confession because of restrictive state law or policy.

Past acceptance of agents' unrecorded testimony is not proof that the testimony was accurate or complete, nor is it a logical reason to continue the nonrecording policy. Judge Carr noted the circular reasoning involved: Agents are usually believed without recordings, therefore agencies should continue not recording. But the very fact that the interviews are not recorded may explain why agents' testimony has so often been accepted. Lacking the best evidence of what occurred, judges and jurors have little choice but to choose between testimony of an accused defendant (or no testimony from the defendant) and that of federal law enforcement officers, who bring to the witness stand the prestige of the agency and the credibility of the badge.

There is a second logical flaw. With greater accuracy easily available, past acceptance of the scribble-type policy is not a sound reason to perpetuate it. We routinely adopt better methods in our daily lives, including innovative law enforcement investigative techniques, many of which involve oral and visual electronics. Just as law enforcement personnel changed from the horse and buggy when gas-powered automobiles were produced, the Department of Justice should put aside its antiquated methods when conducting custodial interviews of felony suspects.

If nothing else persuades the DOJ officials responsible for this outmoded policy, self-interest should. Even the most hidebound proponent of current DOJ policy has to admit that electronic recordings inevitably yield a far more precise account of custodial interrogation than agents' testimony based on recollection, notes, and typewritten reports.[23] Prudence and concern for accuracy in the criminal justice system should impel those in command to establish recording as the required best practice.[24]

Reason 2: Recordings may interfere with rapport-building techniques and disclose lawful investigative methods that jurors may deem inappropriate.

To explain this reasoning, the FBI's general counsel wrote that "... perfectly lawful and acceptable interviewing techniques do not always come across in recorded fashion to lay persons as proper means of obtaining information from defendants." She gave as an example "misleading a defendant as to the quality of the evidence against him [which] may appear to be unfair deceit."[25] Similarly, the response of the ATF's chief counsel refers to "law enforcement techniques [that] (although perfectly legal) may still be unsettling for some jurors in video and audio form."[26]

These explanations raise serious questions as to the ethical propriety and even the legality of the agencies' practices. Readers may consider whether the reasons given disclose a deliberate intention to avoid giving courts and juries a full and accurate description of the entire custodial interview. Let us hope not, because worries about deleterious consequences of truthful testimony do not justify violations of the testimonial oath and are not a defense to a perjury or subornation prosecution. The witnesses' oath commands, under penalty of perjury for violation, "the truth, the whole truth, and nothing but the truth." This is required of all witnesses, *especially law enforcement personnel*, regardless of how their testimony will be received or thought to affect the outcome of the trial. As a captain in a Police Department in Anchorage, Alaska, put it in blunt but simple terms, "If you're not willing to tell the truth about what occurred during an interview, you shouldn't be on the police force."[27]

In any event, this contention is based on a false assumption. In our interviews with hundreds of veteran detectives and their supervisors, we have seldom heard concerns about being impaired in using legitimate interviewing techniques or of adverse reactions by jurors to the use of permissible methods designed to induce cooperation from suspects.[28] Indeed, we have often been told that knowing their interviews are being recorded causes detectives to prepare better and be more circumspect in their conduct, language, and volume—which result in their ability to conduct better and more productive interviews.

Reason 3: Suspects may be less candid or may "play to" the camera.

This is a common and purely speculative and hypothetical objection given by officers who have not conducted recorded interviews but is seldom mentioned by the many who do. This was a major point made by detectives to the Supreme Judicial Court of Massachusetts in the *DiGiambattista* case, when they urged the court not to impose a statewide recording mandate.[29] After the court rendered its decision in the case, which indirectly led to electronic recording statewide, police experience showed the dire predictions to be unfounded, and that alarm bells had

been unnecessarily rung, leading veteran prosecutors to recant their objections:[30]

> 'I felt that to record all the statements would result in a number of defendants refusing to give statements. They might be willing to speak to the police, but they'd be hesitant and reluctant to be recorded. I was wrong.' … [S]everal other DAs say the taped confessions have proven so beneficial for the prosecution that they've spent tens of thousands of dollars equipping police departments with recording equipment.

In any event, if a suspect exercises the right to refuse to speak if recorded, the statutes and court rules authorize the officers to record the refusal, turn the equipment off, and proceed with an unrecorded interview.

Reason 4: Difficulties in operating the equipment may prevent making recordings.

This argument is a straw man that is often voiced by those who have not recorded custodial interviews. The statutes and court rules make allowances for occasional, unintentional, and unexpected failures of equipment as well as for other circumstances that prevent officers' good faith efforts to record. A contemporaneous record is made of the difficulty, and the interviews proceed with handwritten notes and typed reports. These provisions have proven sufficient to protect against officers' unintentionally losing the fruits of nonrecorded interviews.

Reason 5: Failures to make recordings as required may result in suppression of confessions or harmful jury instructions.

The consequences of unexcused failures to record custodial interviews as required by statute or court rule varies from state to state, but none is draconian. For example, some provide a rebuttable presumption that oral testimony is inadmissible, while others require the trial judge to give a cautionary jury instruction; some do not address this subject.[31]

However, in the responses we have received during our telephone calls to and the written surveys received from over a thousand departments operating under recording requirements, we have not been told of a single instance in which an otherwise valid confession was kept out of evidence owing to a failure to record as required. This concern joins the others as hypothetical, not real.

Reason 6: The costs of electronic recording are prohibitive.

The DOJ agencies pressed exaggerated concerns about costs, including the need for "massive logistic and transaction support." But savings from recordings far outweigh and outlast their relatively modest set up and operating costs, which are well within the agencies' huge budgets. Furthermore, many of the costs are incurred at the outset, for example, sound proofing rooms, purchasing and installing equipment, and training detectives. These agencies already own some of the world's most expensive recording and surveillance devices, so it strains credulity when they raise the issue of the cost of equipping a room or two in their own facilities.

Reasons 7 and 8: Joint federal-state operations may be impaired, and a recording requirement may have an adverse impact in civil suits brought against the federal government.

These concerns, which are technical and seldom arise, are discussed at length in my article, "Recording Federal Custodial Interviews," published in the *American Criminal Law Review* in 2008 and need not be repeated here.

Conclusion

In criminal prosecutions, federal law enforcement officers have an obligation to present the most accurate, trustworthy, and verifiable evidence available. It is self-evident that electronic recordings of custodial interviews are the best evidence. Accordingly, federal prosecutors and agents, as well as their supervisors, have a professional responsibility to make electronic recordings of all custodial interviews. Senior Judge Van Pelt put the point succinctly more than three decades ago:[32]

> We must recognize that the capacity of persons to observe, remember and relate varies as does their ability and desire to relate truly. For jurors to see as well as hear the events surrounding an alleged confession or incriminating statement is a forward step in the search for the truth. And after all, the end for which we strive in all trials is "that the truth may be ascertained and the proceedings justly determined.

The time has come for all federal investigative agencies, especially those in the Department of Justice, to require electronic recordings of custodial interviews. **TFL**

Thomas P. Sullivan has practiced law in Chicago with Jenner & Block since 1954, except from July 1977 to April 1981 when he served as U.S. attorney for the Northern District of Illinois. *He would like to thank his associates, Jennifer T. Beach and Gabriella L. Guajardo, and his personal assistant, Jo Stafford, for their valuable help in the preparation of this article.*

Endnotes

[1]*U.S. v. Cook*, 3:10-CR-522 (N. D. Ohio, Sept. 8, 2011), transcript of record at 433-435, 2011 U.S. Dist. LEXIS 74333.

[2]The FBI prohibits its agents from recording custodial interviews if, but only if, for each particular interview, advanced approval to record is received from either the special agent or assistant special agent in charge of the field office.

[3]A current list of these departments is available from the author at tsullivan@jenner.com. For a detailed compilation of the law and practice of each state, and several federal investigative agencies, *see* www.ajs.org/ajs/publications/Judicature_PDFs/955/ajs_955_compendium.asp.

[4]Texas Code Crim. Proc. § 38.22. *See Franks v. State*, 712

S.W.2d 858, 860 (Tex. Ct. App. 1986); *Moore v. State*, 999 S.W.2d 385, 400–401 (Tex. Crim. 1999); The Justice Project, *Electronic Recording of Custodial Interrogations in Texas: A Review of Current Statutes, Practices and Policies,* (May 2009).

[5]*State v. Barnett*, 789 A.2d 629, 632–633 (N.H. 2001).

[6]ORC § 2933.81 (2010).

[7]Readers are requested to send the author additional examples at tsullivan@jenner.com.

[8]*United States v. Azure,* 1999 WL 33218402 (D.S.D. Oct. 19, 1999).

[9]*United States v. Torres-Galiando*, 206 F.2d 136, 144, n.3 (1st Cir. 2000).

[10]*United States v. Plummer,* 118 F. Supp. 2d 945, 946–947, 951 (N.D. Iowa 2000). *See also* Judge Bennett's opinion in *United States v. Mansker*, 240 F. Supp. 2d 902, 910–911 (N.D. Iowa 2003).

[11]*United States v. Thornton*, 177 F. Supp. 2d 625, 627–628 (E.D. Mich. 2001). *See also* Judge Tarnow's opinion in *Giles v. Wolfenbarger*, No. 03-74073, 2006 WL 176426 (E.D. Mich. 2006) rev'd. and vacated on other grounds, 239 Fed. App'x. 145, 2007 WL 1875080 (6th Cir. 2007).

[12]District Judge S. P. Friot, Letter to author (Dec. 30, 2004).

[13]*United* States *v. Lewis,* 355 F. Supp. 2d 870, 872–873 (E.D. Mich. 2005).

[14]*United States v. Mason*, 497 F. Supp. 2d 328, 335–336 (D.R.I. 2007). *See also* Minnesota Supreme Court Justice Paul H. Anderson in *State v. Sanders*, 775 N.W.2d 883, 890 (Minn. 2009): "I do not understand the FBI's failure to use this proven procedure especially in light of the FBI's history in the middle of the 20th Century. During that time, the FBI frequently took the lead nationally in advising defendants of their rights under the Constitution."

[15]District Judge William E. Smith, E-mail to the author (Jan. 24, 2009).

[16]*U.S. v. Cook*, 3:10-CR-522 (N. D. Ohio, Sept. 8, 2011), transcript of record at 338-343, 433-436, 2011 U.S. Dist. LEXIS 74333.

[17]There undoubtedly are many more frustrated federal judges who have spoken out, on or off the record. I personally have spoken with several judges in the Northern District of Illinois and sent a copy of my article that was published in the *American Criminal Law Review* (see note 19) to the director and the general counsel of the FBI.

[18]B. Boetig, et al, *Revealing Incommunicado: Electronic Recording of Police Interrogations,* FBI Law Enforcement Bulletin 1–8 (Dec. 2006).

[19]*See* Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 American Criminal Law Review 1297, 1315–1335 (2008).

[20]After an acquittal in Philadelphia, a juror said, "My advice to the FBI would be to tape their interviews." As quoted in D. B. Caruso, *FBI's Policy Against Taping Interviews Key in Acquittal,* Pittsburgh Post-Gazette at B1 (Feb. 6, 2005).

[21]E-mail from Sgt. Marc Arnold, Boone County, Ark., Sherriff's Office, to the author (Aug. 11, 2011).

[22]Office of the FBI General Counsel, Memorandum to All Field Offices and Headquarter Divisions, re *Electronic Recording of Confessions and Witness Interviews* (Mar. 17, 2006).

[23]*See,* for example, Chief Justice Monk's discussion in *People v. Shirley*, 723 P.2d 1354, 1378 (Cal. 1982), quoting Sir Frederic C. Bartlett, *Remembering* 204–205, 213 (1964 ed.).

[24]For an example of a videotape that showed an FBI agent ignoring a suspect's request for a lawyer, see *United States v. Hensley*, No. 2:06-CR-168-PS, 2007 U.S. Dist. LEXIS 10692 (N.D. Ind. Feb. 14, 2007).

[25]Memorandum from Office of FBI General Counsel, *Electronic Recording of Confessions and Witness Interviews* (March 23, 2006), on file with the author. The same reason for FBI agents not recording was cited by an FBI spokesperson: "[L]ike any interrogators, FBI agents use psychological techniques such as 'good cop/bad cop' that might not always come across well on tape [FBI spokesperson William] Cotter said." *See* Natasha Korecki, *FBI to Tape More Interrogations: Defense Strategy Spurs Move After Increase on False-Statement Cases,* Chicago Sun-Times (July 17, 2006).

[26]E-mail from T.J. Jawarski, Office of Chief Counsel, ATF, to R.J. Tenpas, associate deputy general attorney general (June 13, 2006), on file with the author.

[27]Author's memorandum of videoconference call with Captain William Miller, Anchorage, Alaska, Police Department (Jan. 13, 2005), on file with the author.

[28]The chief of the Violent Crimes Unit of the Hennepin County Attorney's Office in Minneapolis, Minn., where statewide recording has been required since 1994, speaking to the New Jersey Supreme Court Special Committee on Recordation of Custodial Interrogations, said that jurors are willing to accept frequently used interrogation tactics, such as the good cop-bad cop scenario, trickery, deceit, and the like, necessary to conduct a probing inquiry of the suspect. And, if relevant, judges may instruct jurors as to permissible and impermissible questioning methods. Examples of tactics are described in Sullivan, *Recording Federal Custodial Interviews*, *supra* note 19, at 1326, n. 109.

[29]The dissenting judge summarized these affidavits: "[V]eteran police investigators argue that tape recording will result in far fewer confessions, because many suspects are unwilling to speak if their conversation is to be recorded. They contend that a tape recording requirement will compromise an investigator's ability to build trust with a suspect. ..." *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 541–542 (Mass. 2004) (Spina, J., dissenting).

[30]The inner quotation is by Hampden County District Attorney William M. Bennet. Noah Schaffer, *Tale of the Tape: Recorded Interrogations Level the Playing Field, Despite Initial Fears,* Lawyers Weekly (April 2, 2007).

[31]The reasons why I favor a cautionary instruction are explained in T. Sullivan and A. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law*, 99 J. Crim. L. & Criminology 215 (2009).

[32]*Hendricks v. Swenson*, 456 F.2d 503, 507 (1972).