

FBI WILL NOW VIDEOTAPE IN CUSTODY INTERROGATIONS

[Significant Update Below]

My hometown paper, the Arizona Republic, broke some critically important news a few minutes ago. The story by Dennis Wagner, a superb reporter at the Republic for a very long time, tells of a monumental shift in the policy of DOJ agencies in relation to interrogations and confessions of those in custody.

There was no news release or press conference to announce the radical shift. But a DOJ memorandum –obtained by The Arizona Republic – spells out the changes to begin July 11.

“This policy establishes a presumption that the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA) the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and the United States Marshals Service (USMS) will electronically record statements made by individuals in their custody,” says the memo to all federal prosecutors and criminal chiefs from James M. Cole, deputy attorney general.

“This policy also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances where the presumption does not apply,” such as in the questioning of witnesses.

This has been a long time coming and is notable in that it covers not just the FBI, but DEA, ATF and US Marshals. Calling it a monumental shift may be, in fact, a bit of an understatement. In the course of a series of false confession cases

in the 90's, attempts to get this instated as policy in the District of Arizona were fought by the DOJ tooth and nail. As other local agencies saw the usefulness of audio and/or video taping, DOJ authorities fought the notion like wounded and cornered dogs. That was not just their position in the 90's, it has always been thus:

Since the FBI began under President Theodore Roosevelt in 1908, agents have not only shunned the use of tape recorders, they've been prohibited by policy from making audio and video records of statements by criminal suspects without special approval.

Now, after more than a century, the U.S. Department of Justice has quietly reversed that directive by issuing orders May 12 that video recording is presumptively required for interrogations of suspects in custody, with some exceptions.

What has historically occurred is an agent (usually in pairs) did interviews and then recounted what occurred in what is called a "302" report based on their memories, recollections and handwritten notes (which were then usually destroyed). This created the opportunity not just for inaccuracy, but outright fabrication by overly aggressive agents. Many defendants have been wrongfully convicted, and some who were guilty got off because competent defense attorneys made fools of agents, and their bogus process, in court.

In short, presumptive taping is smart for both sides, and absolutely in the interests of justice. It still remains inexplicable why the DOJ maintained this intransigence so long when every competent police procedures expert in the world has been saying for decades that taping should be the presumption.

Now it should be noted that the policy will only apply to "in custody" interrogations and not

ones where there has been no formal arrest which is, of course, a gaping hole considering how DOJ agents blithely work suspects over under the ruse they are not yet in custody. There will also clearly be an exigent circumstances/public safety exception which are also more and more frequently abused by DOJ (See: [here](#), [here](#) and [here](#) for example).

So, we will have to wait to see the formal written guidance, and how it is stated in the relevant operation manuals for agents and US Attorneys, to get a full bead on the scope of change. And, obviously, see how the written policies are implemented, and what exceptions are claimed, in the field.

But the shift in interrogation policy today is monumental and is a VERY good and positive step. Today is a day Eric Holder should be proud of, and it was far too long in arriving.

UPDATE: When I first posted this I did not see the actual memo attached to Dennis Wagner's story in the Arizona Republic; since that time I have been sent the actual memo by another source, and it is also available as a link in the Republic story that broke this news. Here are a couple of critical points out of the actual memo dated May 12, 2014:

The policy establishes a presumption in favor of electronically recording custodial interviews, with certain exceptions, and encourages agents and prosecutors to consider taping outside of custodial interrogations. The policy will go into effect on Friday, July 11, 2014.

By my information, the gap in implementation is because DOJ wanted to do some top down discussion and orientation on the new policy, which makes some sense given the quantum nature of this shift. My understanding is that this is already ongoing, so DOJ seems to be serious about implementation.

But, more important is the news about non-custodial situations. That was a huge question left unanswered initially, as I indicated in the original part of this post. That agents and attendant prosecutors will be encouraged to record these instances as well is, well, encouraging!

The exceptions, which are outlined in Section II of the memo are pretty much exactly as I indicated should be expected above.

Notable in the Presumptions contained in Section I of the memo is that the rule applies to ALL federal crimes. No exceptions, even for terrorism. Also, the recording may be either overt or covert, which is not different from that which I have seen in many other agencies that have long recorded interrogations. Section III specifically excludes extraterritorial situations from the rule. Frankly, I am not sure why that is necessary, the ability to record is pretty ubiquitous these days, extraterritorial should be no problem for presumptive recording.

Those are the highlights of the memo. It is short and worth a read on your own.