VIDEOTAPING CONFESSIONS: IT'S TIME

MAJOR EDWARD W. BERG*

I. Introduction

A. Hypothetical

You are the chief of justice at a large Army installation. One of your trial counsel has just brought you what looks like a confession in a murder case that happened on the installation last weekend. A few things immediately grab your attention. First, the accused signed the rights-waiver form at 0100 and signed the confession at 0930. Second, the narrative portion of the confession appears short and lacking in detail, only three paragraphs long.[1] Third, the statement's question and answer portion between the investigating agent and the accused mostly calls for "yes" or "no" responses to the elements of the crime.[2] When you ask if the confession was videotaped, you find out it was not.[3] When you inquire why it took over eight hours to get this short confession, the answer is that the agent used "rapport building techniques"[4] for the first few hours.

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* Judge Advocate, U.S. Army. Presently assigned as Brigade Judge Advocate, 4-25th Airborne Brigade Combat Team, Fort Richardson, Alaska. LL.M., 2010, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, 2010. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course.

[1] "Narrative portion" refers to the part of the subject's statement that is his or her own account of what happened regarding the incident in question. This part of a statement normally precedes the question and answer portion between the subject and the investigating agent.

[2] While there is nothing legally wrong with this questioning method, it often fails to develop important facts. For example, instead of asking whether an alleged victim was "incapacitated," it would be more helpful to ask questions that uncover facts such as how much the victim drank; whether the victim slurred her words; whether the victim could have walked without stumbling; and whether the victim could have driven a car, given her condition. While the first question calls for a conclusion, the second set of questions draws out facts so that a judge or panel could make the ultimate conclusion.

[3] *See infra* Part III.B (discussing the fact that there is currently no requirement that custodial interrogations be videotaped in the Army).

[4] *See* Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297, 1321 (Fall 2008) (discussing that "rapport building techniques" refers to the practice whereby government questioners "attempt to put suspects at ease by establishing a congenial, cooperative relationship in a non-threatening atmosphere, which helps suspects to relax and talk freely about the events under investigation as well as gently persuading suspects not to invoke the right to remain silent or to have counsel."). *Id.*

B. The Issues

While the special agent and the trial counsel are relieved to have this "confession," you worry about the gaps. What exactly took place between 0100 and 0930? Why is there so little paperwork resulting from the interrogation? Does the defense have a solid basis upon which to bring a motion to suppress the confession? How will the special agent fare at a suppression hearing about what happened in those early morning hours, especially when the hearing is likely months away?[5] Furthermore, even if the confession comes into evidence at trial, what will the fact-finder think about the manner in which the confession was obtained? Additionally, if the government presents video footage of the crime scene and other technologically advanced evidence at trial, will it reflect poorly on the government that the confession was not recorded?[6]

C. A Way Ahead

One way to mitigate the concerns that arise from the scenario above would be to have a videotape of the entire custodial interrogation. Currently, no such policy is mandated across the uniformed services.[7] This article will argue that the Department of Defense (DoD) should adopt a unified policy requiring videotaping custodial interrogations of felony level crimes by the criminal investigative branches of each service, i.e. Criminal Investigative Division (CID) for the Army, Naval Criminal Investigative Service (NCIS) for the Navy and Marine Corps, and Office of Special Investigations (OSI) for the Air Force.[8] This requirement should extend to recording all aspects of the custodial interrogation, including the initial rapport building phase, the rights-warnings under Article 31, Uniform Code of Military Justice (UCMJ),

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[5] *Id.* at 1307 (discussing that a law enforcement officer may have difficulty recalling details of what occurred during a custodial interview when later testifying about those underlying events, without the benefit of a recording of the interview).

[6] Regarding this type of scenario, defense attorney Charlie Gittins has said, "Well, I have had some fun over the years with agents who didn't record after establishing that they had all the equipment available but simply chose not to use it." Posting of Charlie Gittens to CAAFlog, http://www.caaflog.com/2009/08/26/air-force-osi-to-record-interrogations/ (Aug. 27, 2009, 14:53 EST).

[7] *See infra* Part III.B.

[8] Because the Coast Guard falls under the Department of Homeland Security and not Department of Defense, this article will not discuss the policies of the Coast Guard Investigative Service (CGIS) regarding videotaping custodial interrogations.

and *Miranda v. Arizona*,[9] as well as the entire interview session.[10] Where military exigencies do not permit videotaping, other means of electronic recording should be used.[11] Such a policy should also be coupled with the appropriate funding for the required equipment and training.[12]

In Part II, this article will examine the rationale underlying videotaping interrogations. In Part III, this article will trace the national movement in civilian jurisdictions toward requiring videotaping or otherwise electronically recording custodial interrogations. This article will then consider how the military has responded to this national movement, to include some recent pilot programs instituted by NCIS and OSI. In Part IV, this article will lay out the argument for DoD to adopt a unified policy mandating videotaping custodial interrogations that considers both the benefits for and arguments against such a policy. Finally, in Part V, this article will suggest how DoD should implement such a unified policy as well as detail some of the inherent challenges.

II. Rationale Underlying Videotaping Interrogations

The Supreme Court has never held that the Constitution of the United States requires videotaping or otherwise electronically recording a custodial interrogation.[13] However, commentators and academics have long argued that electronically recording custodial interrogations should be used because such a practice would lead to a more fundamentally fair trial process.[14] Several factors, drawn from civilian cases, civilian

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[9] 384 U.S. 436 (1966).

[10] *See* REPORT OF THE COMMISSION ON MILITARY JUSTICE (Oct. 2009) [hereinafter SECOND COX COMMISSION], *available at* http://www.wcl.american.edu/nimj/documents/Cox CommissionFinalReport.pdf?rd=1x.

[11] *Id.*

[12] Costs would include the equipment itself (hardware and software), installation, and training on how to operate the equipment. A basic "Police Interview Equipment System" package that is GSA approved and comes with a concealed camera (allowing a close-up of the subject and a wider shot of other interrogation participants), two concealed microphones, software, DVD recorder with touch-screen console, powered speaker system, headphones, power supply, cables, and technical support sells online currently for $7,090 for the system. *See, e.g.*, http://www.martelelectronics.com/police-interview-room-dvd.html (last visited Aug. 16, 2011).

[13] *See Miranda*, 384 U.S. at 469–75 (setting out what the Constitution does require for custodial interrogation).

[14] *See generally* Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619 (Summer 2004)

jurisdictions that currently videotape custodial interrogations, commentators, and academics, support the rationale underlying videotaping interrogations and the proposition that videotaping interrogations should be mandated within DoD.[15]

The first factor is accuracy.[16] A videotaped rights-waiver and confession will be more accurate and complete than a signed sworn statement by the investigator and accused or testimony recounting those events by either an investigator or an accused.[17] Even if the special agent investigating the hypothetical murder case above took meticulous notes and had an excellent memory, it would be impossible for him to recount word-for-word what both he and the accused said from 0100 to 0930. Further, even if much of what the accused said might not seem relevant to the crime at issue, some of what the accused said during the interview might turn out to be relevant later, either to the crime at issue or to some

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(discussing that electronically recording interrogations helps limit abusive interrogation tactics, improves fact-finders' ability to judge the voluntariness of confessions, and fosters a better relationship between law enforcement and the community); Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771 (Summer 2005) (discussing how mandated recording of interrogations can benefit not only an accused, but can also benefit police officers and prosecutors); Julie R. Linkins, *Satisfy the Demands of Justice: Embrace Electronic Recording of Custodial Investigative Interviews Through Legislation, Agency Policy, or Court Mandate*, 44 AM. CRIM. L. REV. 141 (Winter 2007) (arguing that the benefits of recording interrogations mandates that all such custodial interrogations should be recorded); Sullivan, *supra* note 4 (arguing that empirical evidence regarding recording interrogations supports a policy of requiring all federal investigative agencies to record custodial interrogations).

[15] The four factors that follow are not meant to be exhaustive, but rather to highlight how such considerations derived from civilian cases, civilian law enforcement jurisdictions, commentators, and academics, apply to the military justice system.

[16] *See, e.g.*, Stephan v. State, 711 P.2d 1156, 1161 (Alaska 1985) (stating that a recording requirement provides an objective record of the interrogation); Sullivan, *supra* note 4, at 1298 ("Regardless of how experienced, honorable, intelligent, dedicated and talented, no one is able to recount what occurred on a prior occasion with the same accuracy, completeness and descriptiveness of an electronic recording."); Posting of Dwight Sullivan to CAAFlog, http://www.caaflog.com/2007/10/13/ncis-reportedly-considering-policy-requiring-taping-of-interrogations/ (Oct. 14, 2007, 9:57 EST) ("I don't think interrogations should be recorded because they help the defense. Nor do I think interrogations should be recorded because they will help the prosecution. I think they should be recorded because doing so would promote accuracy—and that is a good thing for a judicial system.").

[17] *See* Sullivan, *supra* note 4, at 1298 (discussing how human memory, regardless of good intention, is less accurate than an electronic recording).

other crime.[18] Thus, having an accurate record of the accused's words could prove helpful in this and other investigations.

The second factor is judging credibility.[19] A fact-finder who observes an accused's gestures and facial expressions, and hears an accused's own words, will be better able to judge the credibility of the accused than if the fact-finder had to rely on second-hand testimony recounting what took place.[20] In the military justice system, the fact-finder is given the ultimate responsibility for determining the credibility of witnesses.[21] The instruction given to a panel regarding credibility of witnesses states, "You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness' intelligence, ability to observe and accurately remember, sincerity and conduct in court. . . ."[22] If a fact-finder is able to observe the reactions of an accused during an interrogation, to include the accused's gestures, facial expressions, and mannerisms, then the fact-finder can make his or her own judgment about the credibility of the accused from first-hand information. On the other hand, if the fact-finder has to rely on the testimony of a law enforcement agent regarding what the accused said and did, then the fact-finder is left with second-hand knowledge upon which to base a credibility determination.[23] Thus, videotaping interrogations enables a fact-finder to better judge the credibility of both an accused and the law enforcement officials involved.

The third factor is assessing voluntariness.[24] Military courts, following Supreme Court jurisprudence,[25] use a totality of the

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[18] *Id.* at 1307 (discussing, for example, that seemingly unimportant details surrounding a crime might end up linking the accused to other crimes, unknown to law enforcement at the time of the interrogation).

[19] *See, e.g.*, Thurlow, *supra* note 14, at 807 (arguing out that an accused's demeanor and tone of voice may convey as much meaningful insight to a fact-finder regarding an accused's guilt or innocence as the written words of a confession); Sullivan, *supra* note 4, at 1307 (pointing out that a video record may show any physical injuries sustained in the commission of the crime, body language, eye movements, attitude, dress, sobriety, and emotional condition—all of which carries important meaning that would otherwise be lost on a defense counsel, prosecutor, judge, or jury).

[20] Sullivan, *supra* note 4, at 1298.

[21] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-1-1, at 975 (1 Jan. 2010).

[22] *Id.*

[23] Sullivan, *supra* note 4, at 1298.

[24] *See, e.g.*, SECOND COX COMMISSION, *supra* note 10, at 14 (noting that when voluntariness of a confession is in issue and there is no videotape, then significant time and resources are often required to litigate issues that could be readily resolved by such a

circumstances test to determine "whether a confession is the product of an essentially free and unconstrained choice by its maker."[26] On the other hand, if the choice is not free and unconstrained but "instead, the maker's will was overborne and his capacity for self-determination critically impaired, use of the confession would offend due process."[27] If a videotaped rights-warning and confession are available, the military judge can more easily make this threshold voluntariness determination without a lengthy "swearing contest"[28] between the investigator and an accused.[29] The military judge can simply watch the videotape. In the hypothetical above, without a videotape or other electronic recording of what transpired between the accused and the special agent, the military judge at a suppression motion would have to consider the sworn testimony of each party regarding what happened during those early morning hours. A videotape of the rights-warning process and custodial interrogation could substitute for the testimony of both the investigator and the accused, as well as provide a more accurate rendition of what happened.[30] Although a judge may have to review hours of videotape, the end result would be less in-court testimony and a more complete and accurate assessment of voluntariness.

The fourth factor is the integrity of the military justice system.[31] Videotaping interrogations will cast sunlight on the "sausage-making" of gathering a confession. As such, all aspects of the interrogation process

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videotape); Thurlow, *supra* note 14, at 781–84 (discussing Supreme Court jurisprudence on voluntariness and how videotaping custodial interrogations would assist judges determine voluntariness).

[25] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

[26] United States v. Bubonics, 45 M.J. 93, 95 (C.A.A.F. 1996) (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

[27] *Id.*

[28] The term "swearing contest" or "swearing match" is used throughout the caselaw and academic literature discussing videotaped confessions to describe the process of a court taking sworn testimony of an accused and law enforcement officials in order to determine the admissibility of confessions. *See, e.g.*, SECOND COX COMMISSION, *supra* note 10, at 14 (noting that significant time and resources often have to be dedicated to litigating these "swearing contests"); Stephan v. State, 711 P.2d 1156, 1161 (Alaska 1985) (discussing the fact that courts must resolve "swearing matches" between a defendant and a law enforcement official when voluntariness of a confession is contested).

[29] SECOND COX COMMISSION, *supra* note 10, at 14.

[30] *Id.*

[31] *See generally* Sullivan, *supra* note 4, at 1310 (emphasizing how electronic recording improves the integrity of the civilian judicial system, especially in the public's eye, because as a "superior source of evidence," recorded interrogations help ensure that only the guilty are convicted and deter improper police conduct because their actions are revealed on tape).

are open for the parties to observe, thus promoting the fair and efficient administration of justice.[32] For example, in the vast majority of cases where the investigating agent uses proper techniques, the agent's work will be supported by objective video evidence.[33] This objective evidence would then make it less likely that the voluntariness of the confession would even be attacked. Also, the mere fact that the agent knows that his actions during custodial interrogations are being videotaped serves not only as a deterrent to improper behavior, but also as a tool to critique his performance and improve his technique.[34] For trial and defense counsel, having a videotaped rights-waiver and interrogation means that they can more quickly and efficiently assess and resolve contested issues related to voluntariness.[35] For defense counsel, a damning confession on video could also serve as a means of client control.[36] For trial counsel, an improper rights-warning or involuntary confession could lead to an alternate disposition of the case. For panel members, they will be able to see and hear the actions of the accused and investigating agents for themselves and not have to rely on counsel's arguments about improper versus proper interrogation and investigation techniques. Just as the military justice system supports an open discovery system based on the principle that such openness supports the ends of a just and efficient system,[37] so should the military justice system support videotaped custodial interrogations for those same reasons. Regarding open discovery, the Manual for Courts-Martial (MCM) states:

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[32] *Id.*

[33] Brian P. Boetig et al., *Revealing Incommunicado*, 75 FBI L. ENFORCEMENT BULL., Dec. 2006, at 5 (discussing how recorded interrogations help enhance an investigator's credibility by not only providing an objective record of what happened, but also because the practice indicates to the judge or jury that the investigator used the most complete and accurate method available for collecting the confession and thus that he did not have anything to hide).

[34] Sullivan, *supra* note 4, at 1306 (stating that how investigators who know they are being videotaped become more aware of their words and mannerisms and focus on the interview itself rather than on taking notes).

[35] *Id.* at 1308 (discussing his research in states that have adopted mandatory recording rules that when prosecutors and defense counsel verify a proper rights-warning and confession, or substantiate involuntary ones, that pretrial motions to suppress have been virtually eliminated).

[36] *See* Posting of Marcus Fulton to CAAFLog, http://www.caaflog.com/2007/10/13/ncis-reportedly-considering-policy-requiring-taping-of-interrogations/ (Oct. 14, 2007 16:24 EST) (relating that a videotape of an obviously voluntary confession would be a good tool to convince a client of his guilt).

[37] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701 analysis, at A21-33 (2008) [hereinafter MCM].

> Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial. It leads to better-informed judgment about the merits of the case and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. In short, experience has shown that broad discovery contributes substantially to the truth-finding process and to the efficiency with which it functions. It is essential to the administration of justice; because assembling the military judge, counsel, members, accused, and witnesses is frequently costly and time consuming, clarification or resolution of matters before trial is essential.[38]

The words "to include videotaped custodial interrogations" should be added after the words "broad discovery at an early stage" in the quote above, thus furthering the ends of a just and efficient military justice system.

III. Changing Landscape

A. Evolution in Civilian Criminal Law Regarding Videotaping Interrogations

Currently, fourteen states and the District of Columbia require some form of electronic recording of interrogations through legislation or court action.[39] Additionally, hundreds of local law enforcement departments in all fifty states have begun videotaping or otherwise electronically recording custodial interrogations on a purely voluntary basis.[40] This evolution in civilian criminal law toward videotaping interrogations supports the proposition that DoD can and should itself adopt such a policy.

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[38] *Id.*

[39] Illinois, Maryland, Maine, Nebraska, New Mexico, North Carolina, and Wisconsin are all states with legislation mandating electronic recording of custodial interrogations. *See* Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law*, 99 J. CRIM. L. & CRIMINOLOGY app. B, at 215 (Winter 2009). Alaska, Iowa, Massachusetts, Minnesota, New Hampshire, New Jersey, and Indiana are all states with court-mandated electronic recording of interrogations. *Id.*

[40] *See id.*

1. Judicially Mandated Change

The movement in civilian jurisdictions toward videotaping of custodial interrogations began in the state of Alaska in 1985 with the case of *Stephan v. State*.[41] In this case, the Alaska Supreme Court held that due process under the Alaska constitution required that "police record a suspect's custodial interrogation in a place of detention."[42] The Alaska court noted both that human memory is faulty and that when people testify about past events, they tend to interpret the past events in a light most favorable to themselves.[43] Thus, litigation concerning confessions, the court noted, tended to be a swearing match between the law enforcement officer and the accused where the court resolved which version of events was more credible.[44] The court found that a recorded interrogation would provide an objective and accurate record of what occurred during an interrogation and thus reduce or eliminate the need for these swearing matches.[45]

In 1980, five years before its landmark decision in *Stephan v. State*, the Alaska Supreme Court had ruled that law enforcement officials had a duty to electronically record custodial interrogations "where feasible."[46] The problem was that in many cases, such as in the underlying facts of *Stephan*, law enforcement officers had electronic recording devices available, but still were neglecting to record custodial interrogations.[47] Thus, the Alaska court decided to put teeth behind its mandatory recording policy. The court enforced its rule by holding that "an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska constitution, and that any statement thus obtained is generally inadmissible."[48] The court did not provide an exhaustive list of what would constitute an excused failure to record an interrogation, but it did mention that an accused refusing to answer questions while being recorded and unavoidable equipment failures are

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[41] 711 P.2d 1156 (Alaska 1985). *See generally* Sullivan, *supra* note 4, at 1310–14 (tracing the evolution of the national movement toward electronically recording custodial interrogations); Thurlow, *supra* note 14, at 784–91 (outling the current state of video recording in the United States).
[42] *Stephan*, 711 P.2d at 1158.
[43] *Id.* at 1161.
[44] *Id.*
[45] *Id.*
[46] Mallot v. State, 608 P.2d 737 (Alaska 1980).
[47] *Stephan*, 711 P.2d at 1157.
[48] *Id.* at 1158.

two instances that would likely suffice.[49] Instead of providing a list, the *Stephan* court said that trial courts would have to look at each proffered excuse for failure to record on a case-by-case basis.[50]

In 1994, the state of Minnesota followed suit with the next important "recording case."[51] The Minnesota Supreme Court, in *State v. Scales*, held that "all custodial interrogation, including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."[52] Much like the Alaska court, the Minnesota Supreme Court had urged state law enforcement officials to electronically record custodial interrogations in a series of cases from 1988 to 1991.[53] Unlike the Alaska court, the Minnesota court did not find that the due process clause of the state constitution required recording.[54] Rather, the Minnesota court exercised its supervisory power to enforce the mandate to electronically record custodial interrogations.[55] Similar to the Alaska court in *Stephan*, the Minnesota court stated that the failure to comply with the recording requirement would subject the confession to exclusion from evidence on a case-by-case basis.[56]

In addition to Alaska and Minnesota, five other states also have judicially created rules mandating electronic recording of custodial interrogations. These states include New Hampshire (2001),[57] Massachusetts (2004),[58] New Jersey (2005),[59] Iowa (2007),[60] and Indiana

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[49] *Id.* at 1162.
[50] *Id.*
[51] State v. Scales, 518 N.W.2d 587 (Minn. 1994). *See* Sullivan, *supra* note 4, at 1311.
[52] *Scales*, 518 N.W.2d at 592.
[53] *See, e.g.*, State v. Robinson, 427 N.W.2d 224 (Minn. 1988) and State v. Pilcher, 472 N.W.2d 333 (Minn. 1991).
[54] *Scales*, 518 N.W.2d at 592.
[55] *Id.*
[56] *Id.*
[57] State v. Barnett, 789 A.2d 629 (N.H. 2001).
[58] Commonwealth v. DiGiambattista, 813 N.E.2d 516 (Mass. 2004).
[59] NEW JERSEY SUPREME COURT ADMINISTRATIVE DETERMINATION RE: REPORT OF THE SPECIAL COMMITTEE ON THE RECORDATION OF CUSTODIAL INTERROGATIONS (2005). This report was created as a response to the court's ruling in *State v. Cook*, 847 A.2d 530 (N.J. 2004).
[60] State v. Hajtic, 724 N.W.2d 449 (Iowa 2007). The court did not adopt an exclusionary rule but strongly encouraged law enforcement to videotape custodial interrogations, thus leaving the impression that failure to videotape or record without justification would be viewed skeptically by the court. *Id.* at 456.

(2009).[61] No state besides Alaska has found that the due process clause of a state constitution requires electronic recording of custodial interrogations in order to secure a fair trial.[62]

2. States with Legislation Requiring Electronic Recording of Custodial Interrogations

Seven states and the District of Columbia have adopted legislation mandating electronic recording of custodial interrogation. These states include Illinois,[63] New Mexico,[64] Maine,[65] Wisconsin,[66] North Carolina,[67] Maryland,[68] Nebraska,[69] and the District of Columbia.[70] Many other states, including Ohio, Montana, Oregon, Missouri, South Carolina, Texas, Connecticut, New York, and Tennessee all have proposed legislation before either their state house of representatives or senate involving electronic recording of custodial interrogations.[71]

Most state legislation mandating electronic recording follows a common structure.[72] First, there is a definitions section for terms such as "custodial interrogation," "electronically record," and "place of detention."[73] Next, there are exceptions for when interrogations will not be required to be electronically recorded.[74] Generally, these exceptions cover instances when the accused refuses to cooperate unless he is not

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[61] The Indiana Supreme Court amended Indiana Rule of Evidence 617 to "prohibit evidence of a suspect's statement taken during police station questioning unless it was electronically recorded." Amendment, at www.court.in.gov/rules (Sept. 15, 2009). The rule applies to all statements make on or after January 1, 2011. *Id.*

[62] Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985). *See* Thurlow, *supra* note 14, at 785.

[63] 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2007).

[64] N.M. STAT. § 29-1-16 (2006).

[65] ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(K) (2007).

[66] WIS. STAT. ANN. §§ 972.115 (West 2007).

[67] N.C. GEN. STAT. § 15A-211 (2007).

[68] MD. CODE ANN., CRIM. PROC. § 2-402 (LexisNexis 2008).

[69] NEB. REV. STAT. § 29-4501 to 4508 (2008).

[70] D.C. CODE ANN. §§ 5-116.01-03 (LexisNexis Supp. 2008).

[71] *See* Sullivan & Vail, *supra* note 39, at 216–19; *see also* Sullivan, *supra* note 4, at 1311.

[72] *See, e.g.*, Draft Electronic Recordation of Custodial Interrogations Act, National Conference of Commissioners on Uniform State Laws (June 3, 2009), http://www.law.upenn.edu/bll/archives/ulc/erci/ 2009_amdraft.htm [hereinafter Draft Electronic Recordation Act].

[73] *Id.* § 2.

[74] *Id.* §§ 4–9.

recorded, or situations that are out of the investigator's control, such as equipment failure,[75] or a good faith belief that a recording was not required.[76] Finally, there is a listing of the types of crimes that must be electronically recorded.[77]

3. Judicial and Legislative Remedies for Non-Recording

States differ broadly in the remedies that they impose for failure to electronically record custodial interrogations when mandated.[78] On the most severe end are Alaska and Minnesota. These states impose the judicial remedy of excluding the confession from evidence if the court decides that the prosecution lacked a valid reason for failing to record.[79] The most lenient states are Maine, Maryland, and New Mexico. These states impose no remedy or penalty for failure to record.[80] In the middle, the District of Columbia and Illinois impose a rebuttable presumption that a non-recorded custodial interview is involuntary.[81] Finally, a growing number of states are implementing cautionary jury instructions as a remedy for failure to record.[82]

4. Local Jurisdictions that Voluntarily Electronically Record Custodial Interrogations

The most convincing evidence that electronic recording of custodial interrogations has become a national movement lies in the fact that over six hundred local law enforcement offices around the country have voluntarily adopted the practice.[83] A study regarding local jurisdictions

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[75] *Id.* § 9.
[76] *Id.* § 8.
[77] *Id.* § 3. The draft act does not delineate specific crimes. Rather, it leaves the choice to the discretion of the jurisdiction adopting the act. The wording of the draft act reads, "[felony] [crime] [offense]." *Id.*
[78] *See* Sullivan & Vail, *supra* note 39, at 216–19.
[79] Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985), State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).
[80] ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(K) (2007); MD. CODE ANN., CRIM. PROC. § 2-402 (LexisNexis 2008); N.M. STAT. § 29-1-16 (2006).
[81] D.C. CODE ANN. §§ 5-116.01-03 (LexisNexis Supp. 2008); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2007).
[82] N.C. GEN. STAT. § 15A-211 (2007); WIS. STAT. ANN. § 972.115 (West 2007); NEB. REV. STAT. §29-4501 to 4508 (2008); *Scales*, 518 N.W.2d at 592.
[83] *See* Sullivan & Vail, *supra* note 39, app. B.

that voluntarily began recording custodial interrogations found that none of those jurisdictions believed that the burdens of electronically recording custodial interrogations outweighed the benefits; and none of those jurisdictions decided to go back to conducting custodial interrogations without recording them.[84]

B. Changes in the Military Landscape Regarding Videotaping Interrogations

Change is also afoot within DoD criminal investigative services regarding videotaping of custodial interrogations. In 2008, NCIS began requiring videotaping of custodial interrogations involving "crimes of violence."[85] The NCIS defines crimes of violence as, "homicide, sexual assault, aggravated assault, robbery, and incidents involving weapons."[86] In 2009, the Air Force's criminal investigative service, OSI, also began a pilot program mandating videotaping of custodial interrogations.[87] The Army's CID does not currently have a policy that mandates videotaping of interrogations. However, such recording is authorized at the discretion of the special agent in charge of each field office.[88] Additionally, a CID policy update in December 2009 now requires that if and when an agent does record a custodial interrogation, the agent must record the entire interview process, to include the introduction, the suspect's consent to be recorded, the rights-waiver, the entire interview, and any written statement that the suspect agrees to produce after the oral interview.[89]

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[84] Sullivan, *supra* note 4, at 1305.

[85] *See* Memorandum from U.S. Naval Criminal Investigative Service, to Distribution, subject: Policy Change Regarding Recording of Interrogations (4 Sept. 2008) [hereinafter NCIS Policy Change Memo]; *see also* Andrew Tilghman, *New NCIS Policy Requires Agents to Videotape Suspect Confessions*, MARINE CORPS TIMES, Oct. 5, 2009, at 18.

[86] NCIS Policy Change Memo, *supra* note 85, at 1.

[87] *See* SECOND COX COMMISSION, *supra* note 10, at 13.

[88] E-mail from Captain Brendan Cronin, Admin. Law Attorney, U.S. Army Criminal Investigation Command (Oct. 27, 2009, 11:36 EST) (on file with author). *See also* CRIM. INVESTIGATIVE DIVISION, REG. 195-1, CRIMINAL INVESTIGATION OPERATIONAL PROCEDURES ch. 5 (3 June 2009).

[89] *See* Memorandum from U.S. Army Criminal Investigation Command, subject: Procedures for Videotaping Suspect/Subject Interviews (2 Dec. 2009) [hereinafter CID Videotaping Procedure Memo].

C. Fiscal Year 2010 National Defense Authorization Act Videotaping Requirement for Detainees

Congress has recently imposed a videotaping requirement for custodial interrogations on the DoD. However, this requirement only applies to intelligence interrogations on the battlefield, and not to criminal interrogations of Soldiers. Section 1080 of the Fiscal Year (FY) 2010 National Defense Authorization Act (NDAA) requires "videotaping or otherwise electronically recording strategic intelligence interrogations of persons in the custody of or under the effective control of the Department of Defense."[90] The legislation specifically excludes from the videotaping requirement Soldiers engaged in direct combat operations and tactical questioning as defined in Army Field Manual 2-22.3.[91] Furthermore, the law also allows for the Secretary of Defense to grant waivers to the videotaping requirement on a "case-by-case basis for a period not to exceed 30 days" and grant temporary suspensions of the videotaping requirement, provided that the Secretary make a written finding that such a suspension is in the "vital national security interests" of the United States and Congress be notified of such a suspension within five days.[92] Section (f) of the bill tasks the Judge Advocates General of the Armed Services to develop and adopt uniform guidelines for the videotaping of these interrogations.[93]

While the persons required to be videotaped by the FY 2010 NDAA are obviously not in the same group as military criminal defendants, the underlying goals of the FY 2010 NDAA are similar to the goals for videotaping custodial interrogations of Soldiers. The sponsor of this legislative requirement, Representative Rush D. Holt (Democrat, New Jersey), stated that he "proposed the videotaping requirement to protect both the prisoners and the interrogators, who would be less likely to face false abuse allegations."[94] If the Judge Advocates General and DoD adopt and implement videotaping policies to protect the rights of

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[90] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1080, 123 Stat. 2190, *available at* http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname =111_cong_bills&docid=f:h2647enr.txt.pdf.

[91] *Id.* § 1080(d)(1), (2); U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS para. 1-17, at 1-7 (6 Sept. 2006) (According to Field Manual 2-22.3, tactical questioning is "the expedient initial questioning for information of immediate tactical value.").

[92] *Id.* § 1080(e)(1), (2).

[93] *Id.* § 1080(f).

[94] Scott Shane, *Congress Moves to Require Taped Detainee Sessions*, N.Y. TIMES, Oct. 9, 2009, at A18.

detainees and those that question them (albeit by legislative mandate), it begs the question of whether the same protections should be extended Soldiers and the investigative agents who question them?

IV. Department of Defense Should Mandate Videotaping Interrogations

The DoD should adopt a unified policy requiring videotaping custodial interrogations of felony-level crimes by the criminal investigative branches of each service, i.e., CID, NCIS, and OSI. This requirement should extend to recording all aspects of the custodial interrogation, to include the initial rapport building phase, the rights-warnings under Article 31, UCMJ, and *Miranda v. Arizona*,[95] as well as the entire interview session.[96] Where military exigencies do not permit videotaping, other means of electronic recording should be used, such as audio recording with a voice-recorder.[97] A policy mandating videotaping should be coupled with the appropriate funding for the required equipment and training.

A. Additional Benefits to Mandated Videotaping

In Part I above, this article listed four main factors underlying the rationale for mandating videotaping custodial interrogations: accuracy, judging credibility, assessing voluntariness, and the integrity of the military justice system.[98] While each of these factors provides justification for mandated videotaping, there are additional and more specific benefits to mandated videotaping of custodial interrogations. These benefits include efficiency;[99] improving investigating agents' techniques;[100] enhancing investigating agents' credibility;[101] and ease of implementation.[102]

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[95] 384 U.S. 436 (1966).
[96] SECOND COX COMMISSION, *supra* note 10.
[97] *Id.*
[98] *See supra* Part I.
[99] *See, e.g.*, Sullivan, *supra* note 4, at 1309; *see also* Draft Electronic Recordation Act, *supra* note 72.
[100] Boetig et al., *supra* note 33, at 6.
[101] *Id.* at 5.
[102] *See, e.g.*, Thurlow, *supra* note 14, at 797–98 (noting that how advances in recording technology have brought down the price of video recording equipment and will likely continue to do so in the future).

In the twenty-five years that civilian jurisdictions have been electronically recording custodial interrogations, and in the scholarly literature on the subject, one commonly recognized benefit is improved efficiency.[103] This efficiency manifests itself in fewer suppression motions,[104] quicker resolution of any litigated suppression motions,[105] improved case assessment by prosecutors and defense counsel,[106] and the fact that direct evidence is given first-hand to the fact-finder and is not filtered through the memory of either the investigator or the accused.[107]

Videotaped custodial interrogations can also benefit an investigating agent's techniques.[108] The videotape allows the agent to critique his performance for self-improvement and also allows his or her supervisor to assess and mentor the agent.[109] Furthermore, during the interrogation itself, the agent will have more time and attention to focus on interviewing the accused rather than on taking notes of what the accused says.[110]

Additionally, videotaping can help build an investigating agent's credibility with the fact-finder.[111] The agent and the trial counsel can argue to the panel or military judge that the investigating agent has used the most transparent means and methods of investigative practice available if the agent has videotaped the entire interrogation.[112] With everything transparent, the defense will likely be less successful in arguing that the investigator used underhanded means to gain a confession.[113]

If and when the DoD mandates and funds a mandatory recording policy for custodial interrogations, it will be relatively easy to implement.[114] Videotaping equipment is readily available from commercial sources. Flexibility should be built into the procurement

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[103] *See* Sullivan, *supra* note 4, at 1309; *see also* Draft Electronic Recordation Act, *supra* note 72.
[104] Draft Electronic Recordation Act, *supra* note 72, at 6.
[105] Sullivan, *supra* note 4, at 1309.
[106] *Id.* at 1308–09.
[107] *Id.*
[108] Boetig et al., *supra* note 33, at 6.
[109] *Id.*
[110] Sullivan, *supra* note 4, at 1306.
[111] Boetig et al., *supra* note 33, at 5.
[112] *Id.*
[113] *Id.*
[114] *See* Thurlow, *supra* note 14, at 797–98.

system because installation criminal investigative offices have different requirements than deployed or deployable criminal investigative offices.[115]

B. Arguments Against Videotaping

Since Alaska's recording requirements for custodial interrogations were adopted in 1985, a common core of arguments has arisen against videotaping or otherwise recording interrogations. The most common arguments include the following: that a camera in the room will lead to a decrease in the number of suspects voluntarily making confessions;[116] that recordings may undermine investigators' rapport building efforts;[117] that it will cost too much;[118] and that the costs in terms of confessions suppressed by failure to record will be too high.[119] There are also some military-specific arguments that can be made against video recordings, including the following: that the burden of video recording would impose too large of a strain on a busy criminal investigative system in terms of the increased amount of evidence, i.e. in the form of videotaped interrogations that would have to be reviewed and catalogued for felony level crimes;[120] and that video recordings of interrogations could lead to negative publicity for the services, if disclosed.[121]

As to the objections regarding a "chilling effect" and "rapport building," a response to the critics is that the video cameras do not have to be disclosed to the subject.[122] For example, while the current NCIS policy requires that a sign be posted outside each interrogation room

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[115] Deployed criminal investigative offices would likely need lighter and more easily movable video equipment than a garrison criminal investigative office would need.

[116] *See, e.g.*, Thurlow, *supra* note 14, at 800–01 (finding that most police departments who do not record custodial interrogations cite the perceived "chilling effect" as one of their main rationales); Sullivan, *supra* note 4, at 1323–24 (relating his interviews with police departments who changed from non-recording to recording and that they saw no appreciable decrease in willingness to be interviewed on camera, and even when they did encounter resistance, they merely turned off the camera and interviewed without it).

[117] Sullivan, *supra* note 4, at 1321 (discussing that this was a common theme in the reluctance of the FBI and ATF to record custodial interrogations).

[118] Thurlow, *supra* note 14, at 797.

[119] *Id.* at 805.

[120] Posting of Anonymous to CAAFlog, http://www.caaflog.com/2007/10/13/ncis-reportedly-considering-policy-requiring-taping-of-interrogations/ (Oct. 13, 2007 22:13 EST).

[121] *See Killings at the Canal: The Army Tapes* (CNN television broadcast Nov. 21, 2009).

[122] *See* Sullivan, *supra* note 4, at 1322.

stating that the suspect is subject to being recorded at all times,[123] such a warning sign is not a legal requirement.[124] Furthermore, the research data has shown that those civilian police departments that record openly still have not experienced the so-called "chilling effect."[125] As to the monetary costs, while that might be a significant factor for local police jurisdictions, it is mitigated in a large organization like DoD, with larger overall budgets.[126] Further, on a big-picture level, once the equipment is in place, resources and time will be saved by the fact that fewer suppression motions will have to be litigated. This will save the time of investigating agents, attorneys, and military judges.[127] The argument that the added strain on the efficient processing of the military criminal investigative system due to an increased amount of evidence produced is the most credible argument against videotaping and could present a serious issue. In each felony level case, there would now potentially be a recorded rights-waiver and interview. This would be more evidence for the trial counsel, defense counsel, and chiefs of justice to review and for investigating agents to process as part of each investigative file. Furthermore, when lengthy videotapes are played at motions hearings or courts-martial, court reporters' workload would increase because they must then transcribe the custodial interrogation.[128] As an alternative, the criminal investigative service office could send the video to a private transcription service prior to trial; however, this could potentially result in increased costs and a waste of resources if the case either did not proceed to trial, or the confession was not used at trial.[129]

Finally, there is the potential of unwanted publicity. For example, this phenomenon was demonstrated by the four-day *CNN* special from November 2009 that aired segments from hours of custodial interrogations done by CID in the murder investigation of four Iraqi civilians.[130] While these tapes did not reveal any misconduct by the investigating agents, the show's host did point out that the agents were purposefully misstating the amount of evidence that CID currently had

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[123] *See* NCIS Policy Change Memo, *supra* note 85, at 1.
[124] *See* Sullivan, *supra* note 4, at 1322.
[125] Thurlow, *supra* note 14, at 801.
[126] A rough cost estimate would be approximately $7,000 per interrogation room. *See supra* note 12.
[127] *See* Draft Electronic Recordation Act, *supra* note 72, at 6.
[128] *See* MCM, *supra* note 37, R.C.M. 1103(b) (discussing the requirements for when a verbatim record of trial is required).
[129] For example, if the case resulted in a guilty plea.
[130] *See Killings at the Canal: The Army Tapes* (CNN television broadcast Nov. 21, 2009).

against the suspect in order to coax a confession.[131] While most panel members would likely understand these investigative techniques, this television special report nonetheless brought what was likely unwanted scrutiny on CID's methods of interrogation.

V. Implementation

A. Options

Several options exist for how DoD could implement a unified policy requiring videotaping of custodial interrogations. One alternative would be for DoD to mandate the policy across the investigative services and let each individual service decide how to implement the requirement. For example, the Army may decide not to notify suspects that their custodial interrogations are being videotaped. On the other hand, the Air Force may decide that they will have the video equipment out in the open for the suspect to observe. The benefit to this policy alternative lies in the flexibility it would provide to the investigative services to determine what methods best suit its investigators. Also, this flexibility would allow DoD to determine which practices work best in the field, while still meeting the minimum standard of videotaping custodial interrogations from beginning to end.

Another alternative would be for DoD to issue detailed requirements and a model policy that prescribed exactly how to implement the policy in the field. The benefit to this approach would be uniformity and clarity. While the initial burden might be higher on each investigative arm to train and alter its practices, at the end of the implementation period, there would be a level playing field across the services, thus ensuring that suspects receive uniform treatment. The downside would be the decreased flexibility that each investigative agency would have in conducting investigations.

In either alternative, each service would need operational exceptions to the videotaping requirement. This could be done by building flexibility into the policy. For example, audio recordings should be mandated where video recordings are impractical due to operational necessities, such as in the early stages of a contingency operation.

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[131] *Id.*

B. Minimum Policy Requirements

Certain minimum requirements should be included in any DoD policy requiring videotaping of custodial interrogations. The first, as discussed above, is that the videotape should record from beginning to end, including the rapport building phase, the rights-warning process, and the entire custodial interrogation.[132] The second is that the policy should clearly state what level or status of crimes under investigation would trigger the videotaping requirement. As discussed above, a reasonable guideline would be felony level crimes.[133] This would include almost all crimes within the purview of the investigative services (CID, NCIS, and OSI, as opposed to military police investigators) that have a maximum punishment of over one year confinement and a punitive discharge.[134] Since this policy would cover the vast majority of crimes that CID, NCIS, and OSI investigate, videotaping would become the normal routine and not the exception.[135] The third is that the special agent in charge of each field office should be the one who decides when operational considerations dictate a legitimate reason for not recording a custodial interrogation. Furthermore, the special agent in charge should then be required to put his or her decision and the supporting rationale regarding that decision into the investigative case file.

C. Remedy for Failure to Record

The final issue lies in determining the appropriate remedy for failure to record a custodial interrogation. Again, there are several options, ranging from excluding the confession from evidence to cautionary jury instruction, to no remedy at all.[136] In determining the most appropriate approach for DoD to take, it is again instructive to examine the issue in the civilian context. The preeminent civilian expert on electronic recording of custodial interrogations has recently changed his recommendation from excluding a confession from evidence to providing cautionary jury instructions when a law enforcement agency fails to properly record a custodial interrogation.[137] He had two main

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[132] *See supra* Part IV.
[133] *Id.*
[134] *See* U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para. 3-3 and app. B (15 May 2009).
[135] *Id.*
[136] *See supra* Part III.A.3.
[137] *See* Sullivan & Vail, *supra* note 39, at 221–22.

rationales. First, he contended that once a law or court directive mandating electronic recording was established, law enforcement agencies complied just as readily in states with or without the inadmissibility remedy because of the often unexpected benefits resulting from electronically recording custodial interrogations.[138] Second, he argued that legislators, law enforcement officers, and prosecutors were much less supportive of mandatory recording laws that contained the inadmissibility provision for fear that a mistake or technical glitch regarding recording would lead to guilty criminals going free.[139] These insights help inform a way forward for DoD in implementing a remedy for failing to record custodial interrogations.

In the military criminal justice system, the best approach would be two-fold. First, DoD should set clear administrative policy guidance in the form of a DoD Instruction requiring videotaped custodial interrogations.[140] Second, the fact-finder should be allowed to consider any violations of this policy and then decide the weight to give such a violation.[141] Thus, the ultimate remedy would be left in the hands of the fact-finder. Non-legitimate reasons for failure to record would go to the weight of the resulting confession and not its admissibility.[142] The fact-finder would be able to weigh any policy violation against all of the other evidence at hand. The remedy would not be exclusion of the confession from evidence, but would be one factor in a totality of the circumstances test to determine how much weight to give the confession. For example, the special agent in charge may have had a valid reason for deciding not to record the interrogation, such as equipment failure or refusal of the subject to be recorded. In this case, the fact-finder would likely give little weight to the absence of a recorded interrogation. Conversely, the agent may have acted in bad faith and not consulted at all with the special agent in charge. In this instance, the fact-finder would likely give more weight to the absence of a recorded interrogation.

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[138] *Id.* at 221.
[139] *Id.* at 222.
[140] *See supra* Part IV.
[141] The fact-finder being a military judge at a suppression motion and either a military judge and/or a panel at court-martial. *See, e.g.*, United States v. Adcock, 65 M.J. 18, 23 (C.A.A.F. 2007) (holding, in the context of sentencing credit, that violation of a service regulation does not create a per se right to sentencing credit under the Uniform Code of Military Justice).
[142] This would be similar to the remedy for chain of custody violations. *See, e.g.*, United States v. Vietor, 10 M.J. 69, 71 (C.M.A. 1980).

VI. Conclusion

For the benefit of investigating agents, prosecutors, defense attorneys, military judges, panels, and accuseds, DoD should mandate a policy of videotaping custodial interrogations from the rapport building phase through the entire interview. Such a policy would allow agents to become more proficient in their interviewing techniques, substantiate agents' proper behavior in cases of false allegations of misconduct, and relieve them of the burden of drawn-out testimony in suppression motion hearings. Prosecutors would benefit because they would have fewer overall suppression motions to argue and have more compelling evidence of the guilt of an accused by having a videotaped confession from the accused's own mouth. Defense attorneys would benefit by having a tool to quickly assess their client's story; potential proof of any investigator misconduct; and a means for increased client-control if the videotaped interrogation is highly persuasive of a client's guilt. Military judges and panels would benefit from first-hand evidence of what happened between an accused and the investigator. Finally, the accused would also benefit from the underlying rationales supporting the move to videoptaped interrogations: accuracy, fairness, and integrity within the military justice system, which ultimately results in a more equitable trial process.