or defendants. The FBI, in opposing the recording policy, also takes issue with Paul Charlton's description of three failed prosecutions that the USAO attributed to the FBI's failure to record a confession; in each of those three instances, the FBI points out several other factors that contributed to the unfavorable results. More significantly, the FBI contends that the vast majority of Indian country cases, even those in which confessions were not recorded, result in convictions.

B. DEA

The DEA's current policy permits, but does not require, the recording of defendant interviews. In voicing its strong opposition to the proposed pilot program, the DEA describes that the proposal is neither necessary nor practical. Among other things, the DEA notes that there is no history or pattern of the DEA's recording policy resulting in acquittals or the suppression of defendants' statements. Additionally, the DEA notes that given the number of multi-district investigations that it and other agencies conduct, the adoption of a mandatory recording policy by one district would make it extremely difficult for agents operating in other divisions to conduct multi-district investigations that involve that district. Moreover, the DEA, like the FBI, notes the likelihood that a violation of the USAO recording policy would lead to suppression or acquittals in cases in which a confession was not recorded, even where the confession was otherwise obtained lawfully. The DEA additionally notes that, at the very least, the failure of an agent to follow the recording policy would be admissible in civil litigation and could adversely affect agencies' ability to invoke the discretionary function exception in cases brought under the Federal Tort Claims Act.

Additionally, the DEA expressed specific concerns about the particular policy proposed by the USAO in Arizona. First, the DEA notes that the recording policy, which anticipates the recording of statements of all "investigative targets," is overbroad, as the recording requirement would be triggered during even routine interdiction or other *Terry* stops. Additionally, the DEA notes that because the USAO's policy provides no guidance as to what constitutes a "reasonable" reason for not recording a statement, AUSAs and their supervisors might engage in after-the-fact second-guessing of decisions made by the agents, which may result in disputes between the agencies and USAO and "AUSA shopping." Additionally, the DEA avers that the proposed Arizona policy would allow the USAO to decline to prosecute an otherwise meritorious case just because a recording was not made, rather than considering all the facts and circumstances in the case (including *all* admissible evidence), in deciding whether to accept a case for prosecution.

C. ATF

The ATF's current policy does not require electronic recording, but instead leaves the decision about whether to record to the discretion of the individual case agent. In making that decision, the case agent may confer with supervisors and the relevant USAO.

In voicing its opposition to Arizona's proposed pilot program, the ATF states that the Department should not promulgate a one-size-fits all approach to interrogation. Among other things, the ATF expresses concern that (1) a suspect may "play" to the camera or be less candid; (2) utilizing "covert" recordings would not eliminate the problem of a suspect "playing" to the camera or withholding information, because the fact that an agency is covertly recording confessions would become public after the first trial at which such a recording is played; (3) juries may find

otherwise proper interrogation techniques unsettling; (4) suspects may confess while being transported to a place where an interrogation is to take place; (5) mandatory recording raises a host of logistical questions, including questions about retention/storage of recordings and what to do in the event of an equipment malfunction; (6) the costs of supporting such a pilot program, including purchasing recording equipment and securing transcription services, would be enormous; (7) the mandatory language of the Arizona proposal leaves no discretion to agents on the field; and (8) the recording policy would hamper task force investigations where federal charges are brought in jurisdictions in which local law enforcement officers do not electronically record confessions. In sum, ATF argues that any benefits that may result from recording confessions would come at the expense of limiting the flexibility of agents to make the determination of the proper course of conduct depending on the particular situation.

D. USMS

The USMS does not currently require taping of confessions and, indeed, the USMS notes that it does not normally solicit confessions to accomplish its mission of tracking and capturing fugitives. The USMS's opposition to a recording policy is based primarily on the impracticality of taping in carrying out its mission. Among other things, the USMS notes that because it conducts most of its interviews in the field, rather than in a controlled environment, recording is generally impractical. Additionally, the USMS notes that even when a defendant does confess to a crime while in USMS custody, that confession is usually spontaneous and not in response to any question posed by a USMS officer, and is usually made in vehicles or other remote locations where recording is not available.

III. Recommendation

I ~~recommend that the Department not authorize a mandatory recording policy, even one which, like the one proposed by the USAO in Arizona, anticipates exceptions for situations in which recording may not be reasonable~~. I would ~~also~~ recommend against instituting a pilot program to test such a recording policy, as such a program would not provide the Department with any useful measures of success that could be extrapolated to other districts.

As an initial matter, it is abundantly clear that reasonable people – including very experienced investigators – can and do differ in their views about the use and efficacy of recording confessions. The Department should acknowledge that different investigations and circumstances warrant different approaches to tape recording, and accordingly leave that decision to the discretion of the agents in the field, who should be encouraged to consult with their immediate supervisors and USAOs. The FBI policy, which allows only the SAC to institute "exceptions" to the no-recording policy, creates, in my view, the improper presumption that tape recording ordinarily should not be used. Conversely, the Arizona rule creates the improper presumption that recording ordinarily should be used. There is no reason, from a law enforcement perspective, for the Department to make an across-the-board determination about such a fact-specific decision or in any other way formalize a view that recording is presumptively sound or presumptively unsound.

The problems identified by Paul Charlton in formulating his recording proposal – such as the inadequacy of agents' reports documenting confessions – do not appear to be widespread, and

isolated acquittals in the District of Arizona should not, in my view, lead the Department to institute a policy that could hamper multi-district investigations and task force investigations. Absent evidence that many or most cases involving unrecorded confessions result in acquittals, there is simply an insufficient basis to impose any particular practice on all investigative agents around the country.[1]

Although one could reasonably argue that a pilot program could be instituted to study *whether* recording "works," a pilot program in one district will not give the Department any useful measures of success. Measuring the success of such a program by, for example, evaluating the number of acquittals, convictions, guilty pleas or lengths of sentences, would not be helpful because, as seen by the competing views of the FBI and USAO in the District of Arizona, reasonable people can disagree as to the factors that lead to any particular result in a case. Accordingly, it will never be clear whether a recording did or did not lead to a particular disposition or sentence in a case. Additionally, the problem of usefully extrapolating the experience of one district to another district is amplified by the fact that, as noted by the FBI, there are numerous variables involved in how and where to institute such a pilot program. For example, should the district be one in which the local and state agencies record interrogations? Should the district be large or small? Should there be two offices selected so that one can operate as a "control"? Should the selected district be one in which there are many prosecutions under the Assimilated Crimes Act? Should all target interviews be recorded or only those involving certain serious felonies? Should the recordings be surreptitious or overt? Given these variables and the resulting unlikelihood that the experience of one district could be usefully extrapolated to others, the disruption to multi-district and task force investigations that could result from the implementation of a pilot program – not to mention the expense of instituting such a program – is not, in my view, worth the potential benefit.

IV. **Summary**

Given the numerous, legitimate reasons for either recording or not recording a particular target's statements in any particular case, the Department should refrain from instituting a policy that either creates the presumption that recording is necessary and warranted (like the Arizona policy) or creates the presumption that recording is unnecessary or dangerous (like the FBI policy). I therefore recommend that the Department not authorize the USAO's request to initiate a pilot program. I would also recommend that the Department encourage its investigative components to leave the case-specific decision about whether to record a statement in any particular circumstance to the discretion of each agent, who should be encouraged to consult with his or her supervisor and assigned prosecutor.

Doesn't your solution of case-by-case lend itself to easy attacks in the cases where recording ~~would~~ isn't done? Agent has to answer questions on why no recording

[1] The USAO's proposed policy does not appear to be limited to the Department and would presumably apply to investigative agents such as ICE and USPIS.

A) Proposal - no meaningful metrics → to look at results

- defacto becoming new basis on which to suppress statements

For

1) current posture - some kinds of prosec which are benefitted } strengthen class of cases

2) cuurt posture of discretion - SDC (heavily presumption against at least "topic[?]" FBI)

3) can't develop any real experience

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, DC 20530

July 7, 2006

MEMORANDUM

TO: William Mercer
Principal Associate Deputy Attorney General
Office of the Deputy Attorney General

Michael Elston
Chief of Staff
Office of the Deputy Attorney General

FROM: Mythili Raman MR
Senior Counsel to the Deputy Attorney General

SUBJECT: Recommendations for Implementation of Pilot Program Instituting Mandatory Recording Policy in the District of Arizona

You have asked me to consider what, if any, changes should be made to the mandatory recording policy proposed by United States Attorney Paul Charlton in the District of Arizona, if the Department approved the implementation of a pilot program in Arizona to test that policy. I have set forth below some recommendations concerning the scope of the exception to the recording policy, and the manner in which the success of the policy should be measured at the end of a one-year pilot program.

I. Proposed Modifications to the Exception to the Recording Policy

A. The Current Policy

The recording policy currently proposed by the United States Attorney's Office for the District of Arizona provides as follows:

> **Rule:** Cases submitted to the United States Attorney's Office for the District of Arizona for prosecution in which an investigative target's statement has been taken, shall include a recording, by either audio or audio and video, of that statement. The recording may take place either surreptitiously or overtly at the discretion of the interviewing agency. The recording shall cover the entirety of the interview to include the advice of Miranda warnings, and any subsequent questioning.

> **Exception:** *Where a taped statement cannot reasonably be obtained the Recording Policy shall not apply.* The reasonableness of any unrecorded statement shall be determined by the AUSA reviewing the case with the written concurrence of his or her supervisor.

(emphasis added).

B. Proposed Expansion of the Exception to the Recording Policy

I recommend that if the Department were to approve a pilot program implementing the USAO's policy, the stated exception to the policy be modified and expanded to address concerns about (1) the rigidity and limited scope of the current exception to the policy, and (2) the implicit assumption in the current recording policy that an AUSA and USAO supervisor could decline prosecution of an otherwise strong case solely based on an agent's failure to record a statement. Specifically, I recommend that the exception to the policy be amended as follows:

> **Exception**: Where taping a statement would not be reasonable in light of the specific circumstances presented, the Recording Policy shall not apply. Each agent or agency, before making a decision not to record a statement in a particular circumstance, must make every effort to consult with an Assistant United States Attorney. The failure to record a statement pursuant to this Recording Policy will be a factor considered by the United States Attorney's Office in evaluating whether there is sufficient evidence to accept a case for prosecution.

As seen above, the first proposed amendment to the recording policy's exception expands the circumstances under which an agent may invoke the exception to the recording policy. In the current version of the recording policy, the exception to the policy is triggered only in instances "where a taped statement cannot be reasonably obtained." That language suggests that the exception to the mandatory recording policy applies only in cases where the physical act of recording cannot be practicably accomplished – for example, when an agent stops a suspect on the roadside and must immediately begin to question him for safety reasons, even though recording equipment is not readily available to tape the roadside interrogation.

That current version of the exception is not expansive enough to accommodate legitimate law enforcement concerns that go beyond just the availability of recording equipment or the practicability of recording a statement that may be taken at a roadside. For example, the current version of the exception does not appear to take into account the familiar situation in which a target agrees to cooperate with law enforcement and provide information about others involved in criminal activity, but – because of concerns about retaliation, concerns about personal safety or other factors – will do so only if the statement is not recorded and if agents can guarantee that his identity will remain confidential. In those circumstances, it would be reasonable – indeed crucial – for law enforcement agents to decline to record a statement in order to get as much information from the target as possible. This flexibility is particularly important in terrorism cases, where

gathering as much information as possible from a cooperative target is vital for national security. Similarly, the current version of the recording policy's exception does not appear to take into account situations in which, for example, a target in a drug case is interdicted with drug proceeds and immediately agrees to cooperate and conduct a controlled delivery of the money to his supplier. In such a situation, the agents should have the flexibility to determine that the entire pre-delivery debriefing and each statement made by the target while conducting the delivery itself (which could span several days) need not be recorded. My suggested amendment provides flexibility to the agents – in consultation with an AUSA – to decide not to record a statement in such circumstances.

My second proposed modification to the recording policy's exception is the deletion of the sentence which currently reads: "The reasonableness of any unrecorded statement shall be determined by the AUSA reviewing the case with the written concurrence of his or her supervisor." That language, when read in conjunction with the rest of the recording policy, has left the impression with some of the law enforcement agencies that the USAO can and will presumptively decline to prosecute a case in which a statement was not recorded. In cases where the evidence of a target's guilt is overwhelming, but an agent neglected to record the target's statement, declining prosecution clearly would not be in the best interests of the government. Accordingly, I propose deleting that sentence and replacing it with the following sentence: "The failure to record a statement pursuant to this Recording Policy will be a factor considered by the United States Attorney's Office in evaluating whether there is sufficient evidence to accept a case for prosecution." That amendment would give the USAO flexibility to decline a case in which the USAO believes that the failure to record will adversely affect the outcome of the prosecution, while still allowing agencies to present to the USAO cases that perhaps should be accepted for prosecution even absent a recorded statement.

II. Measuring the Success of the Pilot Program

The purpose of instituting a pilot program like the one proposed by the USAO would be to evaluate, at the end of a year, whether the program was successful in the District of Arizona and then to evaluate whether the program should be implemented in other districts. In response to the Department's request for a proposal on how the USAO would evaluate the pilot program, Paul Charlton has indicated that the USAO would take the following steps: (1) the USAO would track pleas and conviction rates in cases in which statements were or were not taped, and would compare those rates to the plea and conviction rates obtained in cases investigated by the "control" squads that would continue to use current agency recording policies; (2) the USAO would convene a coordinating group consisting of representatives from the USAO and the agencies, which would meet periodically to establish uniform procedures and iron out any problems; (3) AUSAs would poll juries after verdicts in which confessions were introduced to determine what effect the decision to tape a confession had on the juries' decisions; and (4) at the end of the one-year trial period, the USAO would distribute a questionnaire to AUSAs and agents soliciting their comments and anecdotal impressions regarding the recording policy and compile all of those findings into a report that could be presented to the Department.

These proposals provide a good start for evaluating the success of a pilot program. I recommend, however, that the following additional factors be considered and tracked in evaluating the success of any pilot program that may be implemented:

1) In addition to tracking conviction rates, the USAO should track whether the defendants are convicted of or plead to the most serious count charged in the indictment. This factor is an important one to follow, precisely because one of the complaints underlying the USAO's request to implement the pilot program was that, in at least one case, the USAO was forced to "plead down" a case to a less serious charge because the defendant's statement was not recorded. Accordingly, to address that concern, it will be essential to measure not only the number of convictions, but also whether the USAO was forced to "plead down" the case to something less than the most serious count charged in the indictment.

2) One of the possible benefits of the recording policy is that defendants, when confronted with their recorded confessions, may elect to plead guilty rather than proceed to trial. Accordingly, the USAO should make every effort to track whether the trial/guilty plea ratio is affected by the implementation of the recording policy.

3) In formulating the questionnaires that are circulated to AUSAs and agents, the Department must focus on obtaining information not just about factors that can be easily quantified – such as number of convictions – but also about other factors that cannot be easily quantified. For example, any anecdotal evidence from jurors that the taping of statements gives the community greater confidence in federal law enforcement would be important to compile and consider.

4) Similarly, in formulating the questionnaires, the Department must focus on determining whether there are law enforcement "costs" that result from the implementation of the program that cannot be easily quantified. Those potential law enforcement "costs," which necessarily would not be reflected in the number of convictions or pleas, include (a) whether a significant number of targets decline to give a statement when faced with a recording device that they may have otherwise given; (b) whether a significant number of targets "negotiate" with agents about what they will or will not say when the agents insist on recording the statements; (c) whether a significant number of defendants decline to cooperate and provide information about others immediately after an arrest because of the recording requirement; (d) whether the failure to comply with the recording policy results in, or is a factor in, any decisions by judges to suppress statements that were otherwise properly obtained; and (e) whether jurors acquit defendants of any or all counts because of a failure to comply with the recording policy where the jurors may not otherwise have considered that factor in the absence of a mandatory recording policy. This set of variables – i.e., the costs to law

enforcement that are not reflected in rates of convictions – will necessarily be the most difficult to track, but, in my view, must be tracked in evaluating any successes and failures of the pilot program.

5) Assuming that the Department adopts the USAO's view that each agency should have a "control" squad that continues to operate under each agency's current recording policy, it will be important at the conclusion of the pilot program to make comparisons *between* agencies, because the "control" groups from each agency necessarily will be using a different standard for recording during the one-year trial period. For example, the FBI "control" squads will utilize a policy of not recording statements absent approval from the SAC, while the ATF "control" groups will operate under a policy that allows each agent to use his or her own discretion in making the decision about whether to record. Because one of the goals of the pilot program should be to determine whether the USAO's proposed recording policy is more effective than any existing policy of any particular agency, it will be crucial that the evaluation of the program include a discussion about whether the recording policy affected cases investigated by each participating agency in a different way.[1]

6) Finally, as discussed yesterday, the questionnaires that are completed by the agents and AUSAs should be anonymous, so that agents and AUSAs feel free to express opinions that may differ from the opinions of their supervisors or agencies. For the same reason, it would be wise for a Department component to compile the questionnaires and the statistics, and then prepare a report on the implementation of the program. Given the wide divergence of views about this pilot program – with the USAO strongly in favor and the agencies strongly against – it would be unwise for either the USAO or the agencies to take the lead on drafting the final report on the benefits and costs of the program. The report generated by the Department should, of course, be circulated to the USAO and agencies for comments.

III. Summary

The evaluation of a pilot program like the one proposed by the USAO in the District of Arizona is necessarily a difficult undertaking, precisely because the benefits and costs cannot be easily quantified. This difficulty is compounded by the fact that, as noted in my first memorandum describing the proposed pilot project, there are widely divergent views on the potential benefits and costs of the USAO's proposed recording policy. Accordingly, if the

---

[1] The USMS should be excepted from complying with the recording policy because, as mentioned in the USMS's submission, the USMS's mission is primarily to find fugitives rather than affirmatively investigate criminal matters, and most of the USMS's encounters with fugitives are under circumstances that do not easily lend themselves to recording.

Department approves the implementation of a pilot project, I strongly recommend that the USAO and the Department fully include the investigative agencies in the process of implementing and monitoring the program.

Department Of Justice
Deputy Attorney General
Control Sheet

Date Of Document: 07/18/06
Date Received: 07/18/06
Due Date: NONE

Control No.: 060718-6342
ID No.: 433295

From: RAMAN, MYTHILI, SENIOR COUNSEL TO DAG

To: DAG

Subject:
PROPOSED PIOLT PROGRAM IN DISTRICT OF ARIZONA IMPLEMENTING MANDATORY RECORDING POLICY.

Executive Reviewer; Elston, Michael Due: 07/18/06

Instructions:

Action/Information: Signature Level: DAG

From: Elston, Michael Assign: 07/31/06 Due: NON To: Tenpas, Ronald

For your review and recommendation.

From: Tenpas, Ronald Assign: 08/01/06 Due: NON To: Elston, Michael

It's a close call but I recommend that the DAG permit the one year pilot to occur, subject to modifications suggested by Mythili Raman. If DAG approves, I recommend we immediately engage OLP (and maybe BJS) to begin formulating the process for evaluating the pilot at its conclusion.

From: Elston, Michael Assign: 08/03/06 Due: NON To: McNulty, Paul

I recommend approval of the Arizona pilot program as narrowed/modified by Mythili's memo.

From: McNulty, Paul Assign: 01/22/07 Due: NON To: Elston, Michael

In light of Paul C.'s departure, should this initiative still go forward?

From: Elston, Michael Assign: 03/16/07 Due: NON To: Raman, Mythili

Please advise on whether a. this should go forward and, if so, b. in AZ or another district.

File Comments:

Department Of Justice
Deputy Attorney General
Control Sheet

Date Of Document: 07/18/06
Date Received: 07/18/06
Due Date: NONE

Control No.: 060718-6342
ID No.: 433295

From: RAMAN, MYTHILI, SENIOR COUNSEL TO DAG

To: DAG

Subject:
PROPOSED PIOLT PROGRAM IN DISTRICT OF ARIZONA IMPLEMENTING MANDATORY RECORDING POLICY.

Executive Reviewer; Elston, Michael Due: 07/18/06

Instructions:

Action/Information: Signature Level: DAG

From: Elston, Michael Assign: 07/31/06 Due: NON To: Tenpas, Ronald

For your review and recommendation.

From: Tenpas, Ronald Assign: 08/01/06 Due: NON To: Elston, Michael

It's a close call but I recommend that the DAG permit the one year pilot to occur, subject to modifications suggested by Mythili Raman. If DAG approves, I recommend we immediately engage OLP (and maybe BJS) to begin formulating the process for evaluating the pilot at its conclusion.

From: Elston, Michael Assign: 08/03/06 Due: NON To: McNulty, Paul

I recommend approval of the Arizona pilot program as narrowed/modified by Mythili's memo.

From: McNulty, Paul Assign: 01/22/07 Due: NON To: Elston, Michael

In light of Paul C.'s departure, should this initiative still go forward?

File Comments:

To Mythili: Please advise on whether
a) this should go forward and, if so,
b) in AZ or another district.

Elston 15 March 07

Department Of Justice
Deputy Attorney General
Control Sheet

Date Of Document: 07/18/06
Date Received: 07/18/06
Due Date: NONE

Control No.: 060718-6342
ID No.: 433295

From: RAMAN, MYTHILI, SENIOR COUNSEL TO DAG

To: DAG

Subject:
PROPOSED PIOLT PROGRAM IN DISTRICT OF ARIZONA IMPLEMENTING MANDATORY RECORDING POLICY.

Executive Reviewer; Elston, Michael Due: 07/18/06

Instructions:

Action/Information: Signature Level: DAG

From: Elston, Michael Assign: 07/31/06 Due: NON To: Tenpas, Ronald

For your review and recommendation.

From: Tenpas, Ronald Assign: 08/01/06 Due: NON To: Elston, Michael

It's a close call but I recommend that the DAG permit the one year pilot to occur, subject to modifications suggested by Mythili Raman. If DAG approves, I recommend we immediately engage OLP (and maybe BJS) to begin formulating the process for evaluating the pilot at its conclusion.

From: Elston, Michael Assign: 08/03/06 Due: NON To: McNulty, Paul

I recommend approval of the Arizona pilot program as narrowed/mofied by Mythili's memo.

File Comments:

Mike, In light of Paul C.'s departure, should this initiative still go forward?

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

July 18, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: Mythili Raman MR
Senior Counsel

SUBJECT: Proposed Pilot Program in District of Arizona Implementing Mandatory Recording Policy

PURPOSE: For decision on whether to approve pilot program.

TIMETABLE: As soon as practicable.

Summary of Memorandum

On March 8, 2006, Paul Charlton, United States Attorney for the District of Arizona, requested the Department's permission to institute a pilot program that would require federal investigative agencies in the District of Arizona to record confessions except in instances where a recording cannot be "reasonably obtained." As described in Section I of this memorandum, the FBI, DEA, ATF and USMS are uniformly opposed to the implementation of the recording policy for a variety of reasons – some that reflect an opposition to the specific policy suggested by the USAO in Arizona, and others that reflect an opposition to the implementation of any mandatory recording policy.

In order to accommodate the USAO's request that a pilot program be approved, but given the many valid concerns voiced by the investigative agencies, I recommend, in Section II of this memorandum, that before the pilot program is implemented, the language of the recording policy be amended in order to provide more flexibility to the agencies to decline to record statements where recording would be counterproductive to law enforcement goals – for example, where a target may be unwilling to give a recorded statement but may be quite willing to give an unrecorded statement. Additionally, in Section II, I recommend that the recording policy be amended to clarify that an agency's failure to record a statement will not necessarily result in a unilateral decision by the USAO to decline the case for prosecution, as there may be many cases in which the evidence of a defendant's guilt is strong even absent a recorded statement. In such a circumstance, the declination of that case for prosecution – simply because it violated the USAO's recording policy – would not be in the government's best interests.

In Section III of this memorandum, I have set forth some suggestions about how to evaluate the pilot program at the end of a one-year trial period, which suggestions are intended to be responsive to the concerns of the USAO and the agencies. Among other things, I recommend that the Department, rather than the USAO itself, conduct the study of the pilot program at the end of the one-year trial period. I also recommend that the study focus not only on factors that are easily quantified – such as the number of convictions or guilty pleas – but also on the costs and benefits of the program that may not be so easily quantified – such as whether the recording policy gives the public a greater confidence in federal law enforcement (a benefit), or whether a significant number of defendants decline to cooperate with the government after an arrest because of their fear that their recorded statements would put them in harm's way (a cost).

I. The USAO's Proposal to Implement a Pilot Program

A. The Recording Policy

The recording policy proposed by the USAO provides as follows:

> **Rule:** Cases submitted to the United States Attorney's Office for the District of Arizona for prosecution in which an investigative target's statement has been taken, shall include a recording, by either audio or audio and video, of that statement. The recording may take place either surreptitiously or overtly at the discretion of the interviewing agency. The recording shall cover the entirety of the interview to include the advice of Miranda warnings, and any subsequent questioning.
>
> **Exception:** Where a taped statement cannot reasonably be obtained the Recording Policy shall not apply. The reasonableness of any unrecorded statement shall be determined by the AUSA reviewing the case with the written concurrence of his or her supervisor.

Although Paul Charlton, in a letter to the investigative agencies in Arizona, emphasized that the policy "does not adopt a rule that all custodial statements at all times in all circumstances must be recorded, and does adopt an express exception precisely to cover situations where obtaining a taped statement would not be practical," he did not identify any specific examples of what he viewed to be acceptable exceptions to the policy.

B. The USAO's Reasons for Implementation of the Pilot Program

In requesting that the Department approve the pilot program, USA Charlton has articulated a number of factors favoring a mandatory recording policy, including that (1) a

recorded statement is the best evidence of what was said; (2) recordings would facilitate the admission of any statements and would save the government time-consuming pretrial litigation; (3) recorded statements have a powerful impact on juries and are particularly important given that jurors are well aware that electronic devices can be small, effective and cheap; (4) recording confessions would enhance the government's ability to obtain convictions and would ensure that agents not be subject to unfair attack; (5) recording confessions would relieve agents of the need to take notes, thereby allowing them to conduct more effective interviews; (6) recording statements would allow agents to review the taped statements to look for additional clues and leads; and (7) recording would raise the public's confidence in law enforcement. Charlton has additionally noted that the U.S. Attorney has sole jurisdiction for prosecuting major crimes in Indian country, and because local police agencies in Arizona routinely tape confessions, the failure of the FBI to record confessions – which, in his view, resulted in acquittals or less than desirable guilty pleas in three different cases prosecuted by his office – has created an unfair disparity between the way that crime is treated in the Native American community and all other communities in Arizona.

II. Opposition to Proposed Recording Policy by Investigative Agencies

With the exception of the Criminal Chiefs Working Group, which expressed a strong sentiment that there should be wider, if not regular, use of recording equipment to document confessions and certain witness interviews, all other agencies whose input was sought uniformly oppose the proposed recording policy. (The Criminal Chiefs Working Group did not articulate any reasons for its position beyond those stated by the USAO.) Although some of the investigative agencies' criticisms are focused on Arizona's particular proposal, many of the criticisms concern the implementation of *any* one-size-fits-all recording policy.

A. FBI

Under the FBI's current policy, agents may not electronically record confessions or interviews, openly or surreptitiously, unless authorized by the Special Agent in Charge ("SAC"). In reaffirming that policy in a memorandum issued to all field offices on March 23, 2006, the FBI stated that (1) the presence of recording equipment might interfere with and undermine a successful "rapport-building interviewing technique"; (2) FBI agents have faced only occasional, and rarely successful, challenges to their testimony; (3) "perfectly lawful and acceptable interviewing techniques do not always come across in recorded fashion to lay persons as a proper means of obtaining information from defendants"; (4) the need for logistical and transcription support would be overwhelming if all FBI offices were required to record most confessions and statements; and (5) a mandatory recording policy would create obstacles to the admissibility of lawfully obtained statements which, through inadvertence or circumstances beyond the control of the interviewing agents, could not be recorded. Despite this presumption in the FBI policy that most confessions are not to be recorded, the policy also anticipates that recording can be useful in

some situations, and accordingly gives each SAC the authority to permit recording if she or he deems it advisable.

The FBI opposes Arizona's proposed recording policy, primarily because the existing FBI policy, in its view, already gives SACs flexibility to authorize the recording of statements, as evidenced by the FBI Phoenix Division's internal policy of recording interviews of child sex victims and by its decision in many cases (including in Indian country cases), to record statements of targets or defendants. The FBI, in opposing the recording policy, also takes issue with Paul Charlton's description of three failed prosecutions that the USAO attributes to the FBI's failure to record a confession; in each of those three instances, the FBI points out several other factors that, in its view, contributed to the unfavorable results. More significantly, the FBI contends that the vast majority of Indian country cases, even those in which confessions were not recorded, have resulted in convictions.

B. DEA

The DEA's current policy permits, but does not require, the recording of defendant interviews. In voicing its strong opposition to the proposed pilot program, the DEA has stated that the proposal is neither necessary nor practical because, among other things (1) that there is no history or pattern of the DEA's recording policy resulting in acquittals or the suppression of defendants' statements; (2) given the number of multi-district investigations that it and other agencies conduct, the adoption of a mandatory recording policy by one district would make it extremely difficult for agents operating in other divisions to conduct multi-district investigations that involve that district; (3) a violation of the USAO recording policy could very well lead to suppression or acquittals in cases in which a confession was not recorded, even where the confession was otherwise obtained lawfully; and (4) the failure of an agent to follow the recording policy would be admissible in civil litigation and could adversely affect agencies' ability to invoke the discretionary function exception in Federal Tort Claims Act cases. Additionally, the DEA has expressed specific concerns about the particular policy proposed by the USAO in Arizona, including that (1) the recording policy, which anticipates the recording of statements of all "investigative targets," is overbroad, as the recording requirement would be triggered during even routine interdiction or other *Terry* stops; (2) because the USAO's policy provides no guidance as to what constitutes a "reasonable" reason for not recording a statement, AUSAs and their supervisors might engage in after-the-fact second-guessing of decisions made by the agents, which may result in disputes between the agencies and USAO and "AUSA shopping"; and (3) the proposed Arizona policy would allow the USAO to decline to prosecute an otherwise meritorious case simply because a recording was not made, rather than considering all the facts and circumstances in the case (including *all* admissible evidence), in deciding whether to accept a case for prosecution.

C. ATF

The ATF's current policy does not require electronic recording, but instead leaves the decision about whether to record to the discretion of the individual case agents, who may confer with supervisors and the relevant USAO.

In voicing its opposition to Arizona's proposed pilot program, the ATF has expressed concern that (1) a suspect may "play" to the camera or be less candid; (2) utilizing "covert" recordings would not eliminate the problem of a suspect "playing" to the camera or withholding information, because the fact that an agency is covertly recording confessions would become public after the first trial at which such a recording is played; (3) juries may find otherwise proper interrogation techniques unsettling; (4) suspects may confess while being transported to a place where an interrogation is to take place; (5) mandatory recording raises a host of logistical questions, including questions about retention/storage of recordings and what to do in the event of an equipment malfunction; (6) the costs of supporting such a pilot program, including purchasing recording equipment and securing transcription services, would be significant; (7) the mandatory language of the Arizona proposal leaves no discretion to agents on the field; and (8) the recording policy would hamper task force investigations where federal charges are brought in jurisdictions in which local law enforcement officers do not electronically record confessions. In sum, ATF argues that any benefits that may result from recording confessions would come at the expense of limiting the flexibility of agents to make the decision about whether to record a confession in any particular situation.

D. USMS

The USMS does not currently require taping of confessions and, indeed, notes that it does not normally solicit confessions to accomplish its mission of tracking and capturing fugitives. Among other things, the USMS notes that because it conducts most of its interviews in the field (including in remote locations and vehicles), rather than in a controlled environment, recording is generally impractical. Additionally, the USMS notes that even when a defendant does confess to a crime while in USMS custody, that confession is usually spontaneous, unanticipated, and not in response to any question posed by a USMS officer.

III. Proposed Modifications to the Exception to the Recording Policy

I recommend that before the pilot program is implemented, the "exception" to the Arizona recording policy be modified to address the concerns expressed by the law enforcement agencies. Specifically, I recommend that the exception be amended to read as follows:

> **Exception**: Where taping a statement would not be reasonable in light of the specific circumstances presented, the Recording Policy shall not apply. Each

agent or agency, before making a decision not to record a statement in a particular circumstance, must make every effort to consult with an Assistant United States Attorney. The failure to record a statement pursuant to this Recording Policy will be a factor considered by the United States Attorney's Office in evaluating whether there is sufficient evidence to accept a case for prosecution.

A. Expansion of Circumstances Under Which the Policy Would Not Apply

In the current version of the recording policy, the exception is triggered only in instances "where a taped statement cannot be reasonably obtained." That language suggests that the exception applies only in cases where the physical act of recording cannot be practicably accomplished – for example, when an agent stops a suspect on the roadside and begins immediately to question him for safety reasons, even though recording equipment is not readily available to tape the roadside interrogation.

That current version of the exception is not expansive enough to accommodate legitimate law enforcement concerns that go beyond just the availability of recording equipment or the practicability of recording a statement that may be taken at a roadside. For example, the current version of the exception does not appear to take into account the familiar situation in which a target agrees to cooperate with law enforcement and provide information about others involved in criminal activity, but – because of concerns about retaliation, concerns about personal safety or other factors – will do so only if the statement is not recorded and if agents can guarantee that his identity will remain confidential. In those circumstances, it would be reasonable – indeed crucial – for law enforcement agents to decline to record a statement in order to get as much information from the target as possible. This flexibility is particularly important in terrorism cases, where gathering as much information as possible from a cooperative target is vital for national security. Similarly, the current version of the recording policy's exception does not appear to take into account situations in which, for example, a target in a drug case is interdicted with drug proceeds and immediately agrees to cooperate and conduct a controlled delivery of the money to his supplier. In such a situation, the agents should have the flexibility to determine that the entire pre-delivery debriefing and each statement made by the target while conducting the delivery itself (which could span several days) need not be recorded. The suggested amendment to the exception – which provides that the policy would not apply where *"taping a statement would not be reasonable in light of the specific circumstances presented"* – provides flexibility to the agents, in consultation with an AUSA, to decide not to record a statement in such circumstances.

B. How the USAO Will Treat A Failure to Record

The USAO's stated exception to the recording policy currently reads: "The reasonableness of any unrecorded statement shall be determined by the AUSA reviewing the case with the written concurrence of his or her supervisor." That language, when read in conjunction

with the rest of the recording policy, has left the impression with some of the law enforcement agencies that the USAO can and will presumptively decline to prosecute a case in which a statement was not recorded. In cases where the evidence of a target's guilt is overwhelming, but an agent neglected to record the target's statement, declining prosecution clearly would not be in the best interests of the government. Accordingly, I propose deleting that sentence and replacing it with the following sentence: *"The failure to record a statement pursuant to this Recording Policy will be a factor considered by the United States Attorney's Office in evaluating whether there is sufficient evidence to accept a case for prosecution."* That amendment would reaffirm that the USAO has flexibility to decline a case in which the USAO believes that the failure to record will adversely affect the outcome of the prosecution, while still allowing agencies to present to the USAO cases that should be accepted for prosecution even absent a recorded statement.

IV. Evaluation of the Pilot Program

In response to the Department's request for recommendations on how the USAO would evaluate the pilot program, Paul Charlton has proposed the following: (1) the USAO would track plea and conviction rates in cases in which statements were or were not taped, and would compare those rates to the plea and conviction rates obtained in cases investigated by "control" squads that would continue to use current agency recording policies; (2) the USAO would convene a coordinating group consisting of representatives from the USAO and the agencies, which would meet periodically to establish uniform procedures and iron out any problems; (3) AUSAs would obtain permission to poll juries after verdicts in cases in which confessions were introduced to determine what effect the decision to tape a confession had on the juries' decisions; and (4) at the end of the one-year trial period, the USAO would distribute a questionnaire to AUSAs and agents soliciting their comments and anecdotal impressions regarding the recording policy and compile all of those findings into a report that could be presented to the Department.

I recommend that the following additional procedures and factors be used in evaluating the program:

1) The questionnaires that are completed by the agents and AUSAs should be anonymous, so that agents and AUSAs feel free to express opinions that may differ from the opinions of their supervisors or agencies. Additionally, given the wide divergence of views about this pilot program – with the USAO strongly in favor and the agencies strongly against – the Department, rather than the USAO, should compile the questionnaires and the statistics, and then prepare a report on the implementation of the program.

2) In addition to tracking plea and conviction rates, the USAO should track whether the defendants are convicted of or plead to the most serious count charged in the indictment.

This factor is an important one to follow, precisely because one of the complaints underlying the USAO's request to implement the pilot program was that, in at least one case, the USAO was forced to "plead down" a case to a less serious charge because the defendant's statement was not recorded.

3) The USAO should track whether the trial/guilty plea ratio is affected by the implementation of the recording policy to determine whether defendants, when confronted with their recorded confessions, elect to plead guilty rather than go to trial.

4) In formulating the questionnaires that are circulated to AUSAs and agents, the Department must focus on obtaining information not just about factors that can be easily quantified – such as number of convictions – but also about other factors that cannot be easily quantified. For example, any anecdotal evidence from jurors that the taping of statements gives the community greater confidence in federal law enforcement would be important to compile and consider. Similarly, in formulating the questionnaires, the Department must focus on determining whether there are law enforcement "costs" that result from the implementation of the program that cannot be easily quantified, including (a) whether targets decline to give a statement when faced with a recording device that they may have otherwise given; (b) whether targets "negotiate" with agents about what they will or will not say when the agents insist on recording the statements; (c) whether defendants decline to cooperate and provide information about others immediately after an arrest because of the recording requirement; (d) whether the failure to comply with the recording policy results in, or is a factor in, any decisions by judges to suppress statements that were otherwise properly obtained; and (e) whether jurors acquit defendants of any or all counts because of a failure to comply with the recording policy where the jurors may not otherwise have considered that factor in the absence of a mandatory recording policy. This set of variables – i.e., the costs to law enforcement that are not reflected in rates of convictions – will necessarily be the most difficult to track, but must be tracked in order to fully evaluate the benefits and costs of the program.

5) Because the "control" squads from each participating agency will be using a different standard for recording during the one-year pilot program, an assessment should be made at the conclusion of the program of whether the recording policy had different effects on cases investigated by different agencies. (For example, the FBI "control" squads will utilize a policy of not recording statements absent approval from the SAC, while the ATF "control" groups will operate under a policy that allows each agent to use his or her own discretion in making the decision about whether to record.) Because one of the goals of the pilot program should be to determine whether the USAO's recording policy is more effective than any existing policy of a particular agency, the Department should endeavor

to determine whether the recording policy affected cases investigated by each agency in a different way.[1]

VI. Conclusion

In order to accommodate the request of the USAO, while taking into account the concerns of the law enforcement agencies involved, I recommend that the amendments to the policy, which are described above, be made before the pilot program is approved. Additionally, I recommend that an independent assessment of the program be made by the Department at the end of the one-year trial period which takes into account not only the easily assessed factors that may be affected by the program, but also the costs and benefits of the program that are more difficult to quantify.

APPROVE:_____

DISAPPROVE:_____

DATE:_____

Concurring Components
None

Non-Concurring Components
None

[1] The USMS should be excepted from complying with the recording policy because, as mentioned in the USMS's submission, the USMS's mission is primarily to find fugitives rather than affirmatively investigate criminal matters, and most of the USMS's encounters with fugitives are under circumstances that do not easily lend themselves to recording.

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

July 18, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: Mythili Raman MR
Senior Counsel

SUBJECT: Proposed Pilot Program in District of Arizona Implementing Mandatory Recording Policy

PURPOSE: For decision on whether to approve pilot program.

TIMETABLE: As soon as practicable.

Summary of Memorandum

On March 8, 2006, Paul Charlton, United States Attorney for the District of Arizona, requested the Department's permission to institute a pilot program that would require federal investigative agencies in the District of Arizona to record confessions except in instances where a recording cannot be "reasonably obtained." As described in Section I of this memorandum, the FBI, DEA, ATF and USMS are uniformly opposed to the implementation of the recording policy for a variety of reasons – some that reflect an opposition to the specific policy suggested by the USAO in Arizona, and others that reflect an opposition to the implementation of any mandatory recording policy.

In order to accommodate the USAO's request that a pilot program be approved, but given the many valid concerns voiced by the investigative agencies, I recommend, in Section II of this memorandum, that before the pilot program is implemented, the language of the recording policy be amended in order to provide more flexibility to the agencies to decline to record statements where recording would be counterproductive to law enforcement goals – for example, where a target may be unwilling to give a recorded statement but may be quite willing to give an unrecorded statement. Additionally, in Section II, I recommend that the recording policy be amended to clarify that an agency's failure to record a statement will not necessarily result in a unilateral decision by the USAO to decline the case for prosecution, as there may be many cases in which the evidence of a defendant's guilt is strong even absent a recorded statement. In such a circumstance, the declination of that case for prosecution – simply because it violated the USAO's recording policy – would not be in the government's best interests.

In Section III of this memorandum, I have set forth some suggestions about how to evaluate the pilot program at the end of a one-year trial period, which suggestions are intended to be responsive to the concerns of the USAO and the agencies. Among other things, I recommend that the Department, rather than the USAO itself, conduct the study of the pilot program at the end of the one-year trial period. I also recommend that the study focus not only on factors that are easily quantified – such as the number of convictions or guilty pleas – but also on the costs and benefits of the program that may not be so easily quantified – such as whether the recording policy gives the public a greater confidence in federal law enforcement (a benefit), or whether a significant number of defendants decline to cooperate with the government after an arrest because of their fear that their recorded statements would put them in harm's way (a cost).

I. The USAO's Proposal to Implement a Pilot Program

A. The Recording Policy

The recording policy proposed by the USAO provides as follows:

> **Rule:** Cases submitted to the United States Attorney's Office for the District of Arizona for prosecution in which an investigative target's statement has been taken, shall include a recording, by either audio or audio and video, of that statement. The recording may take place either surreptitiously or overtly at the discretion of the interviewing agency. The recording shall cover the entirety of the interview to include the advice of Miranda warnings, and any subsequent questioning.
>
> **Exception:** Where a taped statement cannot reasonably be obtained the Recording Policy shall not apply. The reasonableness of any unrecorded statement shall be determined by the AUSA reviewing the case with the written concurrence of his or her supervisor.

Although Paul Charlton, in a letter to the investigative agencies in Arizona, emphasized that the policy "does not adopt a rule that all custodial statements at all times in all circumstances must be recorded, and does adopt an express exception precisely to cover situations where obtaining a taped statement would not be practical," he did not identify any specific examples of what he viewed to be acceptable exceptions to the policy.

B. The USAO's Reasons for Implementation of the Pilot Program

In requesting that the Department approve the pilot program, USA Charlton has articulated a number of factors favoring a mandatory recording policy, including that (1) a recorded statement is the best evidence of what was said; (2) recordings would facilitate the admission of any statements and would save the government time-consuming pretrial litigation; (3) recorded statements have a powerful impact on juries and are particularly important given